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SEXUAL VIOLENCE, THE PRINCIPLE OF LEGALITY, AND THE TRIAL OF HISSÈNE HABRÉ

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INTRODUCTION

On April 27, 2017, the appellate chamber of the Extraordinary African Chambers (EAC) in the Courts of Senegal upheld the conviction of Hissène Habré, former president of Chad, for war crimes, crimes against humanity, and acts of torture.[1] In doing so, it reaffirmed a 2016 trial judgment convicting Habré of rape and sexual slavery as a crime against humanity, among other international crimes.[2] The confirmation of Habré's life sentence for atrocities committed by his security forces, including rape and sexual slavery, was hailed as a tremendous victory for international criminal justice and the rights of survivors of sexual violence. However, the conviction for sexual crimes had in fact come as something of a surprise.

In this article, we review the unexpected emergence of sexual crimes in the Habré trial and why we, as external observers, were invited to weigh in on the possibility of revising charges to more explicitly address them. To help ensure that any revision of charges complied with the principle of legality, we articulated the status of various crimes of sexual and gender-based violence under customary international law at the time of Habré's regime (1982 to 1990). Once the legality of these potential charges was

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1. Prosecutor v. Habré, No. 01/13, Verdict (Extraordinary Afr. Chambers Apr. 27, 2017), http://www.chambresafricaines.org/pdf/Arrêt_intégral.pdf [https://perma.cc/XR9K-FTVS].
2. Prosecutor v. Habré, Judgement (Extraordinary Afr. Chambers May 30, 2016), http://www.chambresafricaines.org/pdf/Jugement_complet.pdf [https://perma.cc/PXK8-94KG].

demonstrated, a path opened up for Habré's landmark conviction—which then itself became a crucial piece of customary international law.

I. THE REGIME OF HISSÈNE HABRÉ IN CHAD

Hissène Habré rose to power in the early 1980s, amid political tumult in Chad. Habré seized the presidency in 1982, after the United States supported his overthrow of President Goukouni Oueddi, who was an ally of Libyan president General Mu'ammar al-Gaddhafi. However, the legitimacy of Habré's ascension was contested by constant rebellion across the country. He enforced one-party rule and actively suppressed competing ethnic groups such as the Sara and the Hedjarai in the south, and the Zaghawa in the northeast. Habré's instrument of oppression was a security agency called the *Direction de la Documentation et de la Sécurité,* or DDS. Later known as "the instrument of terror," the DDS was in charge of eliminating opposition and political resistance both from within and outside of Chad. Eventually, Idris Déby Itno, Habré's former military official, formed an army to overthrow Habré from power on December 1, 1990. Habré fled the country after emptying the national treasury. He settled in Senegal, where he was able to live in relative peace for decades.[3]

After several failed attempts by Habré's victims to prosecute their former president for atrocities he had committed in Chad, a trial against him was finally commenced in Senegal, requiring an alignment of myriad stars.[4] A special tribunal, the EAC, was established within the courts of Senegal by the African Union and the Senegalese government. The EAC had jurisdiction over atrocity crimes committed in Chad between 1982 and 1990—the period of Habré's regime.[5]

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3. Relevant aspects of Chadian history are well captured in MARIO J. AZEVEDO & SAMUEL DECALO, HISTORICAL DICTIONARY OF CHAD (4th Ed.) (2018). *See also* HUMAN RIGHTS WATCH, LA PLAINE DES MORTS: LE TCHAD DE HISSÈNE HABRÉ 1982-1990 [THE PLAIN OF THE DEAD: HISSÈNE HABRÉ'S CHAD 1982-1990] 84-86 (Dec. 3, 2013), [hereinafter LA PLAINE DES MORTS], https://www.hrw.org/sites/default/files/reports/chad1013frwebwcover_0.pdf [https://perma.cc/Y5BG-EC5K].

4. For an excellent summary of the long road to the EAC, see Sarah Williams, *The Extraordinary African Chambers in the Senegalese Courts: An African Solution to an African Problem?*,11 J. IN'TL CRIM. JUST. 1139 (2013).

