The Legality of the Extraordinary African Chambers on the Light of the International Criminal Tribunals: The Case of Hussein Habre

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Abstract

Background/Objectives: 30th of May 2016, The Extraordinary African Chambers (EAC) in its verdict sentenced the Former President of the Republic of Chad Mr. Hussein Habre to life imprisonment. Mr. Hussein Habre was charged for committing international crimes during his Presidency from 1982 to 1990. Methods: Thus, to achieve the objectives of the work have been used analysis, comparative, historic and deduction method of research. The analyzed and comparative documents are the sources of the already created international criminal courts and other court decisions to justify the legality of the EAC. The attention is drawn to the Decisions of the International Court of Justice (ICJ), Court of Economic Community of West African States (ECOWAS) and other national courts such Senegal and Belgium. Findings: According to our analysis all the International Criminal Tribunals (ICT) have been created by the United Nations as a legal entity through the Security Council Decisions. Both states and legal entities with general competences entitled to create such court in terms of International Law. In this point of view, the creation of the EAC by the African Union as a legal entity with general competences in Africa is founded and no contrary to the current International Law. On other hand, the nature of the crimes committed by the accused and his status as former President with an asylum in another country has required the necessity of the creation of the EAC. The result of analytic and comparative studies of the research confirms the legality of the EAC as attested by the Decision of the Court of ECOWAS. Thus, the article through the analytic, comparative and historic methods of study shows that the EAC as a hybrid International Criminal Tribunal is legal in terms of theory and practices of current International Law. Applications/improvements: The creation of the EAC in Africa can serve an example to avoid impunity for international crimes. This approach may improve the practice of the International Criminal law.

Keywords: African Union, Current International Law, Extraordinary African Chambers, International Crimes, International Criminal Law, International Criminal Tribunals

1. Introduction

Contestations of the legality of different International Criminal Tribunals or Courts created to try supposed international criminals have been always contested by many scholars as well as the accused persons. This contestation started from the moment of the idea of the creation of the International Criminal Tribunals (ICT), i.e. from the Second World War (WW2) until now.

One of the recent case of contestation of the legitimacy of such tribunal constitutes the legality of the Extraordinary African Chambers (EAC) created by Senegal under the auspice of the African Union in 22 August 2012.1

During all the Court processes, the accused Mr. Hussein Habre has kept protesting the legality of the EAC. Thus, is it legal the EAC according to the theory and practices of the current International Law.

2. Historic Background of Hussein Habre Case

Hussein Habre was the Former President of the Republic of Chad from 1982 to 1990. He was overthrown in 1990
in a court led by the army. He then fled to Senegal where he was granted asylum.

Hussein Habre was accused by the international community for committing international crimes such crime against humanity, war crimes, and torture during his presidency from 1982 to 1990. From that moment to 2016 Senegal was under pressure from the International Community, many countries and NGO such as UN Committee against torture, Belgium, Human Rights Watch, Amnesty International and others to try Hussein Habre or to extradite him to another country with Universal Criminal Legal Competence to be tried in accordance with the Prinipe autdedereaut judicare (extradite or prosecute).

In January 2000, seven victims filed a criminal complaint in Senegal against Mr. Hussein Habre, but the case was dismissed for lack of Senegal's competence to try him.

On behalf of the Universal Competence of the court and the complaints filed in Belgium by Belgians of Chadian origin and Chadian citizens with residence in Belgium, the Belgium courts issued an international warrant of arrest on Hussein Habre. But The Chamber of prosecution of Dakar Court of Appeal in 4th of July 2002 dismissed the case arguing that the Senegal criminal legislation do not contain provisions on crimes against humanity and the country is not competent to deal with crimes committed abroad. For this reason, Belgium then filed a complaint to the International Court of Justice (ICJ) to compel Senegal to try Hussein Habre other than extradite him to Belgium.²

In this Case the ICJ concluded that the Republic of Senegal has failed to its international obligations under the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984.³

Then the Republic of Senegal has many times referred to the African Union (AU) for solutions and the AU has in many of its meetings of Head of State and Government asked Senegal to implement its international obligations by creating conditions to try Mr. Hussein Habre.

