

New Developments in the Habré Case: Defense Appeal and Reparations under Examination

This guest post is written by El Hadji Alioune Seck, Program Associate with the International Criminal Justice Fund at [TrustAfrica](#). The views expressed below do not necessarily reflect the views of the Open Society Justice Initiative.

On May 30, 2016, the Extraordinary African Chambers within the Senegalese Courts (EAC) sentenced former Chadian President Hissène Habré to life imprisonment. The court found him guilty of crimes against humanity, rape, and sexual slavery committed between 1982 and 1990 in Chad. This decision followed a trial that officially opened in Dakar on July, 20 2015 and came to an end on February 12, 2016 with submissions of final conclusions by both parties and the final indictment by the prosecutor.

While delivering the verdict, Presiding Judge Gustave G. Kam announced that the court would initiate proceedings on reparation and compensation to victims starting May 31, 2016 through a status conference. He also announced that the court would communicate its decision by July 31, 2016 and further granted defense lawyers a 15-day period to appeal the conviction verdict.

The defense's appeal

Throughout trial hearings, Habré challenged the authority of the EAC and denied its legitimacy. He refused to cooperate with court officials and directed his lawyers not to appear in court to defend him. Faced with this situation, EAC judges ordered the accused to be forcibly brought into the courtroom to attend the trial and immediately appointed three lawyers with the mandate of defending Habré.

Following the verdict, these court-appointed defense lawyers appealed Habré's conviction on June 10, 2016 while victims' lawyers filed their conclusions on reparations on behalf of their clients. The defense provided reasons for the appeal by explaining that the life sentence delivered against Habré was of extreme severity and did not take into account any extenuating circumstances whatsoever. In line with his strategy of silence, the newly convicted former president did not make any

strategy of silence, the newly convicted former president did not make any statements on this verdict or on the appeal by his court-appointed lawyers.

The ball is now in the African Union's court, as the organization has the obligation to nominate and appoint judges who will be sitting at the Extraordinary African Chamber of Appeal (Appeals Chamber). According to Marcel Mendy, the EAC's Spokesperson, the Appeals Chamber is expected to be set up and start operating either in September or October of this year. Subsequently, the Appeals Chamber will be granted a seven month period to pronounce on the merits of the case. It is to issue its decision in April or May 2017. The Appeals Chamber must be composed of African judges but cannot be chaired by a Senegalese or a Chadian judge.

Finally, it is worth emphasizing that the EAC's Statute only provides a single level of appeal with the Appeals Chamber; Article 25 of the Statute stipulates in paragraph 4 that "[d]ecisions made by the Extraordinary African Chamber of Appeal are final. They are not subject to any form of remedy, be it extraordinary or otherwise." By way of explanation, the Appeals Chamber is the court of last resort that will decide on the ultimate fate of both the accused and the victims.

Victims' reparation claims under examination

The appeal lodged by the defense does not suspend the EAC's verdict in the sense that it has no bearing on the current mission of EAC judges. They will therefore continue to work according to the original schedule by reviewing victims' reparation and compensation claims until July 31, when they are required to reach a decision.

The EAC established a reparation system in which victims may benefit from reparations and compensation either individually or collectively. In addition, Article 27 of the Statute provides that reparation for victims are three-fold: restitution; compensation; and rehabilitation. Added to this is the creation of a Fund for Victims and their Beneficiaries, which, according to Article 28 of the Statute, "is funded through voluntary contributions by governments, international institutions, non-governmental organizations and other contributors wishing to provide support to victims."

This avant-garde posture regarding reparations is commendable. The court created the possibility to award reparations to victims, "whether or not they participated in the proceedings before the Extraordinary African Chambers." In other words, victims who did not make themselves known during trial proceedings have the opportunity to come forward after the verdict to assert their rights to reparation before the court.

However innovative and arguably generous to victims this system may be, its implementation will be problematic and will raise a number of issues. At a TrustAfrica colloquium in March, international criminal law expert and former EAC outreach coordinator Hugo Jombwe explained that the court will first be faced with the challenge of financing the Fund. Article 28 of the EAC Statute lists various entities that may contribute to the Fund, but these contributions are voluntary by

entities that may contribute to the fund, but these contributions are voluntary by definition. There is no guarantee as to its operationalization, and it is uncertain whether the EAC will be successful in collecting significant enough amounts of cash likely to be redistributed among victims.

Many questions also remain unanswered with respect to the identity and precise number of victims and beneficiaries. To date, no census has been conducted either by the court or local authorities to attain the number of victims. Few attempts were made by the victims' lawyers and human rights organizations, but one should expect an upsurge in the number of claims filed by victims towards the end of the procedure.

Is the EAC's decision legal?

At a press conference held on June 13, 2016, defense counsel Ibrahima Diawara, one of Habré's chosen lawyers along with Francois Serres, rejected the validity of the conviction of his client by challenging the legality of the court's composition. He indicated that one of the sitting judges of the Court, namely Senegalese magistrate Amady Diouf, did not meet the legal requirements to sit on the EAC's bench. He argued that Article 11.5 of the EAC Statute requires that elected judges shall have "held a justice position for a minimum ten years." Diawara considers that his nomination violates the Statute and shall result in the invalidity of the decision.

The court-appointed lawyers upheld the same opinion in their conclusions filed before the court on June 28, 2016 as part of proceedings on reparations. Counsels Mounir Ballal, Mbaye Sene, and Abdul Gning elaborated on the distinction in civil law between "sitting magistrates" (*magistrats du siege*) and "standing magistrates" (*magistrats du parquet*). While the former are called upon to settle disputes based upon the law, i.e. to judge, the latter are the Crown's or State's representatives responsible for conducting prosecutions on behalf of the commonwealth. The court-appointed lawyers stated that the magistrate in question never served as sitting judge during his over twenty-five years of practice in the Senegalese judiciary.

As a result, the defense is requesting the EAC to stay all proceedings on reparation because, they argue, the decision of May 30 is regarded as null and void based on the alleged illegal composition of the bench. "Given the irregular composition of the Extraordinary African Chambers, this Court cannot proceed with the examination of reparations claims" added the defense. Therefore, according to the defense, the Appeals Chamber will first have to address this question before turning to the merits of the case in accordance with Article 25 of the Statute.