

Theorizing empirical court research: The test case of the trial of Hissène Habré

Sharon Weill, Kim Thuy Seelinger and Kerstin Bree Carlson

Sharon Weill is Associate Professor of International Law at the American University of Paris and a research associate at Sciences Po, Paris. Her research focuses on courts and employs socio-legal methods including trial ethnography. Email: sharon.weill@sciencespo.fr.

Kim Thuy Seelinger is a Research Associate Professor at the Brown School of Social Work, Public Health and Social Policy, as well as a Visiting Professor at the School of Law at Washington University in St Louis. She also directs the Center for Human Rights, Gender, and Migration at the Institute for Public Health. She has led several multi-country studies on sexual violence in armed conflict and forced displacement and currently serves as Special Adviser on Sexual Violence in Conflict to the Prosecutor of the International Criminal Court.

Kerstin Bree Carlson is Associate Professor at Roskilde University, where she teaches law and society-related topics. She is also affiliated with iCourts at the University of Copenhagen and The American University of Paris. She writes frequently for The Conversation blog. Email: carlson@ruc.dk.

Abstract

The purpose of this article is to advocate for new methods of studying international law. Hissène Habré, former President of Chad, was convicted by a hybrid tribunal in Dakar. Our book on this judicial process (The President on Trial: Prosecuting Hissène Habré, Oxford University Press, 2020) develops a novel empirical format of first-person testimonials, followed by expert analyses, to trace and contextualize the decades-long story of attempts to bring Habré to justice. The empirical materials collected in our book demonstrate that the Habré trial challenges a linear distribution of power from international (global) actors to local, demonstrating rather a series of horizontal relations between the local and international. Based on this research experience, the article lays out the method we developed. It facilitates an assessment of the legal and political impact of court decisions, routines and broader bureaucratic politics through which the practices of judging are constructed. “Justice” does not speak with one voice; it is made up of multiple actors with different professional interests and personal goals. It is also impacted by power dynamics and by the structure of the institution, including by institutional routine and legal bureaucracy.

Keywords: crimes against humanity, international criminal justice, hybrid tribunals, empirical research, socio-legal methods.

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Introduction

Hissène Habré, former president of Chad, was convicted by a hybrid tribunal in Senegal on 30 May 2016. The judgment was affirmed on appeal on 27 April 2017. Habré’s prosecution resulted from local and international civil society working in tandem. Following the coup that deposed Habré in 1990 and his flight to Senegal, Chadian victims organized and pressed for justice, led by victims’ association leader Souleyman Guengueng, and Chadian human rights advocate, and the country’s first woman attorney, Jacqueline Moudeina. Their cause was taken up by Reed Brody of the international non-governmental organization (NGO) Human Rights Watch (HRW), who saw in the case the possibility of bringing universal jurisdiction to Africa. HRW championed trying Habré for international crimes committed by his regime, and exerted pressure on Senegal, including through the African Union and several international institutions and courts.

The eventual trial conducted before the Extraordinary African Chambers (EAC) was a seminal judicial experience in a novel hybrid construct: created by agreement between the African Union, Senegal and Chad, located in Dakar and staffed almost entirely by Senegalese judicials, it applied international criminal law while working under Senegalese criminal procedure. Completed on time, within budget, with the defendant prosecuted and no dead witnesses, the Habré trial epitomized the potential of hybrid tribunals. In an era of growing resistance to international judicial institutions, hybrid tribunals are touted as quicker,

cheaper and less controversial than their international counterparts. The Habré trial fulfilled these conditions. It also showed itself to be agile regarding the application of international criminal doctrine, as well as savvy regarding political obstacles.

At the same time, one persistent and valid critique of the Habré trial is that it only managed to try Hissène Habré himself. The EAC pre-trial investigatory chamber had actually brought charges against five people, including Habré. However, Habré was the only one living in Senegal, and was thus the only indictee to actually face trial. The sole presence of Habré as the representative for an atrocity-pursuing regime posed challenges for the EAC when it sought to legitimize itself institutionally through the objectivity of its work.

Our book on this judicial process¹ develops a novel empirical format of first-person testimonials, followed by expert analyses, to trace, explain and contextualize the decades-long story of attempts to bring Habré to justice.