5. Statut des Chambres africaines extraordinaires au sein des juridictions sénégalaises pour la poursuite des crimes internationaux commis au Tchad durant la période du 7 juin 1982 au 1er décembre 1990 [Statute of the Extraordinary African Chambers Within Senegalese Jurisdiction for the Prosecution

Consistent with the civil law legal tradition, the EAC's investigating judges issued an "*ordonnance de renvoi*" to present the case and recommend charges to the trial chamber. Issued on February 13, 2015, the 196-page document summarized relevant facts, based on the chamber's investigations in Chad as well as a tremendous amount of documentation inherited from an earlier investigation by Belgian authorities and groups like Human Rights Watch (HRW).[6] The investigating judges included references to the mass or systematic imprisonment, deportation, and torture of presumed opponents. The investigating judges also referred to sexual abuse, including routine rape and sexualized torture committed by Habré's DDS agents, including the forced nudity of a pregnant prisoner, the insertion of chili peppers into another detainee's penis, and the use of electric shocks on a detainee's genitals.[7]

Notably, though the statute of the Extraordinary African Chambers includes jurisdiction over rape and other forms of sexual violence as various war crimes and crimes against humanity, none of the sexual offenses in evidence were charged as such. Instead, the sexualized harms described in the record seemed to fall under the general charge of "torture," if anywhere at all.

The investigating judges recommended the following charges:

- Crimes against humanity including murder, summary execution, and kidnapping, followed by enforced disappearance and torture with respect to the Hadjerai and Zaghawa ethnic groups, the people of southern Chad and political opponents;
- War crimes of murder, torture, unlawful transfer and confinement, and violence to life and physical well-being; and

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of International Crimes Committed in Chad During the Period from June 7, 1982 to December 1, 1990], art. 3 [hereinafter Statute of the Extraordinary African Chambers], http://www.chambresafricaines.org/pdf/Accord%20UA-Senegal%20Chambres%20africaines%20extra%20Aout%202012.pdf [https://perma.cc/96UW-JHCQ], *translated in Statute of the Extraordinary African Chambers*, HUM. RTS. WATCH, https://www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers [https://perma.cc/44NY-XFHZ].

6. Prosecutor v. Habré, No. 01/13, Ordonnance de non-lieu partiel, de mise en accusation et de renvoi devant la Chambre African Extraordinary d'Assises [Order for Partial Dismissal, Indictment, and Referral to the Extraordinary African Chambers' Trial Chamber] (Extraordinary Afr. Chambers Feb. 13, 2015) [hereinafter Ordonnance de renvoi], http://www.chambresafricaines.org/pdf/OrdonnanceRenvoi_CAE_13022015.pdf [https://perma.cc/5C3E-LBYE].

7. *See e.g.,* Ordonnance de renvoi at 52, 136, 138, 163, 165.

- The autonomous crime of torture.[8]

II. THE EMERGENCE OF SEXUAL VIOLENCE TESTIMONY[9]

Despite the omission of explicit references to sexual violence in the initial charges against Habré, witness testimony before the EAC between September and November 2015 revealed that persons detained by the DDS had suffered multiple forms of sexual violence.[10]

For example, a witness testified to the repeated rape and gang rape of women at the prison *Les Locaux*, by security guards and high-level officials.[11] This testimony echoed HRW reports already in the underlying record, which had referenced rape committed against prisoners by male guards.[12] Violations included forced sex with female detainees in exchange for food and medicine.

Other witnesses described slavery. Their testimony echoed earlier documentation by HRW, which described the detention and exploitation of women by Habré's agents in military camps in the desert.[13] For example, a witness testified that she was part of a group of women that was transferred to a camp in Ouadi Doum, where they were used as domestic servants and sexual slaves for a year.[14] Oral testimonies also confirmed earlier reports that men and women detained in Habré's prisons were routinely tortured in the form of rape and intentional injury to the genitals. One victim was

8. *Id.* at 185-87.

9. Parts II and III draw from Kim Thuy Seelinger, Naomi Fenwick & Kahled Alrabe, *Can We Be Friends? Offering an Amicus Curiae Brief on Sexual Violence to the EAC*, *in* PROSECUTING THE PRESIDENT: THE TRIAL OF HISSÈNE HABRÉ (Kerstin Carlson, Sharon Weill & Kim Thuy Seelinger eds., 2020).

10. The *Direction de la documentation et de la sécurité* was created in 1983 and operated under the direct orders of Habré. Initially tasked with preventing pro-Libyan activities, the DDS conducted thousands of arbitrary arrests. LA PLAINE DES MORTS 84-86.

11. *Public Prosecutor v. Hissène Habré: Hearing Report No. 36 of November 9, 2015,* TRUSTAFRICA, http://www.trustafrica.org/images/ICJ_reports/EAC-%20Trial%20Hearing%20Report%20-%209th%20November%202015.pdf [https://perma.cc/2Q6Y-JVYB].

12. LA PLAINE DES MORTS, *supra* note 10, at 236.

13. *Id.* at 239.

