

THE PROSECUTOR V. HISSEIN HABRÉ
Case No. ICTR-96-04-T
Extraordinary African Chambers
Trial Chamber Judgment
May 30, 2016

Judges:

Judge Gberdao Gustave Kam
Judge Amady Diouf
Judge Moustapha Ba
Judge Pape Ousmane Diallo

Prosecution:

Mr. Mbacké Fall
Mr. Youssoupha Diallo
Ms. Anta Ndiaye Diop
Mr. Moustapha Ka

Defense:

Mr. Mounir Ballal
Mr. Mbaye Sene
Mr. Abdoul Gning

Gender Keyword(s): Coercion; Consent; Credibility or Character of the Victim; Detention Centers; Expertise in Sexual Violence; Forced Birth Control; Household Duties; Penis; Rape; Rape, Inhumane Act; Rape, Torture; Sexual Enslavement; Sexual Violence; Vagina

Procedural History: On June 30, 2013, following the orders of the Prosecutor of the Extraordinary African Chambers (EAC), Hissen Habré was arrested and placed in custody (¶ 60). On July 2, 2013, the Prosecutor filed a petition before the investigative chamber of the EAC for the purposes of charging Hissen Habré, Saleh Younouss, Mahamat Djibrine alias El Djonto, Guihini Koreï, Abakar Torbo Rahma and Zakaria Berdet for violations of the EAC Statute,¹ including crimes against humanity and war crimes committed in Chad between June 7, 1982, and December 1, 1990 (¶ 61). That same day, the investigative chamber indicted Habré for crimes against humanity and war crimes and ordered his detention (¶ 62, 96). On July 15, 2013, the victims *Clement Abaifouta et al.* as well as the *Réseau des Associations des Droits de l'Homme du Tchad* (“RADHT”) joined the proceedings as civil parties seeking reparations and precautionary measures (¶¶ 66-67). On July 23 2013, the association of victims *Association des Victimes de Crimes et Répressions Politiques au Tchad* (AVCRP) also joined the proceedings as civil parties (¶ 66-68). On April 23, 2015, the EAC appointed the Trial Judges (¶ 99). On June 3,

¹ “Statute of the Extraordinary African Chambers within the Senegalese judicial system for the prosecution of international crimes committed on the territory of the Republic of Chad during the period from 7 June 1982 to 1 December 1990” Available at: http://www.forumchambresafricaines.org/docs/Statute_of_the_Extraordinary_African_Chambers.pdf

2015, the President of the Trial Chamber proceeded with an initial interrogatory of the accused (¶ 100). On July 20, 2015, the Chamber held its initial formal hearing, however, neither the accused nor his lawyers were present at this hearing (¶ 104). On July 21, 2015, noting that the lawyers for the Defense were again absent, the Chamber appointed new defense lawyers and granted an extension to allow them to prepare for trial (¶ 106). On September 7, 2015, the hearings resumed (¶ 107). Habré refused to appear before the Trial Chamber which led to the Chamber ordering that he be immediately ushered into the courtroom by law enforcement (*id.*). On May 30, 2016, the Trial Chamber brought arguments to a close, deliberated, and announced the judgment (¶ 125). Throughout the trial, Habré remained silent (¶ 126).

Disposition: The Trial Chamber finds Hissein Habré guilty of the crimes against humanity of rape, forced slavery, voluntary homicide, the massive and systematic practice of summary executions, forced disappearance of persons, and torture and inhumane acts under Article 6 of the EAC Statute² (p. 536). The Chamber also finds Habré guilty of the stand-alone crime of torture under article 8 of the EAC Statute³ as well as the war crimes of voluntary homicide, torture or inhuman treatment, illegal detention, and cruel treatment under Article 7 of the EAC Statute⁴ (*id.*). The Trial Chamber acquits Habré of the war crime of illegal transfer (*id.*). The Chamber condemns Habré to life imprisonment (*id.*).

² *Id.* Article 6 defines “crimes against humanity” For the purpose of this Statute, “crime against humanity” as “any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population:

- a) Rape, sexual slavery, enforced prostitution, enforced sterilization, or any other form of sexual violence of comparable gravity;
- b) Murder;
- c) Extermination;
- d) Deportation;
- e) The crime of apartheid;
- f) The enslavement or massive and systematic practice of summary executions, kidnapping of persons followed by their enforced disappearance;
- g) Torture or inhumane acts intentionally causing great suffering or serious injury to body or to physical or mental health, on political, racial, national, ethnic, cultural, religious or gender grounds.”

³ *Id.* Article 8 provides for jurisdiction over the stand-alone crime of torture, defined as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture.”

⁴ *Id.* Article 7 defines “war crimes” as 8 defines “war crimes” as “any of the following acts concerning members of the armed forces, prisoners of war, or civilians, or property protected under the provisions of the Geneva Conventions of 12 August 1949:

- a) Murder;
- b) Torture or inhuman treatment, including biological experiments, or willfully causing great physical or mental suffering;
- c) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- d) Compelling a prisoner of war or other protected person to serve in the armed forces;
- e) Depriving a prisoner of war or other protected person of the rights of fair and regular trial;

Key Gender-Based Holdings:

COERCION:

- The Chamber addresses the concepts of coercion and force in its definition of rape. The Chamber recalls the ICTY’s definition of rape in the case *Prosecutor v. Kunarac, et al.*,⁵ in which the ICTY Appeals Chamber held that force was not an element of rape. Rather, lack of consent is an element and force or threat of force is one way to demonstrate lack of consent (¶ 1509). The ICTY identified other factors—apart from the use of force—that can prove absence of consent, such as coercive circumstances (*id.*). The Chamber held that coercive circumstances, such as the detention of the victim during the commission of the act, evidence a lack of consent (¶ 1510). The Chamber notes that the circumstances in the *Kunarac, et al.* case (in which the victims were held in captivity) and that prevail “in most cases charged as either war crimes or crimes against humanity will be almost universally coercive. That is to say, true consent will not be possible,” even without a resort to physical force⁶ (*id.*).
- The Chamber assesses allegations of rape of women in places of detention operated by the *Direction de la Documentation et de la Sécurité* (DDS) in N'Djamena including at the the Pool and the Locaux Prison, at the Presidential Palace, and in military camps in Ouadi-Doum and Kalait. The Chamber finds that the alleged rapes in this case were committed at times using force, at times under armed threat, and at other times by taking advantage of the vulnerable position of the detained victims (¶ 1516, 1518, 1530). The Chamber finds that the acts of penetration were committed without the victims’ consent and that the perpetrators knew there was no consent (¶¶ 1518, 1522, 1530). The Chamber finds that rape as a crime against humanity was committed by members of the military

f) Unlawful deportation or transfer or unlawful confinement;

g) Taking of hostages.”

