

Review of ‘The President on Trial: Prosecuting Hissène Habré’

Valerie Arnould¹

Published in the International Criminal Law Review (online: 28 June 2021, DOI 10.1163/15718123-bja10075)

The President on Trial: Prosecuting Hissène Habré, edited by Sharon Weil, Kim Thuy Seelinger and Kerstin Bree Carlson (Oxford: Oxford University Press, 2020) ISBN: 978-0-19-189081-9, hardcover, 464 pp, £95.

Over recent years, hybrid courts have experienced a renaissance of sorts. After their initial popularity in the early 2000s, when hybrid courts were touted as a promising midway between distant international tribunals and weak domestic courts, the enthusiasm for hybrid courts waned over their perceived under-performance.² There has since been a re-emergence of interest in hybrid courts, particularly in contexts where such courts can act to complement the International Criminal Court’s limited jurisdiction.³ The Extraordinary African Chambers (EAC), set up in 2013 to investigate crimes committed during the repressive rule of Hissène Habré in Chad, has undoubtedly been the most high-profile of this new generation of hybrid courts. It has garnered much enthusiasm because it represents the first successful trial of a former African president by an African judicial institution and the trial is the culmination of a decade-long effort by victims of Habré’s regime to see justice done. At a time when relations between the International Criminal Court and some African states had significantly soured, the creation of the EAC by the African Union and Senegal also signalled hopeful prospects for a regionalisation of international criminal justice and for the initiation of universal jurisdiction prosecutions in Africa (as discussed in the book in the chapters by Ndeye Amy Ndiaye and Mia Swart). By and large, the EAC has been celebrated as a success story and even as a possible standard-bearer for future hybrid courts on the continent and beyond. Though as Pierre Hazan reminds us in chapter 40 of the book, a fortuitous combination of particular political circumstances played a key role in making the Habré trial possible. Expectations of its replicability to other contexts should therefore be managed with caution.

¹ Senior Research Fellow, Africa Programme, Egmont – Royal Institute for International Relations (v.arnould@egmontinstitute.be); Affiliated Senior Researcher, Leuven Institute of Criminology, University of Leuven (valerie.arnould@kuleuven.be).

² Padraig McAuliffe, ‘Hybrid Tribunals at Ten: How International Criminal Justice’s Golden Child Became an Orphan’, 7 *Journal of International Law and International Relations* (2011) 1-65; Matthias Holvoet and Paul De Herdt, ‘International Criminal Law as Global Law: An Assessment of Hybrid Tribunals’, 17(2) *Tilburg Law Review* (2012) 228-240.

³ Beth Van Schaak, ‘The Building Blocks of Hybrid Justice’, 44(2) *Denver Journal of International Law and Policy* (2015) 101-209; also the chapter by Mark Kersten and Kerstin Ainley in this reviewed book.

Be that as it may, the EAC constitutes an innovative experiment in the universe of hybrid courts that warrants closer examination.

This edited volume by Sharon Weil, Kim Thuy Seelinger and Kerstin Bree Carlson certainly offers the reader an incredibly in-depth analysis of the Habré trial. The chapters in the book discuss the operations of the EAC and reflect on the broader legacies of the court. The collection is highly original in that it combines academic and practice-oriented perspectives. The book is organised in two parts. The first consists of testimonials by actors who were involved in all stages of the trial process: pre-EAC efforts, the establishment of the court, the trial itself and activities beyond the courtroom such as outreach, the media and donor support. These chapters are a welcome contribution to the book as they shine a spotlight on the individuals who make hybrid courts, such as the EAC, a reality. In effect, they give a voice to those vital actors who all too often remain unheard. These contributions offer rich empirical material on the day-to-day functioning of the court as well as on the extensive diplomacy that was deployed on the ground to make the EAC a reality. In this way, the book offers important primary source material for researchers to draw on. It also offers an interesting example of how broadening access to and a better integration of experiential knowledge can be achieved in qualitative research outputs.

The second part of the book groups together seventeen analytical chapters written by academics and practitioner experts to reflect on the significance and legacies of the EAC trial. They engage with a broad set of topics that are relevant to the EAC, such as the role of reparations, victim participation, defence rights and procedural arrangements in internationalised criminal trials. But some of the chapters also look beyond the trial itself to discuss what the EAC tells us about the state of international criminal justice (chapters by Sara Dezalay, Dov Jacobs, Mia Swart, Patricia Viseur Sellers and Jocelyn Getgen Kestenbaum). Overall, the contributions offer much food for thought by highlighting some of the EAC's important innovations, such as outsourcing outreach activities, the provision of an expansive regime for victim participation and the creation of a court model that combines internationalised and universal jurisdiction elements.