14. *Testimony of Kaltouma Defala*, *The Public Prosecution v. Hisséne Habré: Summary of the Twenty-Ninth Hearing Held on 20 October 2015*, TRUSTAFRICA [hereinafter *Defala Testimony at Twenty-Ninth Hearing*], http://www.trustafrica.org/images/ICJ_reports/EAC-%20Trial%20Hearing%20Report%20-%2020th%20October%202015%20-%20English.pdf [https://perma.cc/BHQ9-7V2U].

pregnant in detention; she lost her child.[15] Another cellmate reportedly received electric shocks to her breasts and genitals, leaving her unable to walk.[16] Similarly, one witnesses described DDS agents inserting pieces of wood into his cellmates' penises.[17] Some testimony shed light on other forms of grave sexual violence. For example, Dr. Helene Jaffe, who treated hundreds of survivors of Habré's prisons, testified that some men bore injuries consistent with sexual violence.[18] Other witnesses spoke of various forms of sexual violence including forced nudity in detention[19] and the forced consumption of oral contraception.[20]

Finally, on Monday, October 19, 2015, the Court was stunned by the testimony of one former detainee in particular, Khadidja Hassan Zidane. Zidane testified that Habré himself had summoned her to the presidential palace and violated her on four separate occasions.[21] In a particularly stunning moment, she described scars left by Habré, who had stabbed her with a pen when she resisted him. Zidane paid dearly for her accusation. HRW reported that Habré's media team immediately attacked her on its website, challenging her character and accusing her of being a "nymphomaniac prostitute."[22]

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15. *Testimony of Fatimé Sakine*, *Public Prosecutor v. Hisséne Habré: Summary of the Thirty-First Hearing Held on 22 October 2015*, TRUSTAFRICA, http://www.trustafrica.org/images/ICJ_reports/EAC-%20Trial%20Hearing%20Report%20-%2022nd%20October%202015%20-%20English.pdf [https://perma.cc/3CHM-FWNN].

16. *Testimony of Garba Akhaye*, *The Public Prosecution v. Hisséne Habré: Summary of the Sixteenth Hearing Held on 28 September 2015*, TRUSTAFRICA, http://www.trustafrica.org/images/ICJ_reports/EAC-%20Trial%20Hearing%20Report%20-%2028th%20September%202015%20-%20English.pdf [https://perma.cc/G33G-36TT].

17. *Id.*; *Testimony of Ahmat Maki*, *The Public Prosecution v. Hisséne Habré: Summary of the Sixteenth Hearing Held on 28 September 2015*, TRUSTAFRICA, http://www.trustafrica.org/images/ICJ_reports/EAC-%20Trial%20Hearing%20Report%20-%2028th%20September%202015%20-%20English.pdf [https://perma.cc/4SEA-GEUE].

18. *Testimony of Dr. Hélène Jaffe,* The Public Prosecution v. Hisséne Habré: Summary of the Twenty-Fourth Hearing Held on 12 October 2015, TRUSTAFRICA, http://www.trustafrica.org/images/ICJ_reports/EAC-%20Trial%20Hearing%20Report%20-%2012th%20October%202015%20-%20English.pdf [https://perma.cc/QA65-9ZK3].

19. LA PLAINE DES MORTS, *supra* note 10, at 233 (testimony of Djasrangar Moudonan).

20. *Defala Testimony at Twenty-Ninth Hearing*, *supra* note 14.

21. *Testimony of Khadidja Hassan Zidane, The Public Prosecution v. Hisséne Habré: Summary of the Twenty-Eighth Hearing Held on 19 October 2015*, TRUSTAFRICA http://www.trustafrica.org/images/ICJ_reports/EAC-%20Trial%20Hearing%20Report%20-%2019th%20September%202015%20-%20English.pdf [https://perma.cc/9VHR-J66D].

22. *Senegal: At Hissène Habre Trial, Sexual Slavery Accounts: Women Break 3-Decade Silence about Sexual Abuses*, HUM. RTS. WATCH (Oct. 22, 2015, 2:47 PM),

III. THE BRIEF: OBJECTIVES, CONTENT, AND CHALLENGES

Noticing the emerging testimony of sexual violence during the EAC hearings, civil society groups quickly organized to emphasize the importance of addressing these crimes more explicitly in the charges against Habré. In October 2015, seventeen groups from across Senegal, eastern Democratic Republic of the Congo, the Netherlands, and the United States issued an open letter to the EAC trial judges and Chief Prosecutor Mbacke Fall, calling for greater consideration of sexual crimes. The letter reminded the EAC of the *Akayesu* case before the International Criminal Tribunal for Rwanda (ICTR) two decades earlier, in which witness testimony about rape prompted an amendment of charges that had, until that point, neglected these sexual crimes. This ultimately led to the landmark 1998 judgment establishing rape as an act of genocide.[23] The letter's signatories closed by requesting that the judge and prosecutor allow more victims and witnesses to offer relevant testimony before the end of the trial stage.[24]