Article 7 further provides for the jurisdiction of the Extraordinary African Chambers over “serious violations of the provisions of Article 3, which are common to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of Armed Conflicts and to the Second Additional Protocol to the Geneva Conventions of 8 June 1977.

These violations include:

a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

b) Collective punishments;

c) Taking of hostages;

d) Acts of terrorism;

e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

f) Pillage;

g) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilized peoples;

h) Threats to commit any of the foregoing acts.

⁵ *Prosecutor v. Kunarac, et al.*, ICTY Appeals Chamber Judgment, June 12, 2002, ¶ 129.

⁶ *Id.* ¶ 130.

and authorities in charge of the prison where the women were detained (¶¶ 1519, 1527, 1532). See further discussion under “Consent” and “Rape” below.

CONSENT:

- The Chamber addresses the concept of consent in its definition of rape and highlights how consent relates to both the *actus reus* and *mens rea* elements of rape under international criminal law. The *actus reus* of the crime of rape in international law is “the sexual penetration, however slight (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator where such sexual penetration occurs without the consent of the victim” (¶ 1508). Consent must be given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances (*id.*). According to the Appeals Chamber of the ICTY,⁷ a lack of consent can be evidenced by the use of force, the threat of force, or coercive circumstances (¶ 1509-10). The *mens rea* requires that the perpetrator know that the penetration occurs without the consent of the victim (¶ 1511).
- The Chamber finds that several of the victims in this case were detained in prison and were penetrated, sometimes brutally by force, sometimes repeatedly, sometimes under armed threat, and sometimes by taking advantage of the victims’ vulnerability as detainees (¶ 1516). Therefore, the Chamber finds that the penetrations occurred without the victims’ consent (*id.*). The Chamber also finds that the perpetrators—members of the military and authority figures in charge of the prison where victims were kept—knew that these acts occurred without consent (¶ 1518). The Chamber also considers allegations that victim Khadija Hassan Zidane was raped in the context of being interrogated at the Presidential palace (¶¶ 1520-27). The Chamber finds that penetration occurred by force, without the victim’s consent, and that the perpetrators knew that the act occurred without her consent (¶¶ 1521-22). Finally, the Chamber considers allegations that several victims were raped at a military camp (¶¶ 1528-32). The Chamber finds that the acts of penetration were committed by force, repeatedly, at times brutally, and that the perpetrators took advantage of the vulnerable situation in which the victims were held as detainees at the camp (¶ 1530). The Chamber therefore concludes that the penetration occurred without consent and that the perpetrators knew the acts occurred without consent (*id.*). Therefore, the Chamber finds that rape as a crime against humanity was committed in the prison, at the Presidential palace, and at the military camp (¶¶ 1519, 1527, 1532).

⁷ *Id.* ¶ 129.

CREDIBILITY OR CHARACTER OF THE VICTIM:

- The Defense questioned the credibility of several of the witnesses who testified about sexual and gender-based violence. The Chamber notes that, as a general matter, the direct victims of sexual abuse who testified at the trial “have experienced essentially traumatic situations and have been detained for months without having any idea of the date or time, and without the opportunity to record their experiences” (¶ 709). The Chamber finds that, given this traumatization and the difficulties in remembering the events, minor discrepancies in the women’s testimonies or between their testimonies and prior statements did not affect their probative value (*id.*). The Chamber then analyzes each of the specific attacks on the credibility of the victims:
 - The Defense questioned the credibility of Khadija Hassan Zidane’s testimony, noting Zidane could not identify the specific time various events took place or the periods during which she was detained. (¶ 720). The Chamber notes that the witness presented a sequence of credible events which was generally corroborated by other witnesses (*id.*). The Chamber considers the difficulties the witness faced with regards to specific dates but holds that this did not in any way undermine her credibility (*id.*).
 - The Defense also claimed there was a contradiction between Khadija Hassan Zidane’s testimony and her prior statement regarding allegations that Habré stabbed her in the private parts with an object (¶ 726). During cross-examination, Zidane confirmed that Habré stabbed her in her vagina with a pen, not a knife as her prior statement indicated (*id.*). The Chamber find that this does not constitute a contradiction but rather a clarification with regards to the sequence of events and the object used in the commission of the abuse (*id.*).
 - The Defense questioned the credibility of witness Kaltouma Defallah, highlighting her political affiliations as well as her personal animosity towards Habré (¶ 782). The Chamber rejects the allegations that this testimony was fabricated as a result of hate towards Habré, noting Defallah had testified that she no longer hated him, and finds that the Defense failed to establish that Defallah’s membership in a political opposition party affected her testimony (¶ 783). The Chamber concludes that her testimony was very clear and credible and has a strong probative value given that it was corroborated by other witness testimonies and documentary evidence (*id.*).
 - The Defense also argued that the testimonies of witnesses who testified about sexual abuse in the military camp at Ouadi-Doum were contradictory and claimed that the women at the camp had freedom and enjoyed a special relationship with the camp soldiers (¶ 787). The Chamber analyzes these testimonies and finds the witnesses credible because their testimonies were clear, precise and corroborated by other evidence (¶¶ 787-788).