In this article, we lay out the method we developed in this research (“Designing the empirical research on the EAC” section), and theorize that method, using examples from our empirical research (“Developing a theoretical framework based on the empirical findings” section).

Designing the empirical research on the EAC

We followed the case from 2015 onwards, at first independently, and then as a team. Over our several trips to Dakar, interviewing a spectrum of actors associated with the tribunal, an idea emerged about how we might preserve the empirical richness that we were observing while also telling a coherent story about an important development in international criminal justice.

We wanted to make this empirical source material widely available and we thought the best way to do it was to preserve the actors’ direct testimonies. This is what the first part of the book does; its twenty-six chapters are written by Senegalese, Chadian and foreign experts who were directly involved in facilitating and operationalizing the Habré trial. These chapters tell the story of the trial in chronological order, beginning with Habré’s fall from power and the 1990 regime change in Chad. Contributors include judges, lawyers, administrators, victims’ representatives, politicians, media and civil society leaders central to this case. These chapters are drawn from across the echelons of power, ideology and status, including international judges and bureaucratic workers. Our aim was to construct the narrative of this long process through these accounts, and we invited these participants to tell the story of what they did how, for, or with the EAC, in their own words.

We were aware as we gathered actors’ written perspectives that the process of writing is necessarily transformative. People do not write as they speak, personality often does not translate into text, anecdotes disappear, and stories

1 Sharon Weill, Kim Thuy Seelinger and Kerstin Bree Carlson (eds), *The President on Trial: Prosecuting Hissène Habré*, Oxford University Press, Oxford, 2020.

told “off the record” during an interview might not be shared again on paper. Chance and timing also had some impact: administrators are busy, politicians feel more or less secure as circumstances change, and activists have sometimes moved on to the next engagement. Nonetheless, the book presents much of what was essential about the institution from the actors’ perspectives and how multiple persons and interests interacted in this process.

In the second part of the book we situate the Habré case in its larger context, with seventeen chapters written by scholars and legal experts. Many proponents of international criminal law and transitional justice ask what impact the EAC’s design and jurisprudence can have for other prosecutions of international crimes. As a one-off, *ad hoc* tribunal exploring new judicial forms in the highly contested field of international criminal law in Africa, what is the importance and significance of the EAC’s trial and what will it signify in the pantheon of international criminal law? Can this model be replicated, and should it be? What can we learn from this tribunal’s work to design and strengthen future institutions? This part presents paradigmatic samples of the theoretical and practice-oriented discussions accompanying the Habré trial. We approached scholars mainly within the legal discipline based on the themes we found central to the case: procedural hybridity; international criminal law doctrine; victim and witness participation; and the future of international criminal justice and its challenges. We grouped the chapters of Part II around what we identified as the authors’ own positionality in relation to international criminal law, providing a socio-legal mapping of the field of international criminal law and courts.

The empirical materials collected in our book demonstrate that the Habré trial challenges a linear distribution of power from international (global) actors to local, demonstrating rather a series of horizontal relations between the local and international: this is discussed further below, and at length in the book. The actors’ testimonies helped reveal the ways that professionals and other interested parties interact, an essential aspect of how institutions function. The academic contributions contextualized the work of the EAC against other hybrid and international tribunals, and international criminal justice more generally.

Developing a theoretical framework based on the empirical findings

Based on our research experience in Dakar and elsewhere, we suggest developing a conceptual and methodological framework to analyse the role of courts and to investigate the social, legal and political implications of trials. This method is grounded in empirical observation and seeks to capture the interaction of the actors and their social trajectories, as well as the political context and legal challenges. At the same time, it addresses the institutional routine and political environment in which they are located. It is based on four dimensions: The dynamics of legal doctrines; The role of the human actor; The impact of the institution, structural patterns and bureaucracy net; and Political interaction and

geopolitical influence. In the next part we explore these four dimensions, while providing empirical examples observed in our own research.²

The dynamics of legal doctrines: How law faces international crimes

The first dimension of our conceptual framework examines how political and social goals are translated into legal doctrines, and how, as doctrine is developed and functions as an independent force, it can eventually facilitate or limit the achievement of certain socio-political visions through interpretation or fact-finding.