Almost simultaneously, groups observing the trial contacted us at the Human Rights Center's Sexual Violence Program, based at University of California, Berkeley, School of Law. They requested that we immediately submit an *amicus curiae*, or "friend of the court," brief on international crimes of sexual violence to map out how the available evidence could be charged according to both the court's statute and customary international law in effect at the time of Habré's regime. This would, in turn, assist the judges in their determination as to whether, and how, to amend the charges to specifically include crimes of sexual violence. However, it was already late September 2015. The trial would likely end by early December, so we would have less than two months to research, draft, review, and secure amici sign-on. Then we would still need to translate into French and figure out how to file the brief in Dakar.

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https://www.hrw.org/news/2015/10/22/senegal-hissene-habre-trial-sexual-slavery-accounts# [https://perma.cc/F29E-Z4Q5].

23. Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Trial Judgement (Sept. 2, 1998), https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-96-4/trial-judgements/en/980902.pdf [https://perma.cc/X6SS-FRHW].

24. Open Letter from Seventeen Organizations to the Extraordinary African Chambers in the Courts of Senegal (Oct. 16, 2015), http://refugee-rights.org/wp-content/uploads/2015/10/Open-letter-sexual-violence.pdf [https://perma.cc/22A9-UF2J].

At first, we simply agreed to coordinate a broad drafting effort. However, when it became clear that time was limited and no volunteers had come forward to take charge of the actual research and writing, we found ourselves responsible for generating a draft brief for review. Thankfully, leading experts were willing to advise and review our work—so we recruited the help of another San Francisco-based human rights attorney, Natasha Fain, and got started.

The charges brought against Habré did not specifically include any acts of sexual violence despite the EAC statute's clear mandate with regards to such crimes. In our view, this was easily remedied, given the EAC's statute clearly granted it jurisdiction to prosecute crimes of sexual and gender-based violence under multiple legal characterizations.[25] Amongst other crimes, the statute provided for the prosecution of rape in various ways: as a crime against humanity,[26] as war crimes of torture, inhuman treatment[27] or outrages upon personal dignity,[28] or as an independent crime of torture.[29] Facts of sexual slavery could be prosecuted under the statute as, *inter alia*, the crime against humanity of sexual slavery,[30]or as the war crime of outrages upon personal dignity.[31] The statute further supported the prosecution of other forms of sexual violence of comparable gravity, potentially relevant to facts of control of reproductive function that led to the birth and miscarriage of infants in detention, as war crimes of torture or inhuman treatment[32] and of outrages upon personal dignity[33], or directly as a crime against humanity.[34]

IV. BEYOND THE STATUTE?

The prosecution of crimes of sexual violence remains a complicated task in the world of international justice. This is illustrated by the June 2018 reversal of the International Criminal Court's (ICC) very first conviction for

25. *See generally* Statute of the Extraordinary African Chambers.
26. *Id.* art. 6(a).
27. *Id.* art. 7(1)(b).
28. *Id.* art. 7(2)(e).
29. *Id.* art. 8.
30. *Id.* art. 6(a).
31. *Id.* art. 7(2)(e).
32. *Id*. art. 7(1)(b).
33. *Id*. art. 7(2)(e).
34. *Id*. art. 6(a).

sexual and gender-based violence in the case against Jean-Pierre Bemba Gombo in March 2016.[35] The prosecution of sexual violence under international criminal law is further complicated where, as in the Habré case, the crimes are alleged to have occurred prior to the events assessed by the ICTR and the International Criminal Tribunal for the former Yugoslavia (ICTY). After assessing the legality of charges brought against defendants accused of committing atrocities (including sexual crimes) in the 1990s, these courts confirmed that rape and other forms of sexual violence could indeed constitute war crimes, crimes against humanity, and even acts of genocide under customary international law at the time.[36] However, the crimes alleged against Hissène Habré had been committed during the 1980s, before the Rwandan genocide in 1994 and the Balkan conflicts considered by the ICTY. Would the strong jurisprudence of the ICTR and ICTY with respect to sexual crimes apply to crimes committed in the 1980s?