DETENTION CENTER:

- The Chamber finds that acts of sexual violence, sexual enslavement, rape, torture, and inhumane acts took place in several detention centers in Chad (¶¶ 1516-1617). The Chamber takes into account the fact that these acts took place in prisons, detention centers, and at the Presidential palace where witness Zidane was detained in finding that acts of sexual penetration occurred by force and through the perpetrators’ exploitation of the prisoners’ positions of vulnerability and finds that these acts therefore occurred without the victims’ consent and constitute rape (¶¶ 1516-32). The Chamber also finds that the confinement of women and girls in detention centers in Kalaït and Ouadi-Doum support Habré’s conviction for sexual slavery as a crime against humanity (¶¶ 1533-38). The terrible conditions in which the women and girls were kept in detention centers also supports the Chamber’s conviction of Habré for inhumane acts as a crime against humanity (¶¶ 1608-17).

EXPERTISE IN SEXUAL VIOLENCE

- The Chamber heard testimony about sexual violence committed against women during the Habré regime from Olivier Bercault of Human Rights Watch (¶ 706). Bercault explained that the women he talked to “had been very modest” and that therefore their reports of sexual violence were “not direct” (*id.*). For example, one woman told Bercault that following a torture session, she had awoken “covered with sex seed” (*id.*). Bercault confirmed that “sexual violence during the Hissein Habré regime had been, in his view, underestimated because of its psychological and cultural dimension” (*id.*).
- The Chamber also cites evidence from H  l  ne Jaff  , a specialist in victimization who made several missions to Chad beginning in 1991 (¶ 707). Jaff   explained that women had hesitated to visit her due to modesty and were reluctant to share that they had been tortured because there was an implicit understanding that when torture occurred, “there had been sexual abuse” (*id.*). Jaff   explained that given the cultural context of Chad, it was very difficult for women to talk about sexual violence, so that “[o]ften the women who were raped say, ‘they wanted to rape me... I found myself hurting’” (*id.*). Jaff   stated that victims deny what happened, “not because they lost consciousness,” but because they do not want to remember anymore. They do not want to know anymore” (*id.*).
- The Chamber cites these experts when noting the “the stigmatization surrounding sexual violence in the cultural and psychological context of the victims of this trial, as well as the difficulties in testifying in public session of sexual abuse” (¶ 708). The Chamber notes that the direct victims of sexual abuse who testified at the trial “have experienced essentially traumatic situations and have been detained for months without having any idea of the date or time, and without the opportunity to record their experiences” (¶ 709). The Chamber finds that, given this traumatization and the difficulties in remembering the events, minor discrepancies in the women’s testimonies or between their testimonies and prior statements did not affect their probative value (*id.*).

FORCED BIRTH CONTROL:

- According to one witness, the military administered contraceptive pills in the detention centers to prevent the detained women from getting pregnant (¶ 800). In assessing the evidence supporting its conviction of Habré for sexual slavery as a crime against humanity, the Chamber finds that the perpetrators' control over the victims' reproductive function was one factor in determining that the perpetrators exercised powers associated with the right of ownership (¶ 1536). In assessing the evidence supporting the Chamber's conviction of Habré for inhumane acts as a crime against humanity, the Chamber finds "the military had control over the reproductive functions of at least some women [detained in Ouadi-Doum and Kalait] through the use of contraceptives without their being informed" (¶ 1613).

HOUSEHOLD DUTIES:

- As noted below in the section on "sexual enslavement," the women detained in military camps performed household duties for the military, such as washing and cooking for the military personnel (¶¶ 789-792, 812-822, 1535-1538). One witness testified that women were transferred to one of the camps to serve as "military wives" (¶ 812). The Chamber cites the facts that the women performed these duties, they were not paid for their work, they were kept under poor conditions, and they were repeatedly raped as support for convicting Habré of sexual enslavement as a crime against humanity (¶¶ 810, 820-22, 1535-38, p. 536).

RAPE:

- The Prosecutor and the Investigative Chamber charged Habré with crimes against humanity, war crimes, and torture as a stand-alone crime (¶ 61). Acts of rape and other forms of sexual violence were alleged under the torture allegations but not charged separately as crimes against humanity (¶ 150). However, the Trial Chamber requalifies the allegations of rape and sexual slavery as crimes against humanity (*id.*).
- The Chamber determines that rape is defined under international criminal law as: "the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim" (¶1508). The *mens rea* is the intention to effect this sexual penetration and the knowledge that it occurs without the consent of the victim (¶ 1511). The Chamber recalls that the ICTY Appeals Chamber "explicitly rejected the argument that continued victim resistance was a condition necessary to indicate to the rapist that the victim does not consent," recalling the ICTY's finding in *Kunarac, et al.* that the "assertion that nothing short of continuous resistance provides adequate notice to the perpetrator that his attentions are unwanted is wrong on the law and absurd on the facts"⁸ (*id.*). "The Chamber notes that to establish the crime of rape as a crime against humanity, it is necessary to show that the conduct must be objectively part of a generalized or systematic attack directed against a civilian population (¶ 1512). The perpetrator or the

⁸ *Id.* ¶ 128.

accused must have knowledge of this attack directed against the civilian population and the fact that the prohibited act is a part of this attack (¶ 1512).