One clear example of this is the way that the EAC developed international criminal law jurisprudence regarding sexual violence. Sexual violence was not explicitly charged in the investigating phase of the EAC's work. Instead, recommended charges in part referenced torture, presumably including acts of sexualized torture in Habré's prisons that were described in the underlying facts established by the investigating judges. At trial, daily testimony was summarized and uploaded to the Internet by an NGO. During hearings, several witnesses unexpectedly testified about sexual violence committed by members of Habré's regime; one woman, Khadidja Zidane, even testified about being violated by Habré himself. These sudden accounts of sexual violence alerted international scholars. As discussed in Chapter 17, a group of leading experts from Africa, Europe and the United States submitted an *amicus curiae* brief outlining how the evidence of sexual violence could be charged under the EAC statute and the customary international law in effect during Habré's regime.³ Chambers accepted the brief as informational and it was also made public by journalists, although there was no clear mechanism for accepting such a submission into the formal record. And yet the document is seen to have had influence: victims' counsel echoed several arguments from the brief in its own submissions and the trial court subsequently bent procedure to "requalify" the facts and amend charges to include sexual violence. It then found Habré guilty of, *inter alia*, sexual violence committed by his subordinates and also as a direct perpetrator. Ultimately, the appeals court dismissed this latter conviction on procedural grounds, finding that the allegations of Habré's direct perpetration of rape against Ms Zidane were brought too late. Although the trial court finding regarding rape was not accepted, other doctrinal developments, including how sexual violence can be prosecuted, were affirmed.

2 Our method is inspired by socio-legal literature such as Bruno Latour, *The Making of Law. An Ethnography of the Conseil d'Etat*, Polity Press, Cambridge, 2010 (translation); Malcolm M. Feeley, *The Process is the Punishment: Handling Cases in a Lower Criminal Court*, Russell Sage Foundation, New York, 1979; Didier Fassin and Carolina Kobelinsky, "Comment on juge l'asile : l'institution comme agent moral", *Revue française de sociologie*, Vol. 53, No. 4, 2012; Jacqueline Hodgson, *French Criminal Justice: A Comparative Account of the Investigation and Prosecution of Crime in France*, Hart Publishing, Oxford and Portland, OR, 2005.

3 Prior to researching the EAC itself, Seelinger was involved in the development of an *amicus curiae* brief submitted to the court in December 2015, regarding the potential to charge sexual violence crimes according to the EAC statute and based on customary international law in effect during the 1980s.

This demonstrates how, while developing the doctrinal framework, the legal decision is motivated by the social and political forces that created it. The EAC's decision, which will be probably taught in law schools detached from its socio-political process, will have a jurisprudential impact on the development of the law. We decided to include a summary of the judgment alongside the other "actors" chapters, as it has become an actor in itself. In doing so, we argue that emerging legal doctrines should not be understood as separate from the social and political forces that guided them as much as facts and laws.

To look at this from another angle, consider the experience of Habré's appointed counsel, brought on while the trial was underway. Habré's appointed counsel, Senegalese lawyers and therefore experts in Senegalese procedure, were confident before the judgment that the irregularities of the process were such that the trial court could not convict Habré (see Chapter 14). Yet in the Habré trial, too much was riding on a court determination to allow Senegalese procedure to dictate. In domestic trials, criminal procedure is not an element where flexibility is permitted. International trials have demonstrated far more flexibility, however, and the experience of the Habré trial develops this doctrinal trend. As a high-ranking justice official, who ultimately did not write for the book, told us, "Once you have the politics lined up, the law can get the job done."

The role of the human actor: "Law at work"

A court decision is a product of the interaction and contribution of many actors. Yet, standard legal research concerns essentially the study of legislation and precedents or selective cases, without considering the socio-political and empirical context of judicial practice. The components of "the law in action"—such as the legal ritual and procedure, the narratives of the protagonists, the judicial actors' behaviour and interaction—need to be observed and analysed, in order to understand the impact of those interactions on the production of case law. Thus, it is not only the abstract norm and court decision that interest the researcher but the actual practice, the interaction of the actors on a concrete case on which the theoretical analyses are based.