Due to the principle of legality (*nullem crimen sine lege*), which requires that an offense entail criminal liability under international customary or conventional law at the time of its commission, the timing of an act can be the most important factor in determining whether charges may even be brought. The legality analysis is in essence a historical one. To assess whether an act was in fact a crime under customary or conventional law at the point of alleged commission, jurists have examined not only the jurisprudence of past tribunals, but also military manuals, national legislation, national cases, and Security Council resolutions existing at the time in question.[37]

For example, the legality question was at the heart of Habré's challenge before the Court of the Economic Community of West African States

35. Prosecutor v. Bemba, ICC-01/05-01/08, Judgment, ¶ 633 (Mar. 21, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_02238.PDF [https://perma.cc/847N-ST93], *rev'd*, ICC-01/05-01/08A, Judgment on the Appeal, ¶ 198 (June 8, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_02984.PDF [https://perma.cc/HQD8-ZJHF].

36. *See, e.g.*, Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment on Appeal, ¶ 289 n.349 (Int'l Crim. Trib. for the Former Yugolsavia July 15, 1999), https://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf [https://perma.cc/S9D7-76Z5]; Prosecutor v. Kunarac, IT-96-23, Judgment on Appeal, ¶¶ 7-9 (Int'l Crim. Trib. For the Former Yugosloavia June 12, 2002), https://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf [https://perma.cc/L5NE-FAUC]; Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Judgement (Sept. 2, 1998), https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-96-4/trial-judgements/en/980902.pdf [https://perma.cc/X6SS-FRHW].

37. Int'l Law Comm'n, Rep. on the Work of Its Seventieth Session, U.N. Doc. A/73/10, at ch. V (2018), https://legal.un.org/docs/?path=../ilc/reports/2018/english/chp5.pdf&lang=EFSRAC.

(ECOWAS).[38] Although that challenge was eventually addressed by the Court of ECOWAS, it nevertheless highlighted the fact that legality constituted a potential obstacle to the prosecution of Habré for crimes committed from June 1982 to December 1990. This was particularly true for crimes of sexual violence, around which the development of customary international law was for many decades—if not centuries—a subtle affair.[39]

To assist the tribunal in assessing the legality of potential charges permitted by the EAC statute, the *amicus* brief focused on grounding the EAC's authority to charge and prosecute acts of sexual violence committed by the Habré regime under customary international law. The brief first summarized the apparent evidence of sexual violence that had emerged from documentary and trial testimony, much of which was publicly available due to the broadcasting of the hearings. It then summarized the potentially relevant provisions of the EAC statute. As noted above, Article 6 provides jurisdiction over a wide range of crimes against humanity including rape, sexual slavery, enforced prostitution, and any other form of sexual violence of comparable gravity as crimes against humanity, along with torture or inhumane acts.[40] Similarly, Article 7 provides a list of other war crimes largely derived from the 1949 Geneva Conventions and Additional Protocols including torture or inhuman treatment, violence to life, health and physical or mental well-being, outrages upon personal dignity (in particular, humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault).[41]

Finally, in the heart of the brief, we needed to present the evolving jurisprudence of sexual crimes under customary international law prior to 1990, in order to map out the legality of potential charges in Habré's case.

38. Sarah Williams, *The Extraordinary African Chambers in the Senegalese Courts: An African Solution to an African Problem?*, 11 J. INT'L CRIM. JUST. 1139, 1142 (2013).

39. In 2008, the Court of the Economic Community of West African States (ECOWAS) agreed that pursuits on the basis of retroactively enacted amendments to Senegal's criminal and constitutional law would violate the principle of legality. Instead, the ECOWAS Court suggested that the legality challenge could be obviated by the creation of a special *ad hoc* judicial chamber within the Senegalese judiciary before which to try Habré. *See* Cour de Justice de la Communauté Économique des Etats de l'Afrique de l'Ouest [ECOWAS Court] Nov. 18, 2010, Habré v. Senegal, ECW/CCJ/JUD/06/10 ¶¶ 54-58, *translated in* Human Rights Watch, *Hissène Habré v. Republic of Senegal*, INT'L CRIMES DATABASE, https://www.asser.nl/upload/documents/20120419T034816-Habre%20Ecowa%202010.pdf .

40. *See supra* note 30 and accompanying text.

41. *See supra* notes 27-28 and 31, and accompanying text.