- The Chamber considers the testimonies of several witnesses supporting the charge of rape as a crime against humanity in three different contexts:
 - ***Khadija Hasan Zidane and others raped in prisons:*** According to Zidane and several other witnesses, Zidane was raped while she was detained in prison and other women were also raped and endured other forms of sexual violence while they were detained and/or interrogated in several places of detention operated by the DDS in N'Djamena including at the Pool and the Locaux Prison (¶ 738, 760-772, 793-99). Three of these women detained in the prisons affirmed that the rape of detainees by the military, by DDS agents and the *Brigade Spéciale d'intervention Rapide* (BSIR) was frequent and systematic (¶¶ 761-72). The Chamber concludes that the female detainees in these locations additionally experienced poor conditions in detention, including having to give birth without any medical assistance (¶ 772). The Chamber notes that the women prisoners experienced sexual penetrations that were forcibly imposed, sometimes repeatedly, and with brutality, sometimes even under the threat of weapons, and that the perpetrators took advantage of the women prisoners' vulnerable situation (¶ 1516). The Chamber finds therefore that the acts of sexual penetration were committed without the victims' consent and that the perpetrators knew it was without their consent (¶ 1518). The Chamber concludes that agents of the DDS and BSIR as well as the authorities in charge of the prisons between 1984 and 1989 raped many women detained at the DDS, the Pool and the local prison, thereby committing crimes of rape as a crime against humanity in violation of the EAC Statute (¶ 1516-1519).
 - ***The Treatment of Khadija Hasan Zidane at the Presidency:*** Khadija Hassan Zidane testified that during her detention at the Presidency, she was raped by DDS agents as well as by President Habré himself (¶ 719-722). According to this witness, Habré raped her at the Presidency on three to four occasions and on one of the occasions, Habré asked her to swallow his semen (¶¶ 723-25). Zidane testified that on one occasion, Habré stabbed her vagina with a pen after she refused to have sexual intercourse with him and refused to swallow his semen (¶¶ 725-26). The Chamber concludes that Zidane was a victim of physical abuse which included sexual violence during her detention at the Presidency by the DDS agents as well as by Habré on four occasions (¶ 736). The Chamber notes that the DDS agents committed sexual penetration that was forcefully imposed on Zidane and occurred without her consent (¶¶ 1520-22). The Chamber is "equally convinced" that these perpetrators had the intention of having sexual relations with Zidane knowing she had not consented to this act (¶ 1522). Furthermore, as a result of the perpetrators' affiliation to the authorities in charge of the repression in the secret prisons of the DDS, there is no doubt that the perpetrators of these acts had knowledge of the attack against the civil population, and that they knew

that their actions contributed to this attack, thus satisfying this contextual element for crimes against humanity (¶ 1522). The Chamber concludes that the DDS agents raped Zidane during her three month detention at the Presidency, thereby committing the act of rape as a crime against humanity in violation of the EAC Statute (¶ 1523). The Chamber also established that during the detention at the Presidency, Zidane was subjected to acts of sexual violence imposed by Habré on four occasions, including penetration of her vagina by Habré's penis, an injury to her vagina he caused using a pen, and penetration of Zidane's mouth with Habré's penis (¶¶ 1524-25). The Chamber finds that these "acts of sexual relations" took place without Zidane's consent (¶ 1526). The Chamber concludes Zidane was subjected to the crime of rape as a crime against humanity in violation of the EAC Statute (¶ 1527).

- ***The Military camps of Ouadi-Doum and Kalait:*** The Chamber finds that both between 1985-1986 and 1988-1989, women as well as young girls were confined in the Kalait military camp where they performed domestic duties and were subject to forced sexual relations by the commander and the military agents of the camp (¶ 1528-1529). The Chamber notes that these acts included acts of forced repeated sexual violence sometimes committed with brutality. The Chamber is convinced that these sexual acts took place absent consent on the part of victims and that the perpetrators had the intention of having sexual relations with the victims knowing fully that these victims did not consent (¶ 1530). The Chamber therefore concludes that Chadian military personnel assigned to these camps raped many women and young girls, including two minors, thereby committing the crime of rape, a crime against humanity under article 6(a) of the EAC Statute⁹ (¶ 1532).

RAPE, INHUMANE ACTS:

- The Prosecutor charged Habré with inhumane acts as a crime against humanity under article 6(1)(g) of the EAC Statute¹⁰ (¶ 96). Article 6(1)(g) of the EAC Statute defines inhumane acts as "acts intentionally causing great suffering and serious bodily or mental harm which have a political, racial, national, ethnic, cultural, religious or sexist motive" (¶ 1590). The Chamber begins with the elements of this crime under customary international law:
 - the victim must have suffered serious bodily or mental harm or an attack to his or her human dignity;
 - the suffering must be the result of an act or omission of the accused or his subordinate; and
 - when the offence was committed, the person criminally responsible must have acted

⁹ See *supra* FN 2.

¹⁰ See *supra* FN 2.

- 1) with intent to seriously harm the physical or mental integrity or human dignity of the victim, or
 - 2) without that intention, but with a reasonable expectation that the act or omission was likely to lead to serious injury to the physical or mental integrity or human dignity of the victim (¶ 1591).
- The Chamber then clarifies that the requirement that the acts must have a “political, racial, national, ethnic, cultural, religious, or sexist motive” is a jurisdictional element that was added to the EAC Statute (¶ 1593).
 - The Chamber notes further that the severity of the act “must be assessed on a case-by-case basis, having regard to the circumstances of the case” (¶ 1592). To assess the severity, the Chamber must take into consideration the nature of the act or omission, the context in which it occurred, and the personal situation of the victim—including the victim’s age, sex, and health—as well as the physical, mental and moral effects of the act or omission on the victim” (*id.*).
 - The Prosecutor alleged that abuses and poor detention conditions of women held at both Prison des Locaux and the detention centers at Ouadi-Doum and Kalaït constituted inhumane acts as a crime against humanity under article 6 of the EAC Statute (¶ 1595). The Chamber finds that the conditions of detention of women and young girls in the Prison des Locaux were very poor due to lack of hygiene, lack of food and water, and lack of healthcare, which forced detained women to give birth without assistance, resulting in the deaths of two newborn babies (¶ 1608). Additionally, the women taken to Ouadi-Doum and Kalaït were kept in an abandoned hangar in the desert where the heat, lack of food, and lack of medical assistance, including for additional women who gave birth in detention, contributed to the deplorable conditions (¶ 1613). The Chamber finds additionally that “the military had control over the reproductive functions of at least some women through the use of contraceptives without their being informed” (*id.*). The Chamber finds that these terrible conditions of detention in both locations constituted severe attacks on the women’s mental and physical integrity and that the perpetrators intended this result (¶¶ 1609, 1614). The Chamber finds that the perpetrators’ motives were based on ethnic or political reasons, including the real or perceived alliance of the women with political opposition groups (¶¶ 1610, 1615). The perpetrators of these acts were part of the authorities in charge of the secret prisons and detention facilities and thus the Chamber is convinced that they had knowledge of the attack on the civilian population and also knew that their actions contributed to these attacks, meeting the contextual elements for crimes against humanity (¶ 1611, 1616). In light of all of these findings, the Chambers concludes that the conditions of detention imposed on the women in each of these locations constitute inhumane acts as a crime against humanity under article 6(g) of the EAC Statute (¶¶ 1612, 1616).