At least three specific groups of actors play a key role in making case law: judges, defence lawyers and State prosecutors. Yet, other actors such as civil society actors, victims' associations, clerks, donors, secretaries, journalists, academics, NGOs, experts and political actors are also important.

The EAC was portrayed as an African Court established to try an African leader by African professionals. This socio-political *raison d'être* of the EAC implied three categories of actors: visible actors, such as the Senegalese/African judges and clerks; background actors, such as a number of French technical experts embedded within the different chambers and judicial corps; and hidden actors such as the French judge who actually drafted whole sections of the decision. This latter category was not hidden to all; those working in the court knew of course. Traces of these actors found their way into the judgment as well. One of the defence attorneys pointed to the phrase "springtime" included in the judgment to

define a timeline, explaining that only a French lawyer would use such a word; for locals, there is no “spring” in Chad but rather a rainy season and a dry season.

More theoretically, we argue that the actors’ career trajectory, competences, and prior socialization and political positioning are key to understanding how court decisions are made.⁴ In this context, the interaction between these players, and in particular the extent to which they were cooperating, confronting and being impacted by different internal or political struggles or networks, should be examined. Of particular interest is understanding how the practice and the legal choices made by the different actors are affected by these power dynamics.

Chapters in the book written by an investigating judge, the prosecutor and an appeal judge all speak to how the strengths and obstacles derived from their own professional fields made cooperation possible (or not). For example, EAC judges discussed how during their investigations in Chad, Senegalese and Chadian judicial officials were all similarly trained in and familiar with civil law investigation procedures, and this facilitated their cooperation as they handled hundreds of witnesses. Additionally, Belgium shared its files from the investigation conducted by Judge Fransen; Belgian investigatory procedures are similar to those practised in Senegal and Chad (Chapter 6).

Networks and tensions are revealed all over the book: between academics and the judicial professions (Chapter 26); between the court, victims and NGOs; and internationally between diplomats and government officials. Chapters written by HRW experts Reed Brody and Olivier Bercault, as well as by the victims’ lawyers, discuss a flow of information, ideas and attention travelling horizontally. Consider again the *amicus curiae* brief on sexual violence, which was not entered into the official court record as such, but rather entered the public domain via news media coverage linking to the brief. Likewise, a Senegalese journalist travelled with the investigating judges to Chad, bringing detailed news of the investigation into the Senegalese media sphere (Chapter 24). As a more subtle example of the pervasive power of information networks, consider the source of a key statistic regarding the number of deaths attributed to Habré’s regime. In 1992, a truth commission set up by Habré’s successor, Idris Déby, established that nearly 3,900 people had died in Habré’s prisons. Determining that this number constituted approximately 10% of the deaths for which the regime was responsible, the Truth Commission rounded the number of dead up to 40,000 (Chapter 2). This “statistic” was accepted by NGOs and victims, and made its way into the trial uncontested.

Institutional factors: hierarchy, bureaucracy and performance

Legal work is necessarily impacted by the structure of the institution, including by institutional routine and legal bureaucracy.⁵ This is how even an exceptional trial

4 Pierre Bourdieu, “The Force of Law: Toward a Sociology of the Juridical Field”, *Hastings Law Journal*, Vol. 38, No. 5, 1987; Mikkel J. Christensen, “Crafting and Promoting International Crimes: A Controversy Between Legal Professionals of Core Crimes and Anti-Corruption”, *Leiden Journal of International Law*, Vol. 30, No. 2, 2017.

5 Didier Bigo (ed.), *The Field of the EU Internal Security Agencies*, L’Harmattan, Paris, 2007.

such as that of a former president for violations of international criminal law becomes a work of routine by professionals bounded by institutional bureaucracy, hierarchy and, in this case, by personal precarity.

Routines, organized by managers, set the balance between the legal and social dimensions of the task and orient the work of courts towards a bureaucratic goal of efficiency.

