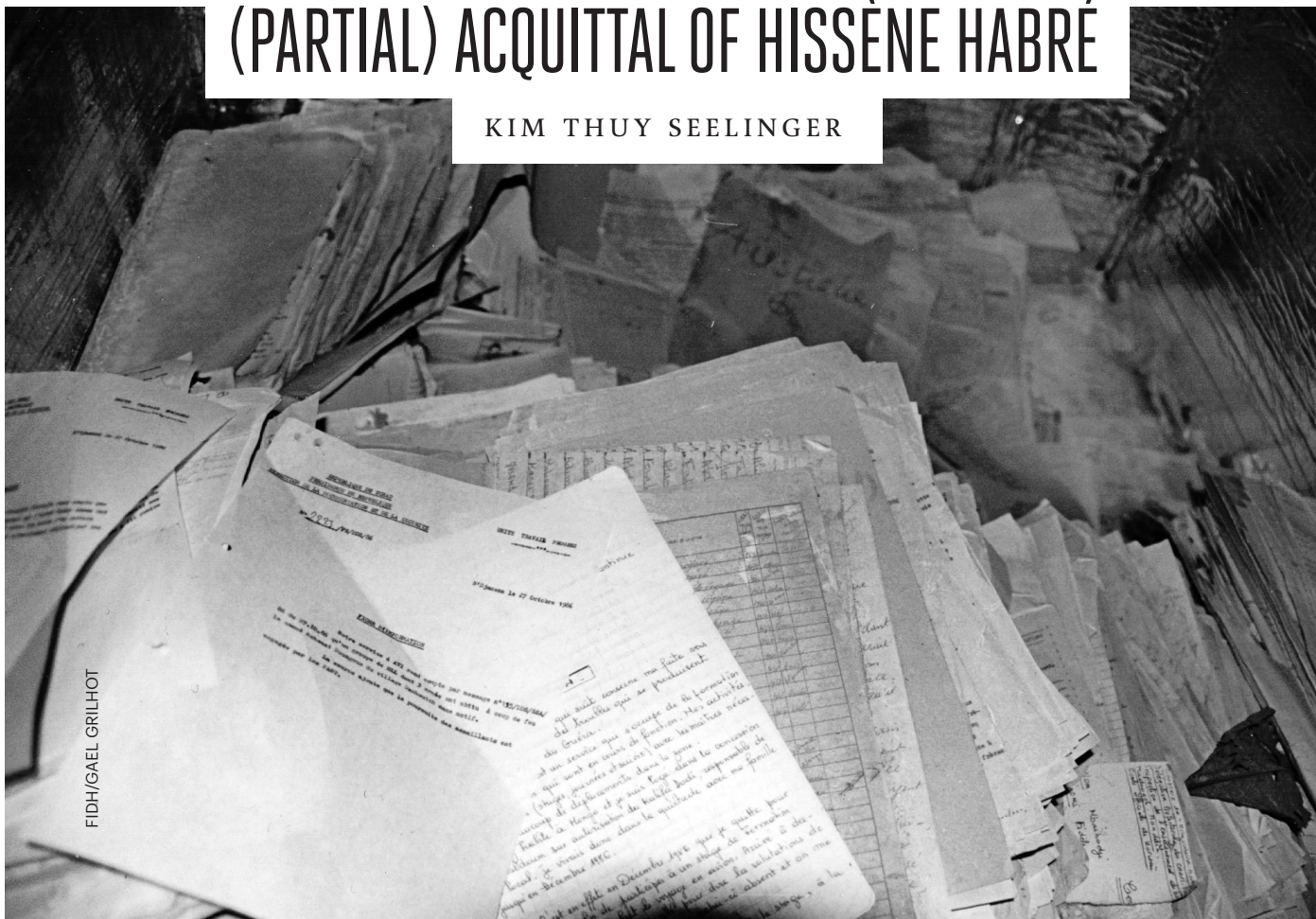


# RAPE AND THE PRESIDENT: THE REMARKABLE TRIAL AND (PARTIAL) ACQUITTAL OF HISSÈNE HABRÉ

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Researchers discovered thousands of files in Chad allegedly documenting crimes committed under the Hissène Habré regime.