Importantly, the edited volume also underscores the fact that hybrid courts are not necessarily a panacea. Indeed, what emerges strongly from the book is that there are as many procedural, logistical and political challenges for creating and operating hybrid courts as there are for domestic or international courts. For instance, many have celebrated the fact that the EAC

was a relatively inexpensive court *and* that it managed to remain within budget. However, the chapters by Amadou Mokhtar Seck, Aboubacry Ba and Mbacké Fall clearly show that doing justice on a shoestring budget always comes at a cost, including at the EAC where it imposed limits on the scope of investigations, the time frame for the Court's operation, and the administrative support that could be provided. But while hybrid courts may have their shortcomings, the strong sense that emerges from the contributions to the book – especially in the chapters in the first section – is that it is worth taking on such a challenging task because of the significant value such trials have for victims.

Reading all the chapters together, there are four overarching themes that strongly emerge from the collection as general 'lessons learned' from the EAC experience: the centrality of victims, the role of cross-national advocacy networks, the politics of justice, and the limits linked to the ephemerality of hybrid courts. Firstly, the practice at the EAC aligns with the broader trend of the growing inclusion of victims in international criminal justice processes. As testimonies by Souleymane Guengueng and Jacqueline Moudeïna in the book make clear, without the willingness of victims to organise themselves through victims' associations and to continually press their demands for justice at national and regional levels – despite legitimate fears of reprisals by the Chadian authorities – the trial of Habré would not have taken place. Furthermore, of all the hybrid courts established so far, the EAC had one of the broadest victim participation regimes: over 8,000 victims were able to participate in the trial as civil parties, civil party lawyers were allowed to question every witness, and the court had the authority to award both collective and individual reparations to victims. At the same time, as the chapter by Gaëlle Carayon and Jeanne Sulzer shows, the lack of a proper victim registry system and victim support unit at the EAC created significant challenges when it came to defining victims' reparations claims. The experience of the EAC has so far not been extensively taken up in research on victim participation, where the focus has primarily been on the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia.⁴ Insights from this edited volume thus offer a useful contribution to current debates about the 'appropriate' scope and nature of victim participation in international criminal justice processes.

⁴ Brianne McGonigle Leyh, 'Victim-Oriented Measures at International Criminal Institutions: Participation and its Pitfalls', 12(3) *International Criminal Law Review* (2012) 375-408; Rachel Killean and Luke Moffett, 'Victim Legal Representation Before the ICC and the ECCC', 15(4) *Journal of International Criminal Justice* (2017) 713-740.

A second cross-cutting theme that strongly emerges from the book is the central role of civil society organisations (CSOs) in accountability efforts for past atrocities. The importance of examining the agency and contributions of civil society in shaping accountability and transitional justice processes is well established.⁵ In particular, the EAC experience aligns with research that argues for the powerful role of cross-national advocacy networks in the global spread of anti-impunity practices.⁶ The various contributions in the book show how the combined efforts and collaborative relationships built between Chadian victims associations, international human rights organisations and academic experts, and sympathetic foreign judicial actors made the creation of the EAC and the trial of Habré possible. This network was key in keeping the issue on the agenda, exerting diplomatic pressure on national and regional decision-makers, reaching out to the media and in collecting and exchanging information that built a strong judicial case against the Habré regime. Reed Brody, who was a central actor in this cross-national advocacy network, aptly describes the EAC trial in chapter 4 as a form of ‘private international prosecution’ that was largely carried by private efforts by victims and CSOs rather than by states or international organisations.

But this preponderant role of CSOs also raises some legitimate questions about how this impacts the rights of the defence and the independence of the judicial process. In particular, the public campaigning by CSOs and media reporting on the trial pose challenges to the presumption of innocence of the accused. This is a dilemma that is more generally prevalent among international and hybrid courts, especially where they seek to investigate and prosecute high-level political or military officials. Another concern the book raises is the *de facto* hegemony of CSOs in building the factual case against Habré. This resulted from the extensive evidence collection that CSOs undertook during the decade prior to the trial and their ability to draw on expert knowledge, combined with the limited time and resources available to the EAC judges to conduct their own investigations. It is undeniable that the fact-finding reports collated by CSOs, and the amicus curiae brief on sexual violence (drafted by the Human Rights Center at the University of Berkeley) influenced the final judgment at the EAC, an element which is recognised in the chapters by Reed Brody, Kim Thuy Seelinger

⁵ Naomi Roht-Arriaza, ‘Civil society in processes of accountability’, in M Cherif Bassiouni (ed.), *Post-Conflict Justice* (Transnational Publishers, Ardsley, 2002), pp. 97-114; Hugo van der Merwe and Maya Schklone, ‘The Role of Local Civil Society in Transitional Justice’ in Cheryl Lawther, Luke Moffett, Dov Jacobs (eds.), *Research Handbook on Transitional Justice* (Edward Elgar Publishing, Cheltenham, 2017), pp. 221-243.