V. TRACING SEXUAL VIOLENCE THROUGH CUSTOMARY INTERNATIONAL LAW

Demonstrating the legality of charging Habré for sexual crimes allegedly committed during his regime required examination of whether acts of rape, sexual slavery, and related forms of sexual violence enumerated in the EAC statute were established as crimes under customary international law during the 1980s. Unlike with crimes of murder or pillage, the clarification of sexual violence under customary international law has been a more subtle, challenging process. This may be due in part to the historical use of vague or euphemistic language to describe sexual acts committed in wartime, representing contemporary cultural sensibilities.[42] Both modern and contemporary scholars understand the phrase "family honour and rights" as encompassing rape and sexual violence.[43] Similarly, when describing the rape of Belgian women during the First World War, Professor J.H Morgan, a British lawyer, described it as the frequent "outrages upon the honour of women" by German soldiers.[44]

Additionally, the term "inhuman treatment," a grave breach under the laws of international armed conflict, has long been understood to encompass rape as well. In 1958, the International Committee of the Red Cross (ICRC), the authoritative entity for the interpretation of the Geneva Conventions, instructed that the grave breach of "torture or inhuman treatment" in Article 147 of the Fourth Geneva Convention should be interpreted in conjunction with Article 27's prohibition of rape.[45]

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42. *See e.g.*, Garthine Walker, *Rereading Rape and Sexual Violence in Early Modern England*, 10 GENDER & HIST. 1, 3-5 (1998). Further, Article 46 of the 1907 Hague Convention on the Laws and Customs of War requires that "*family honour and rights*, the lives of persons, and private property, as well as religious convictions and practice, must be respected. *See* Convention (IV) Respecting the Laws and Customs of War on Land, Annex art. 46, Oct. 18, 1907, 36 Stat. 2277 (emphasis added).

43. As legal scholar Cherif Bassiouni explained, "The protection of 'family honour and rights' is a euphemism of the time [of the Hague Convention] that encompasses a prohibition of rape and sexual assault, and this provision is mandatory." M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION 428 (2011).

44. *See* Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT'L L. 288, 300 n.61 (2003).

45. OSCAR M. UHLER ET AL., INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 596-98 (Jean S. Pictet, ed. 1958).

Even though the terms historically used to prohibit and criminalize sexual violence acts have been euphemistic and vague, this should not pose an obstacle with respect to legality. The principle of legality in the national context requires that crimes be defined as accurately and in as much detail as possible. In international criminal law, however, such strict legality is inapplicable.[46] International criminal law is full of indeterminate terms lacking specific elements such as "other inhumane acts," "grave breaches," and "inhuman treatment." It is the role of the courts to clarify and give precision to the law by examining, among other things, general principles common to major legal systems in the world.

The 1990s' *ad hoc* tribunals' watershed jurisprudence on the prosecution of crimes of sexual violence is often viewed as a turning point. By the 1990s, the statutes underlying the ICTY and ICTR included forms of sexual violence specifically. For example, in the case of the ICTY, rape is explicitly noted as a potential crime against humanity within the jurisdiction of the court.[47] Similarly, in the statute establishing the ICTR, rape is included in the list of crimes against humanity and listed a potential war crime of "outrage upon personal dignity". The two courts' jurisprudence was born after a long gestation period in which the judges of each tribunal examined the legality of crimes listed in statutes drafted in the mid-1990s.[48] Once expressed in judgments, these customary norms would influence other tribunals ever after.[49] This was certainly the case with the ICTR and ICTY, whose judges labored to produce significant jurisprudence on sexual violence under international criminal law. Their judgments established, *inter alia*, rape's status as an act of genocide, a crime against humanity,[50] and a form of torture,[51] and sexual humiliation as constituting the war crime of "outrages upon personal dignity."[52] They also presented various modes of liability through which defendants—often high ranking

46. ANTONIO CASSESSE ET AL., CASSESE'S INTERNATIONAL CRIMINAL LAW 28 (3d ed. 2013).
47. Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 5 (2009), https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.
48. The ICTY and ICTR were established by S.C. Res. 827, ¶ 2 (May 25, 1993) and S.C. Res. 955, ¶ 1 (Nov. 8,1994), respectively.
49. GUÉNAËL METTRAUX, INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS 14 (2005).
50. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 685-697 (Sept. 2, 1998).
51. *See, e.g.*, Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment, ¶¶ 495-496 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998).
52. Prosecutor v. Kuparac, Case Nos. IT-96-23 & 23/1-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002).

officials or commanders—could be held responsible for sexual crimes they did not personally commit.[53] Though geographically and temporally limited by their statutes, the ICTY and ICTR ultimately delivered judgments that would become a cornerstone of customary international law, including for sexual and gender-based crimes.