**O**n May 30, 2016, the Extraordinary African Chambers in the courts of Senegal issued its historic conviction of Hissène Habré, the former president of Chad. In handing Habré a life sentence for war crimes, crimes against humanity, and acts of torture committed in Chad from 1982 to 1990, the trial chamber delivered the most important milestone in international criminal justice in years. It was a victory for universal jurisdiction, the principle by which a state can prosecute a person

accused of atrocities regardless of where those atrocities were committed. The judgment was also the first time a domestic court had convicted a former head of state for war crimes and crimes against humanity. Finally, the decision was groundbreaking in terms of its considerable inclusion of sexual crimes. After trial judges amended charges to include acts of sexual violence, Habré was convicted of rape and sexual slavery committed as crimes against humanity and acts of torture. It was a remarkable day in a remarkable trial.

This year, on April 27, 2017, the appeals chamber upheld all of Habré's convictions—except for one. In preserving the life sentence, Judge Wafi Ougadeye reaffirmed the trial judgment that had, in the course of a year, become famous for its elevated treatment of sexual violence. But the appeals chamber partially acquitted Habré of rape as a crime against humanity and act of torture on procedural grounds. It found that one woman, who accused Habré of personally raping her, had spoken up too late for the testimony to be included as evidence. In so doing, the court raised a critical question posed by the prosecution of sexual violence: How can courts balance survivors' readiness to disclose their experiences with defendants' rights to know the full nature of charges against them as soon as possible?

### HABRÉ'S REGIME

In the early 1980s, Habré rose to power amid political tumult in Chad. The U.S. provided millions of dollars in covert assistance to Habré, considered an anti-Gadhafi ally in the region, to help him overthrow President Goukouni Oueddeye, who was seen as a friend of the Libyan leader. In 1982, Habré seized the presidency, imposing one-party rule and suppressing ethnic groups such as the Sara and the Hedjarai

in the south and the Zaghawa in the northeast. Habré orchestrated this oppression through a security agency called the Documentation and Security Directorate, or DDS. Later known as "the instrument of terror," the DDS was charged with eliminating opposition and political resistance. Eventually, Idris Déby Itno, Habré's former commander-in-chief, formed an army and ousted the president on Dec. 1, 1990. After emptying the national treasury, Habré fled the country, settling in Senegal, where he has been allowed to reside ever since.

By 1991, Déby had become president of Chad and established the Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habré to document atrocities carried out by the previous regime. The Commission published its report in May 1992, concluding that Habré's government was responsible for an estimated 40,000 deaths and for acts amounting to "cruelty, contempt, and terrorizing the population."

Seven Chadian victims and a victims' association filed a private prosecution in Dakar Regional Court on Jan. 26, 2000, which accused Habré of "torture, barbarous acts, and crimes against humanity." On Feb. 3, 2000, Habré was indicted, and placed under house arrest in Senegal.

In May 2001, the international NGO Human Rights Watch discovered thousands of documents in the former DDS headquarters in N'Djamèna, Chad's capital. The files contained lists of prisoners and DDS agents, death certificates, intelligence reports, and letters addressed to then-President Habré regarding the detentions, displacements, and deaths. The cache also included the names of 1,208 people who had been killed or who had died in detention and 12,321 victims of arbitrary detention, torture, and other human rights violations.

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## PROSECUTION IN SENEGAL

This trove would fuel a series of prosecution attempts from Brussels to Dakar, ultimately leading to the creation of the Extraordinary African Chambers in the courts of Senegal. Belgian prosecutors were eager to try Habré in Europe on the basis of universal jurisdiction. But Habré had been living in Senegal since 1990 and then-President Abdoulaye Wade refused to extradite him.