Finally, in 2012 the Agreement between the Republic of Senegal and the AU to create the EAC was reached and signed.¹

The Former President of Chad has been in custody of authorities of Senegal and with pressure from Belgium and the international community the Republic of Senegal commenced the modification of her National Legislation in order to try Mr. Hussein Habre. In response, the accused from the aforementioned reasons in 2008 filed a complaint to the ECOWAS Court of Justice alleging that the Republic of Senegal violated his human rights by amending its National Legislation to try him. Hence, the Republic of Senegal has also infringed on the Prinipe of non-retroactivity of the criminal law guaranteed by National Law as well as the International Law.

The ECOWAS Court of Justice in this case concluded that the Republic of Senegal must respect the authority of the decision of her National Court and should accord absolute respect to the Prinipe of no-retroactivity of the criminal law. On the other hand, the Court considered that the Republic of Senegal can create an ad hoc tribunal as practiced by the international law on the basis of the legitimacy conferred by the AU.³

The same case of Mr. Hussein Habre was examined by the African Court on human and people's rights. The Case was instituted by Mr. Michelot Yogogombaye against the State of Senegal on its decision to modify its legislation with the objective of trying and sentencing Mr. Hussein Habre. And was dismissed by the Court alleging that Senegalat that time did not make declaration to the Court to consider individual complaints as provided by Article 34 (6) of the Protocol to the African Charter on human and people's rights.²

Consequently, on Hussein Habre as has been mentioned above in accordance with the AU, ICJ, Belgium National Court of Justice, Senegal National Court, African court on human and peoples' rights, ECOWAS Court of Justice, the UN Committee against torture and then the EAC. These are to portray the case from a legal point of view.

3. Legal Meaning of the Creation of the Extraordinary African Chambers

The creation of the EAC by Senegal on the basis of the agreement between the country and the AU is conditioned by many legal event that could be used as precedent in International Law.

3.1. Examples of the International Criminal Tribunals

The creation of the International Criminal Tribunals around the world has always been criticized by lay peo-
people as well as scholars. ICT mean here all the Special Tribunals, Courts and Hybrid Courts established by the competent bodies to try peoples alleged for committing international crime as provided by the International Law, created around the world.²

So as mentioned, for the legality of the any ICT one of the most important element is the competent body to create them. For instance, all the international criminal courts have been created exclusively under Resolutions of the UN Security Council on the basis of the Chapter VII of the UN Charter except for the Former Nuremberg (Nazis) Criminal Tribunal and the Tokyo Military Tribunal. Article 39 of the same Charter states that the UN Security Council may take all means and measures to maintain or to restore international peace and security. For this purposes and on this basis the UN Resolutions created Special Tribunal for The Former Yugoslavia, The Special Tribunal for Cambodia, The Special Tribunal for Rwanda, The Special Tribunal for Lebanon, Special Court for Serra-Leone and The Ad-Hoc Court for East Timor.²

As result, only in 1998 the International Community reached an argument on the establishment of a Permanent International Criminal Court (ICC) on the base of the Statue of Rome, which came into force in 2002.²

Thus, the history of the creation of the ICT around the world started at the end of WW2 by creating Nuremberg Criminal Tribunal and the Tokyo Military Tribunal by the Allies Countries to try peoples alleged for committing international crimes. This gave birth to jurisprudence in International Criminal Law.

Hence, the initiative of the creation of the ICT is exclusively devoted to all international legal entities with general competences such as UN, AU, EU OAS, etc., and secondly to the states within a special agreement such as the Rome Statute. As we can see all legal entities (Intergovernmental Organizations and states) constitute the main actors of the International Law and relations. So the competence for the creation of the ICT by legal entities of international relations in current International law became a custom (customary law) for international law as mentioned by the ECOWAS Court in its Decision in the Case of Hussein Habre. in. The Republic of Senegal.³

As conclusion to this Part we can note that the creation of the ICT to prosecute individuals alleged of gross human rights violations is devoted to the international legal entities as states and inter-government organizations within the existing International Law.