RAPE, TORTURE:

- The Prosecution and the Investigative Chamber charged Habré with torture as a crime against humanity, as a war crime, and as a stand-alone offense under Article 8 of the EAC Statute¹¹ (¶ 96). Allegations of rape and other forms of sexual violence supported the charges of torture as a crime against humanity and as a stand-alone offense¹² (¶¶ 1565, 1806).
- The Chamber recalls that Article 8 of the EAC Statute defines torture as a stand-alone offense as “any act of severe pain or suffering, whether physical or mental, that is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in, or incidental to lawful sanctions” (¶ 1544). The Chamber applies this definition of torture not only to the charges of torture as a stand-alone crime but also to torture as a crime against humanity under Article 6 of the EAC Statute¹³ and torture as a war crime under Article 7¹⁴ because Article 8 of the EAC Statute provides that it is the definition of torture “[f]or the purposes of this Statute” (¶ 1548).
- The Chamber also notes the definition of torture under customary international law, which includes the following elements:
 - The infliction of physical or emotional pain or suffering by an act or omission,
 - The act or omission must be deliberate;
 - The act or omission must be for the purpose of obtaining information or a confession; to punish, intimidate or coerce the victim or a third party; or to discriminate for whatever reason (¶ 1545).
- The Chamber acknowledges that while the definition of torture in the EAC Statute and the Torture Convention on which it is based includes an element of state action, customary international law does not require that acts or omissions be committed “by a public official or any other person acting on behalf of the official title or at his instigation or with his express or tacit consent” (¶ 1546). This is because, as the ICTY Appeals Chamber has explained, the Convention against Torture applies to states, not individuals, and thus requires state action (¶ 1547). While noting this difference between the elements of torture under customary international law and as defined by Article 8 of the EAC Statute, the Chamber states that it nonetheless must apply the definition found in Article 8 of the EAC Statute and therefore includes the state action requirement (¶¶ 1548-49).

¹¹ See *supra* FN 3.

¹² Habré was also charged with torture as a war crime but this charge was supported by allegations of mistreatment of prisoners of war not involving sexual and gender-based violence. See ¶¶ 1745-1762.

¹³ See *supra* FN 2.

¹⁴ See *supra* FN 4.

- The Chamber applies the elements in the EAC Statute’s definition of torture to the evidence presented at trial of rape and other forms of sexual violence:
 - **The infliction of physical or emotional pain or suffering by an act or omission:** The Chamber recalls that when assessing the seriousness of the pain and suffering experienced, it can consider factors such as “the nature, purpose and persistence of the acts committed” as well as “more subjective criteria, such as the victim’s state of mental and physical health, the consequences, the treatment to which she has been subjected, the age, sex or state of health of the victim, or even the subordinate position of the victim” (¶ 1551). The Chamber notes that the victim need not suffer permanent injury from the commission of the crime for the act to constitute torture (*id.*). The Chamber agrees with the ICTY Appeals Chamber when it held that rape *per se* causes “acute pain or suffering, physical or mental,”—that is, severe pain or suffering is the “probable and logical consequences” rape— thus rape constitutes torture (¶¶ 1552-53). The Chamber also endorses the ICTY finding that “the rape of any person [is] a despicable act which strikes at the very core of human dignity and physical integrity... Rape causes severe pain and suffering, both physical and psychological. The psychological suffering of persons upon whom rape is inflicted may be exacerbated by social and cultural conditions and can be particularly acute and long lasting” (¶ 1554). The Chamber concludes, therefore, that acts of rape or other forms of sexual violence that meet the other elements below will constitute torture (¶ 1555).
 - **Through state action:** The Chamber notes ICTY jurisprudence finding that “[t]he condemnation and punishment of rape becomes all the more urgent where it is committed by, or at the instigation of, a public official, or with the consent or acquiescence of such an official” (¶ 1554). The Chamber finds that rape and other acts of sexual violence were committed by President Habré as well as DDS and BSIR personnel and concludes that the element of state action to establish torture is met because all of the perpetrators were state agents (¶ 1549, 1564-69).
 - **For a prohibited purpose:** Article 8 of the EAC Statute requires the purpose of the act to be obtaining information or a confession from the victim, punishing the victim for an act, intimidating or coercing, or based on discrimination of any kind (¶ 1544). The Chamber finds that young girls and women were detained and interrogated by military and detention camp authorities in secret prisons and military camps during which they were raped and subjected to several forms of sexual abuse including electrocution of intimate parts of the body and the insertion of a bayonet into the vagina (¶ 1572). The Chamber concludes that “the rapes and abuses inflicted on female detainees were intended to punish and/or intimidate victims, but also, in some cases, to obtain information or confessions” in relation to the victims’ alleged connections to Libya or the opposition (¶ 1573).
- Based on all of the above, “the Chamber is convinced that the rape and abuses—in particular the sexual abuses—caused severe pain and suffering, both physical and

psychological, to detained women and young girls. The perpetrators were state agents and acting within their scope of work, had the intention of inflicting suffering with the goal of punishing and/or intimidating the victims and also in certain cases, to get information and confessions about the victim's link with Libya or the opposition" (¶ 1574). In assessing the contextual elements of crimes against humanity to determine whether the accused committed torture as a crime against humanity, the Chamber finds that because the perpetrators were members of the government forces in charge of law enforcement, "there is no doubt that the perpetrators of these acts knew of the attack on the civilian population [and] that their actions were part of this attack" (¶ 1575). The Chamber finds, therefore, that the Chadian military subjected several women and young girls at DDS prisons and detention camps, in the Presidential Palace, and at detention camps in Kalait and Ouadi-Doum to physical and mental torture, thereby committing torture as a crime against humanity under article 6(g) of the EAC Statute¹⁵ (¶¶ 1576, 1582, 1589).