In our brief to the EAC, however, we realized we could bolster our tracing of sexual crimes under customary international law by reaching further back, to the 1940s. This inquiry was possible due to the recent publication of a large number of cases adjudicated by national tribunals and guided by the United Nations War Crimes Commission (UNWCC) after World War II.[54] Although the UNWCC investigated over thirty thousand international war crimes cases between 1943 and 1948, with almost two thousand cases leading to completed trials, little was known about the UNWCC's work until very recently.[55] The entirety of the UNWCCs archives were officially classified until 1987 and only became available to certain researchers in 2011.[56] Many national cases, guided by the UNWCC, demonstrated the prosecution of crimes of sexual violence under international criminal law well before the establishment of the *ad hoc* tribunals.[57]

The UNWCC's mandate was to assist participating governments in prosecuting war criminals after World War II by either investigating war crimes and reporting such findings to participating states, or evaluating files submitted by national prosecutors and approving certain cases for prosecution.[58] Of relevance here, the UNWCC provided guidance to domestic prosecutions for war crimes by providing a list of war crimes, which included rape and prostitution.[59] Notably, domestic courts supported

53. *See, e.g.*, Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgement (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).
54. Dan Plesch & Shanti Sattler, *A New Paradigm of Customary International Criminal Law: The UN War Crimes Commission of 1943–1948 and its Associated Courts and Tribunals*, 25 CRIM. L.F. 17 (2014).
55. *Id* at 18.
56. *Id*. at 30. The War Crimes Project of the Center for International Studies and Diplomacy (CISD) and the University of London School of Oriental and African Studies (SOAS) have led the charge of examining this archival data since that time.
57. Dan Plesch, Susana Sácouto & Chante Lasco, *The Relevance of The United Nations War Crimes Commission To The Prosecution Of Sexual And Gender-Based Crimes Today*, 25 CRIM. L.F. 349, 350-54 (2014) [hereinafter *The Relevance of the UN*].
58. 124 Parl Deb HL (5th ser.) (1942) cols. 582-83 (UK).
59. *The Relevance of the UN*, *supra* note 57, at 350–52.

by the UNWCC prosecuted World War II forces for acts of rape. For example, in the 1946 *Takashi Sakai* case, a war tribunal under Chinese jurisdiction found a Japanese military commander guilty of war crimes and crimes against humanity for allowing his troops to commit, among other crimes, acts of rape.[60]

A number of UNWCC-related war crime trials in Europe, the United States, and Australia were *solely* based on sexual violence charges.[61] These cases indicate the previously underappreciated status of rape as a war crime under customary international law. Before the publication of these UNWCC cases, the conventional understanding was that rape and sexual violence were rarely prosecuted or even raised before international criminal tribunals prior to the establishment of the ICTR and ICTY in the 1990s.[62] In fact, the entirety of the case law on rape and sexual violence under international criminal law at the *ad hoc* tribunals was developed without any knowledge of these recently uncovered UNWCC cases. The impact these early judgments would have had on the jurisprudence of the ICTR and ICTY should not be understated. In the words of Justice Richard Goldstone, the first Chief Prosecutor of the ICTY:

> Had the work of the UNWCC been taken into account by the drafters of the Security Council statutes for the ICTY and the [ICTR], the definitions of war crimes might well have been more explicit with regard to gender-related crimes…I would have benefited immeasurably from access to this rich material…
>
> …Had we been able to access the ample records of the UNWCC, our approach would have unquestionably been

60. 4 U.N. WAR CRIMES COMM'N, *Trial of General Tomyuki Yamashita*, *in* LAW REPORTS OF TRIALS OF WAR CRIMINALS 88 (1948).

61. *The Relevance of the UN*, *supra* note 57, at 359–60, cites the following examples: in Australia, a Japanese man was charged for the rape and related torture of a woman, *id.* at 359, nn.13 & 38; in Greece, a Bulgarian man was charged with raping two women, *id.* at 359 n.39; in the United States, a case proceeded against Japanese soldiers for rape and assault with intent to commit rape on an American nurse .*id.* at 360 n.40; in Yugoslavia, a lieutenant in charge of food distributions raped a thirteen year old girl and was charged with violation of Yugoslav Penal Code and art. 46 of Hague Convention of 1907, *id.* at 360 n.41.

62. *See generally* Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT'L L. 424 (1993).

> influenced by the careful analysis that emerged from its deliberations and decisions.[63]

In light of the jurisprudence emanating from the UNWCC and the *ad hoc* tribunals, it became clearer that the acts of sexual violence described in the evidence before the EAC were crimes under customary law during the 1980s. With these findings, the *amicus curiae* brief presented a rich review of both the statutory framework and the historical jurisprudence from which the EAC could charge Habré with crimes of sexual violence without violating the principle of legality.