In 2008, Senegalese law was amended to allow for prosecution of Habré in domestic courts under principles of universal jurisdiction, but the change was invalidated by the constitutional court. The need for a special chamber with specific jurisdiction over crimes committed during Habré's regime became clear.

In December 2012, the Senegalese legislature enabled the creation of such a chamber within the country's judiciary. This court, called the Extraordinary African Chambers (EAC), was established following the election of President Macky Sall. It became operational quickly, thanks to an infusion of funds from the African Union, Chad, and various foreign governments including France, Belgium, and the United States. As an "internationalized" domestic tribunal, the EAC would operate under its own statute, which would draw largely from international criminal law for substantive questions and some procedural matters. Senegalese laws of criminal procedure would apply where the Court's statute was silent or incomplete.

In terms of structure, the EAC would track the regular Senegalese judicial hierarchy. It would include its own chamber of instruction, trial chamber, and appeals chamber. As in other civil law legal systems, the chamber of instruction would be composed of investigating judges responsible for fact-finding. These judges would transmit a closed universe of triable facts, as well as a list of recommended charges, to the trial chamber for deliberation.

In the Habré case, the investigating judges issued their *ordonnance de renvoi* on Feb. 13, 2015.

The 196-page document summarized relevant facts, based on the chamber's limited investigations in Chad and a tremendous amount of documentation from the earlier Belgian investigators and groups like HRW. The facts included reference to the mass or systematic imprisonment, deportation, and torture of presumed opponents. The investigating judges also mention sexual abuse including routine rape and sexualized torture committed by Habré's DDS agents, such as the forced nudity of a pregnant prisoner and the insertion of chili peppers into another detainee's penis. The investigating judges, however, did not include explicit charges of sexual violence in their recommendations.

The investigating judges proposed 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
- the autonomous crime of torture.

Notably, though the EAC's 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 TRIAL

Habré's trial began in Dakar on Sept. 7, 2015, and witness testimony quickly took an unexpected turn. Jacqueline Moudeina—one of the brilliant and relentless Chadian lawyers who had worked with Habré's victims for over a decade—

had long feared that some of her clients had suffered sexual violence at the hands of the DDS. Yet strong taboos against speaking of sex at all, much less rape, made it difficult to address directly.

As Moudeina tells it, one of her female clients pulled her aside on the eve of trial. She said, essentially, “Listen, there is something I have not told you. You know I was detained. You know many of us women were. What do you think happens when women are imprisoned by men?”

This woman had been silent for years about the details of her experience. After so many false starts, she had given up hope of seeing justice. Now, a trial against her former president was, against all odds, about to take place. So with oral hearings around the corner, this Chadian woman wanted to testify fully—she had decided to speak of rape.

She was not alone. From September through November 2015, several other victims represented by Moudeina and her team also unexpectedly testified about sexual violence they had either witnessed or suffered directly. Their testimony confirmed that men, women, and even children had suffered several forms of sexual violence under the Habré regime, as alluded to in the investigating judges’ report.

One former prisoner watched security guards and high-level officials repeatedly rape and gang rape women at the prison Les Locaux. This testimony echoed HRW reports already in the pretrial record, which included accounts of forcible sex with female detainees in exchange for necessities of survival, like food and medicine. Evidence also indicated that children were raped. One former detainee testified that soldiers had raped and killed a girl of seven or eight years old.

Some witnesses spoke of sexual slavery. Their testimony elaborated on earlier HRW documentation, which had indicated that women were detained and exploited by Habré’s agents in military camps in the desert. For example,

one witness said 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.

Witnesses also corroborated earlier references to sexual torture, confirming that men and women detained in Habré’s prisons were routinely raped and subjected to intentional injury to the genitals. One prisoner reportedly received electric shocks to her breasts and genitals, which left her unable to walk. Similarly, one

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## WHEN JUDGE KAM HANDED DOWN THE SENTENCE, A COLLECTIVE GASP SEIZED THE ROOM.