- The Chamber also considers whether the charges of torture as a stand-alone crime, torture as a crime against humanity, and torture as a war crime are cumulative, finding that "[t]orture as a crime against humanity requires proof that the act is part of a systematic and widespread attack against the civilian population and that torture in as a war crime requires the existence of a link between the prohibited act and an armed conflict (international or not). These are distinctly distinct contextual elements not required for torture for autonomous act. Accordingly, a conviction for an autonomous crime may be combined with convictions for war crimes and crimes against humanity" (¶ 2275).
- The Chamber finds Habré guilty of torture as a stand-alone crime, a crime against humanity, and a war crime (¶¶ 1576, 1582, 1589, 1806-08, p. 548).

SEXUAL ENSLAVEMENT:

- The Prosecutor and the Investigative Chamber charged Habré with crimes against humanity, war crimes, and torture (¶ 61). Acts of rape and other forms of sexual violence were alleged under the torture allegations but not charged separately as crimes against humanity (¶ 150). However, the Trial Chamber requalifies these allegations as rape and sexual slavery as crimes against humanity (*id.*).
- The Trial Chamber notes the definition of sexual enslavement found in the ICC Elements of Crime as well as jurisprudence from the Special Court for Sierra Leone (¶ 1502, FN 2285). This definition provides that to qualify as sexual enslavement, "the perpetrator must exercise any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons or by imposing on them a similar deprivation of liberty" (¶ 1502). Additionally, the perpetrator must have caused such person or persons to engage in one or more acts of a sexual nature (*id.*). The *mens rea* of the offense is to have "the intention to engage in the act of sexual enslavement or to have acted with reasonable knowledge that the crime

¹⁵ See *supra* FN 2.

of sexual enslavement was likely to occur” (¶ 1506). Additionally, to constitute sexual slavery as a crime against humanity, the conduct must be committed as part of a widespread and systematic attack directed against a civilian population and the perpetrator must have known that the conduct was part of or intended the conduct to be part of this widespread or systematic attack directed against a civilian population (¶ 1507).

- The Chamber considers several witness testimonies regarding sexual slavery in Chad:
 - ***Treatment of Women Transferred to Ouadi-Doum:*** Witnesses testified that women were lodged at Ouadi-Doum, in a hangar in the desert, where they were engaged in household duties such as doing laundry and preparing meals for the military in addition to other household tasks (¶¶ 789-790). These women were not paid for their work (*id.*). Witness Khadija Hassan Zidane explained that in the beginning, the women were tasked with washing military uniforms and eventually the military men started raping the women (¶ 793). Zidane testified that “at night we were their prostitutes and during the day we were their prisoners” (*id.*). These daily acts of rapes were confirmed by all the female victims who testified (¶ 794). Witnesses testified that girls as young as thirteen to fifteen years of age were raped and that the girls and women were used to fulfill the “sexual needs of the military” and treated as “sexual slaves, sexual objects” (¶¶ 795-800, 1533). Based on this evidence, the Chamber concludes that the women transferred to the military camp Ouadi-Doum served as domestic servants to the commander and military of the camp; they lived in extremely difficult conditions for about a year, between March 1998 and March 1989; and during that time they were victims of repeated sexual violence by the commander and the military at the camp (¶ 810).
 - ***Treatment of Women transferred to the Kalait military camp:*** Witnesses testified that ten or eleven women were taken to the Kalait military camp in the desert to serve as “military wives” (¶¶ 811-16) Witnesses testified that women were tortured and suffered repeated rapes at the camp (¶¶ 815-16). The Chamber finds that these women served as domestics to the military; that they lived in difficult conditions between March 1985 and January 1986; and that they were subjected to repeated acts of sexual violence at the military camp (¶ 820). The Chamber finds that and the condition of servitude and the climate of violence was an integral part of the repressive system put in place against the opposition and the alleged enemies of the regime (*id.*).
- The Chamber assesses whether the evidence described above establishes the elements of sexual slavery as a crime against humanity. The Chamber finds that the women described above were transferred and detained in the two military camps in Kalait and Ouadi-Doum in remote desert locations which were surrounded by landmines, and thus they experienced limited freedom of movement (¶ 1535). These women were tasked with household duties such as washing and cooking for the commander as well as military personnel, and they engaged in sexual relations against their will (*id.*). In light of the above, the Chamber is convinced that the perpetrators at these military camps at Kalait

and Ouadi-Doum exercised powers over these women attaching to the right of ownership (¶ 1536). The Chamber finds that the military personnel at these camps deliberately forced the women to have sex with them and they were aware that these women “lived in captivity in their camp for a long period without the possibility of flight, did not have any autonomy, and that the military exercised their power such that the women were actually completely under their control, including their reproductive power” (*id.*). With regard to the contextual elements of crimes against humanity, the Chamber finds that because of the perpetrators’ affiliation to the government military forces, the perpetrators had knowledge of the attack against the civilian population and knew that their actions were part of the attack (¶ 1537).

- The Chamber therefore concludes that the Chadian military posted to the Kalait and Ouadi-Doum military camps reduced several women and young girls to sex slaves and therefore committed the crime against humanity of sexual slavery in violation of the Article 6(a) of the EAC Statute¹⁶ (¶ 1538).

VAGINA:

- The Chamber uses the word “vagina” in defining the material elements of rape as “the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim” (¶ 1508). Witnesses also used the word “vagina” in their testimonies to describe rape and other acts of sexual violence inflicted on them including the insertion of a pen into witness Zidane’s vagina and the insertion of a bayonet into another witness’s vagina (¶¶ 725-726, 1572).