⁶ Cath Collins, ‘Grounding Global Justice: International Networks and Domestic Human Rights Accountability in Chile and El Salvador’, 38(4) *Journal of Latin American Studies* (2006) 711-738; Hun Joon Kim, ‘Structural determinants of human rights prosecutions after democratic transition’, 49(2) *Journal of Peace Research* (2012) 305-320; Geoff Dancy and Veronica Michel, ‘Human rights enforcement from below: Private actors and prosecutorial momentum in Latin America and Europe’, 60(1) *International Studies Quarterly* (2016) 173-188.

and Sarah Williams. This can be seen as a positive contribution to achieving accountability and promoting the development of norms. However, it also raises questions about the ways in which an over-reliance of international or hybrid courts on evidence collected by NGOs may impact the independence and quality of trials – a point which has also sparked much controversy with regards to the investigative practices of the Office of the Prosecutor at the International Criminal Court.⁷

The third theme running through the edited volume is the centrality of politics in international criminal justice. Like all hybrid courts, the EAC was the product of protracted political negotiations between Chad, Senegal and the African Union. These were in turn influenced by the actions of ‘sideline’ actors such as Belgium, the International Court of Justice, the ECOWAS Court of Justice and the European Union – as well as by changes in the domestic political context in Senegal where Habré was living in exile. For those actors advocating for the prosecution of the crimes of the Habré regime, being able to navigate this political environment was a key requirement. As Chadian activist and lawyer Jacqueline Moudeïna observes in chapter 5, “every actor had to be political” in order to constantly mobilise the necessary political will for investigations and the creation of the EAC. It is here that cross-national coalition building proved so important, as well as the coalition’s ability and willingness to mobilise a variety of tools at their disposal to keep accountability for Habré’s crimes on the agenda: launching judicial actions before the Belgian courts, diplomatic engagements with the AU, reaching out to the media, lobbying western donors, etc.

Politics also continued to impact the EAC after its establishment because of its reliance on the willingness of the Chadian government to cooperate with the Court. What clearly emerges from the book is the ambiguous attitude of the Chadian authorities towards the EAC, due to concerns that it would cast its net wide enough to bring to light the involvement of then President Idriss Déby in the crimes committed during Habré’s rule. As the chapters by Judge Jean Kandé and by Mbacké Fall explain, while Chad officially cooperated with the Court it deployed all possible tactics to maintain a degree of control over the scope of its investigations. One immediate result of this was that the EAC was only able to try Habré as the Chadian authorities refused to hand over his five closest collaborators who had also been

⁷ Christian M. De Vos, ‘Investigating from Afar: The ICC’s Evidence Problem’, 26 *Leiden Journal of International Law* (2013) 1009-1024; Rafael Braga da Silva, ‘Sherlock at the ICC? Regulating Third-Party Investigations of International Crimes in the Rome Statute Legal Framework’, 18(1) *Journal of International Criminal Justice* (2020) 59-86.

indicted by the EAC. This inevitable presence of politics within international criminal justice processes commonly opens courts up to the criticism that they are conducting ‘political trials’. A critique which the EAC, rightly or wrongly, was not spared either, as illustrated by the chapter by H elene Ciss e and the interview excerpt with Habr e himself.

A fourth and final theme that can be drawn from the book is the challenges that are posed by the ephemerality of hybrid courts. Since hybrid courts are by their nature temporary institutions, they operate within limited time frames (the EAC was in operation for four years, from February 2013 to April 2017). Even when the statute of a hybrid court does not set a fixed time frame on the court’s operation, in practice it is often dependent on the willingness of financial donors to continue supporting the court and on the prevailing political context rather than on operational considerations. While the EAC managed to produce an impressive amount of work within its short lifetime, the contributions by Judge Ouagadeye Wafi, Mback e Fall, Amadou Mokhtar Seck and Mounir Ballal illustrate how the strict time schedule imposed limits on the administrative operations of the Court, the conduct of the investigations, the ability of the defence to build its case, and for the judges to issue a verdict. Most prejudicial, as shown in the chapters by Werner & Marchand, Ga elle Carayon & Jeanne Sulzer and Christoph Sperfeldt, has been the manner in which the time constraints left very little time to prepare victims’ reparations claims and to put in a place a follow-up structure to ensure the implementation of the reparations order.

In conclusion, ‘The President on Trial’ is a collection rich in material about the inner workings of the EAC and the place it occupies within the ever-expanding universe of hybrid courts. It is the first section comprised of testimonials by the actors directly involved in the workings of the EAC that makes the book particularly interesting. The second section engages in a useful reflection on the EAC’s experience and legacies within the broader context of international criminal justice developments. However, not all of the chapters manage as successfully to link their arguments back to the EAC and to engage with the other chapters in the book, which somewhat affects the coherence of the second part of the edited volume. Notwithstanding, this edited volume is the most comprehensive resource available on the Habr e trial and a must-read for anyone interested in the real-time operation of hybrid courts.