3. 2. Legality of the Extraordinary African Chambers

The creation of the EAC was determined by many events that may justify its legality. So, was it founded on the bases that the EAC was illegal in the eyes of International Law as argued by Mr. Hussein Habre? Three main sustainable arguments are relevant to justify the legality of the EAC.

1. The first argument consists of the creation of the EAC by the support of the AU as an African Institution (Inter-governmental Organization) as a legal entity.

2. The second argument relates to the exceptionality of the gravity of the alleged international crimes against Mr. Hussein Habre.

3. The third argument is based on the PactaSuntServanda as a general Principle of International Law.

The first point of view on the legality of the EAC is base on the fact that the AU has the general competence in terms of the creation of the EAC. The creation of ICT as mentioned in previous paragraph is devoted to the competence of legal entities like AU and the states within an international agreement. In the case of the creation of the EAC the State of the Republic of Senegal has concluded an international agreement with the AU. This agreement did not only reflect the view or the will of the Republic of Senegal to try by any means the Former President of Chad, but also confirms the calling of the Republic of Senegal by the AU to try Mr. Hussein Habre in respect to its international obligations.

Secondly there are some international crimes, such as crime against humanity, war crime, crime of genocide, crime of aggression⁴ that cannot be anyway accepted by the current International law not matter where they were committed. Mr. Hussein Habre was accused of crime against humanity, war crime and crime of torture. These crimes constitute international crimes as mentioned above.

The third point is that, it was imperative for the Republic of Senegal to try Mr. Hussein Habre according to its international obligations under the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 in accordance with the Decision of the ICC.⁴ So the question was not about the extradition of the accused to another state to be tried, but by the Republic of Senegal to carry out its international obligations. Even the extradition of
Mr. Hussein Habre to be tried in Belgium should not exclude the Republic of Senegal from the violation of its International obligations. Thus, the country has signed and ratified the aforesaid Convention almost 3 decades ago.22 No measures have been taken by the country to conform its National Legislation to its international obligations.

3.3. The Extraordinary African Chambers

The EAC is a Hybrid Quasi-Judiciary Body created on the basis of an international agreement between the Republic of Senegal and the AU to try Mr. Hussein Habre alleged to have committed international crime. Despite EAC completes operation as a Senegalese National Judicial Institution, it presents some very important features that guaranteed its Statute as an international impartial hybrid legal body. The EAC comprises of four Chambers:

- Chamber 1. Section on investigations with four (4) Senegalese Judges,
- Chamber 2. Section for prosecution composing of three (3) Senegalese Judges,
- Chamber 3. County Court with two (2) Senegalese Judges and a President from another African country,
- Chamber 4. Appeal Chamber two (2) Senegalese Judges and a President from another African country.

Another important fact is that most of the judges of the EAC are Senegalese, they are appointed by the President of the AU Commission. On the other hand, judges from other African countries played important roles as President of chambers. Ended The Presidents of County Court and the Appeal Court are from other African countries.10

4. Conclusion

In conclusion, the EAC did not differ from the previous ICT created in other parts of the world by the UN. Its creation and competence are in conformity with the current International law. The legality of the EAC is therefore justified. So the creations of an ICT by any regional organizations should be in conformity with the current International Law. Other examples like EAC can be created by other regional and sub-regional organizations to try persons alleged to have committed international crimes on the basis of regional specification.

The Decision of the EAC to sentence Mr. Hussein Habre has great relevance to the African continent in terms of human rights protection. EAC constitutes a good example against impunity in Africa. Also, it is a new away for the African peoples to deal with African problems with African solutions. This can be considered as a victory for African leaders, that have always claimed their independence from the ICC.

5. Acknowledgment

This paper was financially supported by the Ministry of Education and Science of the Russian Federation on the program to improve the competitiveness of Peoples’ Friendship University (RUDN University) among the world’s leading research and education centers in the 2016-2020.

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