PENIS:

- As noted in “Vagina” above, the Chamber uses the word “penis” in its definition of the material elements of rape as (¶ 1508). In applying this definition, the Chamber finds that Habré’s penetration of witness Zidane’s mouth with his penis constitutes rape (¶ 1525).

SEXUAL VIOLENCE:

- The Chamber held that women and young girls were subjected to various acts of sexual violence including electrocution of the genitals, and the insertion of a pen and a bayonet into victims’ vaginas (¶¶ 772, 736, 765, 1524-1525, 1530). Evidence of these acts of sexual violence supports the Chamber’s conviction of Habré for rape and torture as crimes against humanity as well as torture as a stand-alone crime (¶¶ 1555, 1565, 1570, 1572, 1576-77, 1582, p. 548).

Other Issues:

¹⁶ See *supra* FN 2.

MODES OF LIABILITY:

- Hassan Habré was charged with crimes under multiple modes of liability, including direct commission of a crime, superior responsibility, and participation in a joint criminal enterprise (JCE) (¶¶1809-1812). The Chamber assesses Habré’s culpability under each of these modes of liability (¶¶ 1819-2065).
 - **Direct commission:** The Chamber considers the evidence introduced at trial that Habré directly committed several crimes against victim Khadija Hassan Zidane including rape as a crime against humanity, torture as a crime against humanity, and torture as a stand-alone crime (¶¶ 1826-39). The Chamber finds that Habré personally subjected Zidane to sexual violence on four occasions while she was detained in the Presidential palace (¶ 1827). The Chamber finds that the evidence established Habré’s guilt in personally committing these crimes against Zidane, the elements of which are discussed above under “Rape” and “Rape, Torture” (¶ 1840). The Chamber also finds Habré guilty of direct commission of voluntary homicide as a crime against humanity based on evidence unrelated to sexual or gender-based violence (¶ 1863).
 - **JCE:** The Chamber considers evidence introduced at trial that Habré participated in a JCE with Guihini Korei, Abakar Torbo, Mahamat Djibrine, and Saleh Younous with a common goal of “seizure of power by the practice of terror over the population” by means of the crimes of torture and crimes against humanity (¶ 1809). The Chamber notes that there are three categories of JCE under customary international law:
 - 1) The first category (JCE I) is characterized by cases where the participants are driven by the same criminal intent to achieve the common goal.
 - 2) The second category, (JCE II), is a variant of JCE I characterized by the existence of an organized criminal system of abuse, such as concentration camps or detention centers.
 - 3) The third category, (JCE III), holds members responsible for crimes committed by other members of the JCE even if the crimes go beyond the common goal, provided they are a natural and foreseeable consequence of achieving the common goal (¶ 1893).

The Chamber notes that these three categories have the same material elements, but differ with regard to the mental element (*id.*).

- The Chamber considers whether Habré participated in a JCE to commit each of the crimes against humanity of which he was accused, as well as the stand-alone charge of torture, and if so what type. (¶¶ 1865-2170). The Chamber considers that a JCE existed and that its members shared a common goal, which was “to suppress not only any rebellion and opposition that might, in the eyes of the regime, undermine unity and the sovereignty of Chad, but also to prevent any hint of opposition by imposing a regime of terror” (¶ 1928). “[I]n order to achieve this common goal, the members of the JCE had the intent to resort to, and resorted to, the crimes of willful homicide, mass summary executions, kidnapping followed by disappearance, torture and inhumane acts” (¶ 1929). The Chamber notes a

DDS document that “literally enunciates the criminal means to be used to achieve the common goal” by providing that “[t]he repression is to permanently stop the adverse activities by an PHYSICAL ELIMINATION, PRISON, ARREST, CONDEMNATION or any other form of repression (¶ 1930, capitalization in original). The Chamber finds that “this JCE is globally type I, but includes JCE type II with regard to the organized system of ill-treatment set up in the network of DDS prisons” (¶ 1933). The Chamber finds that Habré was part of this JCE and “intended to commit the crimes foreseen by the joint criminal enterprise, namely, intentional homicide, the practice of massive and systematic summary executions, the kidnapping of people followed by their disappearance, torture and inhumane acts” (¶ 2154). The Chamber finds that “Hissein Habré had, moreover, the intention to participate in the common criminal goal he shared with other members of the JCE,” that Habré was a member of the joint criminal enterprise, and that in this capacity, he committed the stand-alone crime of torture under Article 8 of the EAC Statute as well as the crimes against humanity of willful homicide, mass and systematic summary executions, kidnapping followed by their disappearance, torture and inhumane acts in violation of the EAC Statute (*id.*).

- However, with regard to the commission of the crimes against humanity of rape and sexual slavery, the Chamber finds that the evidence demonstrates that the members of the JCE did not intend “to resort to rape and sexual slavery [as] the common goal” (¶ 1934). The Chamber “is convinced,” however, “that the rape and sexual slavery of detained women was a natural and predictable consequence of the execution of the JCE” given the fact that “these women, most of them subjected to torture, were held in a climate of widespread and institutionalized violence and in a state of extreme vulnerability, without any protection” (*id.*). Furthermore, in the camps at Kalait and Ouadi-Doum, “the women who were detained there were also almost the only women accessible to soldiers stationed in these camps in the middle of the desert” (*id.*). Adding to the foreseeability of sexual violence against female detainees, the Chamber cites remarks made by Abba Moussa—Deputy Director of the DDS Penitentiary Service—just before the women were transferred to Ouadi-Doum, in which he said that “if women wanted men, they would be taken where there are men” (¶¶ 1931, 1934). Based on all of these findings, the Chamber holds that the crimes against humanity of rape and sexual slavery committed against female prisoners were foreseeable and were committed through a JCE, type III (¶ 1934).
- The Chamber assesses Habré’s culpability specifically for rape and sexual slavery as crimes against humanity under JCE III liability (¶¶ 2157-70). The Chamber recalls that the ICTY Appeals Chamber has confirmed that the standard applicable to JCE III is that an accused must be aware of the “possibility” – rather than the “probability” – that a crime beyond the shared common goals might be committed (¶ 1904). The Chamber clarifies further that the mental element of JCE III requires that “the possibility that the crime may be committed [be] sufficiently substantial to be