We invited a small, select group of *amici* to sign on, including some of the world's leading experts in the prosecution of sexual violence as a war crime or crime against humanity, Justice Goldstone, Dr. Patricia Sellers, and Professor Anne-Marie de Brouwer. Leading African jurists with expertise in sexual violence, like Liberian jurists, Counsellor Felicia Coleman and Counsellor Deweh Gray, and Kenyan human rights expert George Kegoro, signed onto the brief as well.

CONCLUSION

While the legal argument for the brief was clear, the process for filing it was not. The EAC, like other criminal courts in civil law systems, did not have a clear tradition or procedural mechanism for accepting *amicus curiae* briefs. However, per the EAC statute, the chambers could take general informational resources into account during its deliberations. So, while we sent the document to the Dakar chambers as an *amicus curiae* brief, we understood that there was no guarantee that it would be treated as such or become part of the official record. Though the *amicus curiae* brief was not admitted into the record for timing and procedural reasons, the trial chamber judges confirmed receipt and thanked us for the useful information. However, that same week, the brief entered the public domain thanks to an article in *The Guardian* that included a link to the brief on the Human Rights Center's website—the brief and its arguments were now in the public domain and available to all parties.[64]

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63. Richard Goldstone, *United Nations War Crimes Commission Symposium*, 25 CRIM. L.F. 9, 13–14 (2014).

64. Celeste Hicks, *Lawyers Press for Chad's Hissène Habré to Face Sexual Slavery and Rape Charges*, GUARDIAN (Dec. 22, 2015), https://www.theguardian.com/global-

Oral hearings closed in December 2015 and closing submissions were due at the start of the new year. We later learned that the brief, though not part of the official record, had served as a helpful reference to the parties to the case and the chambers. We had provided a roadmap to evaluate the potential charges of sexual crimes; it was our hope that judges would verify our tracing of customary international law and match our suggested charges to the evidence in record. If satisfied, they might feel comfortable amending the indictment to more explicitly include sexual crimes.

Ultimately, for likely a number of reasons, the EAC trial chamber did amend charges after the close of oral testimony; specifically, they added crimes of sexual violence as crimes against humanity. This was permissible because, while Senegalese criminal procedure binds the trial judges to the facts received from the *chambre d'instruction*, it also allows them to reformulate charges around those facts at any time through a process called "requalification."[65] This requalification of facts in record made it possible to convict Habré of rape and sexual slavery as a crime against humanity as well as the independent crime of torture.

On May 30, 2016, the presiding judge of the EAC's Trial Chamber pronounced Hissène Habré guilty of crimes against humanity (in the form of rape, forced slavery, voluntary homicide, mass and systematic summary execution, the kidnapping of persons followed by their disappearance, and torture and inhumane acts), war crimes (in the form of voluntary homicide, torture, inhuman treatment, and illegal detention on one hand and murder, torture, and cruel treatment on the other), and the autonomous crime of torture. It condemned him to life imprisonment.[66] Because the conviction reflected considerable evidence of rape and sexual slavery, the decision was hailed as a major victory for sexual violence victims' rights, as well as a resounding acknowledgement of these crimes.

On April 27, 2017, the appeals judges upheld the trial court's judgment, including Habré's responsibility for the sexual crimes committed by his subordinates. However, based on procedural grounds, the appeals bench

development/2015/dec/22/chad-hissene-habre-lawyers-sexual-slavery-rape-charges-trial [https://perma.cc/Z7QJ-VZ2M].

65. Prosecutor v. Habré, No. 01/13, Verdict, ¶¶ 515-17 (Extraordinary Afr. Chambers Apr. 27, 2017), http://www.chambresafricaines.org/pdf/Arrêt_intégral.pdf [https://perma.cc/XR9K-FTVS].

66. *Id.* ¶ 568.

acquitted Habré of personally raping Khadidja Hassan Zidane.[67] Unlike the rape and sexual slavery that Habré's security forces were committing in his prisons and military camps, the crimes against Ms. Zidane had not been referenced in the underlying record upon which charges could be based. In the end, Habré's conviction for sexual violence as crimes against humanity and torture remained (aside from aspects related to the specific, personal rape of Ms. Zidane Hassan), as did his life sentence.[68] The conviction vindicated many of the Chadian survivors who testified against Habré—as well as countless others who had not been able to make the journey across Africa to Senegal. It remains remarkable that sexual violence ended up being such a dominant aspect of Habré's final conviction—the strength of survivors and witnesses to speak of these crimes in court led to an amendment of charges that withstood the legality principle and led to an historic conviction of Chad's former president for rape and sexual slavery as crimes against humanity and forms of torture. In so doing, the EAC's judgment against Habré not only relied upon customary international law related to sexual violence—it became part of it.

67. *Id.* ¶ 567.
68. *Id.*