In this context, the book chapters of the administrators and the foreign donors highlight their role and importance as well as some of the internal conflicts that arose, including unexpected power relations. For example, it became evident to us that the EAC Administrator, with his strong personality and professional background, functioned as a gatekeeper between international pressures and the everyday operation of an efficient tribunal. Within the tribunal, the Administrator was spoken of in glowing terms, and the fact that he made everything work with a tiny office staff of only three people including himself was all the more impressive. For example, it was a testament to the Administrator's effectiveness that hundreds of witnesses were able to come to the EAC from Chad without a single person being harmed. For the donors, however, the Administrator often popped up as an irritating figure who imposed unnecessary obstacles and was not "a team player".

"Finishing on time" was a mantra repeated by many actors, and indeed efficiency took precedence in many aspects, as the court-appointed defence attorney pointed out. Even the appeal needed to be filed before the 300-page written judgment was rendered, and so the appeal was made on the basis of the thirty-page summary read out in court. Likewise, the budget was a determinative force that sometimes seemed to play outside the purely practical. For example, prior to the judgment, we asked one of the EAC officials if they believed that there would be an appeal. "Of course," they replied. "We budgeted for it."

Interaction with politics: Judging at the frontier of politicized justice

While the law claims its underlying capacity to evade political variables, we are interested in showing the positions given to politics and international relations within judicial proceedings, and how facts are established by judges. It is thus essential to contextualize these kinds of trials in the broader international political arenas, as well as historical situatedness, despite the key claim of political detachment.

There is much to discuss in this regard, but due to the limited scope of this article, we point to two examples. First, Habré himself (Chapter 7) drew attention to the aid he received from the United States and France in order to deter the threat of Libya. Habré was received by Ronald Reagan in the US White House in 1986, and was always financed by France. In fact, those forms of support have not changed since Habré's time. Habré's successor, Idris Déby, received counter-terrorism aid from these same foreign allies during his thirty-year reign. Déby died unexpectedly in 2021 and was succeeded by his son.

Second, Chad was initially an enthusiastic supporter of the EAC and its quest to try Habré. Chad was the largest single donor to the tribunal and it even

applied to be a civil party in the trial. This demand was finally rejected by the court, due to the fear of political interference. Chad's initial cooperation and support stopped as the EAC widened its investigation to include international crimes that implicated Déby, however. A fifth investigatory trip was ultimately cancelled due to this change in Chad's position (see Chapters 9 and 13 of the investigating judge and the prosecutor). This also explains Déby's sudden interest in trying a number of Habré-era government officials and regime participants in Chadian courts immediately prior to the commencement of the Habré trial – no extraditions to Senegal would take place (see Chapter 25).

Conclusion

By analysing these four dimensions, our framework facilitates an assessment of the legal and political impact of court decisions, routines and broader bureaucratic politics through which the practices of judging are constructed. This method could be used to study a variety of courts and trials, both domestic and international. For example, Sharon Weill has applied these methods to her study of French terror trials;⁶ Kerstin Carlson has applied these methods to a wider consideration of African courts.⁷ As a team, we are now in the process of applying our method in our study of the Special Tribunal for Peace (JEP) in Colombia.

The purpose of this article is to advocate for new methods of studying international law. The empirical elements of law, including the actors and their perspectives, are essential components in an understanding of legal practice, which itself is part of developing legal doctrine. We hope the book can contribute to new ways of seeing and speaking about international legal practice. An essential part of such seeing is how international law is taught. Since the publication of the book, we have used the book in our classes (on international law, international criminal law and human rights) as follows: students break into groups and prepare a short presentation of an actor's chapter (it can be also only a selection of chapters from the different sections). Then, following the chapters' presentations by the students, we conduct the entire process of the trial as a miniature moot court. This has proved an effective method to expose students to an actual case, including its challenges, possibilities and outcomes. This personal participation can then be contrasted with video footage of the trials, which is available online, casting this footage in a very different light after the actors and their choices have become more familiar to students.

6 Sharon Weill, "Transnational Jihadism and the Role of Criminal Judges: An Ethnography of French Courts", *Journal of Law and Society*, Vol. 47, No. S1, 2020; Sharon Weill, "French Foreign Fighters: The Engagement of Administrative and Criminal Justice in France", *International Review of the Red Cross*, Vol. 100, No. 907–909, 2018.

7 Kerstin Bree Carlson, *The Justice Laboratory: International Law in Africa*, Chatham House/Brookings, London, 2022.