foreseeable by an accused” (*id.*). In assessing whether Habré had the requisite knowledge to foresee the rape and sexual slavery of detainees, the Chamber finds that Habré was the creator and leader of the DDS and BSIR security forces that committed these acts (¶¶ 1981, 2157). Habré was also sometimes present in the prisons where torture and mistreatment occurred, participated in interrogations, and issued instructions that led to his subordinates committing acts of torture (¶ 2047). The Chamber finds further that, in his capacity, Habré was aware of the transfer of women to the detention camps in Kalāit and Ouadi-Doum and “was therefore aware that women were detained in a climate of generalized and institutionalized violence and were therefore placed in a state of extreme vulnerability, without any protection,” and that the women were “being interrogated and monitored by state agents, exclusively male” who committed violence against detainees on a daily basis, with impunity (¶¶ 2159, 2161-70). The fact that the women were raped by senior officers of the DDS or BSIR with whom Habré worked and with whom he participated in a JCE and the fact that Habré himself raped Zidane four times adds to the Chamber’s finding that it was foreseeable to Habré that his subordinates were likely to commit the crime of rape in turn (¶¶ 2159-60). The Chamber finds that as an “ongoing participant” in this JCE, Habré “took the risk that this crime [would be] committed” (¶ 2161). The Chamber additionally cites Habré’s position as the head of DDS and the information he received as a result, including the reports he received from key government agencies, the report about the women’s situation published by Amnesty International, cards from Amnesty International calling for the release of specific women and girls, and media reports about the detained women, as further evidence that Habré had the requisite knowledge (¶¶ 2162-68). The Chamber is therefore convinced that it was foreseeable to Habré that crimes of rape and sexual enslavement, as crimes against humanity, were likely to be committed in the realization of the JCE’s common goals and concludes that Habré is guilty of the crimes against humanity of rape and sexual enslavement in violation of the EAC Statute (¶¶ 2169-70).

- **Superior Responsibility:** The Chamber considers evidence that Habré is responsible under superior responsibility for war crimes committed by his subordinates (¶¶ 2171-2261). These allegations of war crimes do not involve sexual or gender-based violence.
 - The Chamber finds that under international law, there are four conditions needed to be present in order to hold a person responsible under superior responsibility: These are:
 - 1) the crime committed must be under the jurisdiction of the Chamber;
 - 2) there must be an existence of a superior-subordinate relationship;
 - 3) the superior knew or had reason to know that crimes were about to be or had been committed; and
 - 4) the superior failed to take the necessary and reasonable measures to prevent these crimes or punish their perpetrators (¶ 2175).

The Chamber notes that given Habré’s positions, including Minister of Defense since 1986, and his education, including a degree in political science and a law degree, he “could not be unaware that his criminal responsibility could be incurred for not having prevented and/or sanctioned serious violations of international humanitarian law committed by his subordinates” (¶ 2174). The Chamber also cites the testimony of a witness who stated that Habré had “perfect knowledge” of his obligations under the Geneva Conventions (*id.*). With regard to the first element, the Chamber finds that “it is not necessary for a superior to know the exact identity of those of his subordinates who committed crimes” within the jurisdiction of the court in order to be held responsible under superior responsibility (¶ 2178). In interpreting the second element, the Chamber notes that in assessing the existence of a superior-subordinate relationship, international jurisprudence has held that the main factor to take into account is whether or not the superior had “effective control” over his subordinates, defined as “the ability to prevent or punish criminal behavior” (¶ 2179). The Chamber notes further that “it is not necessary to prove the existence of a direct or formal relationship of subordination” rather, it is necessary to show that the accused had “by virtue of his position in an official hierarchy or otherwise, a rank superior to the perpetrator of the crime” and the ability to give orders and take disciplinary actions (¶¶ 2180-81). With regard to the knowledge element, the Chamber recalls ICTY jurisprudence finding that in assessing the “had reason to know” standard, “it must be proved that the superior ‘[h]ad sufficiently alarming information to warrant further investigation’” (¶ 2184). The information does not have to contain details of the unlawful acts to be “sufficiently alarming” to require the superior to inquire further (*id.*). Factors that indicate knowledge on the part of the superior include whether the superior is in close proximity to where the crimes occurred or whether these crimes occurred repeatedly (¶ 2186). With regard to the last element—failure to take reasonable measures to prevent or punish the acts—the Chamber notes that “[a] superior cannot be held criminally responsible for failing to take measures that are not in his power” (¶ 2188). Thus, the superior’s position and power determine what measures are expected (*id.*). The Chamber finds that “the duty to prevent lies with the superior as soon as he knows or has reason to know that a crime is being committed” (¶ 2189). As for the duty to punish, “[t]he obligation of a superior to punish the perpetrators of a crime requires, at the very least, to investigate possible crimes, to establish the facts, and if the superior is not authorized to implement penalties, report them to the competent authorities” (¶ 2190). This obligation to punish “is clearly not fulfilled if the superior is satisfied with assurances which he knows are not or will not be implemented” (*id.*).

- The Chamber held that Habré, in his capacity as President of the Republic, Supreme Chief of the Armed Forces and, from 1986, Minister of Defense, had effective control over his subordinates, including the ability to appoint and dismiss agents, give orders, and to prevent and punish conduct (¶¶ 2194, 2201-05). Habré knew or had reason to know of the crimes committed by his subordinates and failed to prevent or punish these acts (¶¶ 2221, 2229, 2234, 2245, 2253, 2256, 2258-59). Therefore, the Chamber finds that the elements for superior responsibility were met and hold Habré responsible under superior responsibility for the war crimes of voluntary homicide, torture, inhumane treatment, illegal detention, murder, torture and cruel treatment (¶ 2261).