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man said he had observed DDS agents inserting pieces of wood into his cellmates’ penises.

Finally, trial testimony built out earlier indications of other forms of grave sexual violence. For example, Dr. Hélène Jaffe, who had treated hundreds of survivors of Habré’s prisons, testified that many of the men bore injuries consistent with sexual violence.

Not all the testimony described sexual crimes committed by DDS agents. On Oct. 19, 2015, Khadidja Hassan Zidane, who had been detained on Habré’s presidential grounds, stunned the court. Zidane said that Habré had summoned her to the presidential palace and raped her on four separate occasions. In a particularly powerful moment, she offered to show the judges her scars from when Habré had stabbed her with a pen as she resisted him. Zidane paid dearly for her accusation. Habré’s media team immediately attacked her on its website, denouncing her as a “nymphomaniac” and drug user.

## REPORTAGE | JUSTICE DENIED

Concerned by the accounts of sexual violence articulated by so many victims at trial, civil society organizations sought to remedy the omission of these crimes from the recommended charges. In October 2015, 17 groups from across Senegal, eastern Democratic Republic of the Congo, the Netherlands, and the United States issued an open letter to Judge Gberdao Gustave Kam, president of the Extraordinary African Chambers trial panel, and Chief Prosecutor Mbacké Fall, calling for greater consideration of sexual crimes.

The letter specifically urged the EAC to heed the lessons of the Akayesu case before the International Criminal Tribunal for Rwanda two decades earlier, in which witness testimony about rape prompted an amendment of charges to include sexual crimes. This led to the landmark 1998 judgment establishing rape as an act of genocide. The letter's signatories concluded by requesting that the judge and prosecutor allow more victims and witnesses to offer relevant testimony before the end of the trial stage.

Around the same time, parties observing the trial contacted my team at the Human Rights Center at the University of California, Berkeley. They requested that we draft and submit an *amicus curiae*, or "friend of the court," brief on international crimes of sexual violence as quickly as possible. This advisory document would map out how the trial judges could charge the alleged acts of sexual violence according to the court's statute and customary international law. We did our best in limited time, producing a bilingual submission that charted the charging options provided by the Court's own statute and confirmed the status of each as crimes under international law when Habré's was in power. This was important in order to avoid violating the principle of legality, which prohibits the conviction of a person for an act that was not a crime at the time it was committed. Though the *amicus* brief was not admitted into the record for timing and

procedural reasons, it was received by the trial chamber and became available to all parties.

Before close of trial at the end of 2015, Judge Kam and his colleagues did amend charges against Habré to explicitly include crimes of sexual violence—not as subsidiary harms subsumed under the crime of torture, but as distinct crimes against humanity. They were able to do so because, while Senegalese criminal procedure binds the trial judges to the universe of facts received from the chamber of instruction, it does allow them to reformulate charges around those facts at any time through a process called "requalification." This would make it possible to convict Habré of rape and sexual slavery as distinct war crimes, crimes against humanity, and acts of torture.

## CONVICTION AND APPEAL

On May 30, 2016, Judge Kam sat before a packed courtroom, flanked by his co-judges. He read a summary of the trial court's judgment. The panel pronounced 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 various forms such as voluntary homicide, torture, inhumane treatment, and illegal detention), and the autonomous crime of torture.

In reading the summary, Judge Kam repeatedly invoked the name of Khadidja Hassan Zidane. Habré was not only convicted for the sexual violence committed by subordinates whose foreseeable atrocities he had failed to control or prevent, a common way that prosecutors try to link high-level commanders to ground-level crimes. The judges also found Habré guilty of having personally raped Zidane. In an already momentous and unlikely trial, this was an outcome no one could have anticipated.

When Judge Kam handed down the sentence, a collective gasp seized the room. The

former president of Chad had been sentenced to life in prison.

The trial judgment was generally hailed as a major achievement. Not only had this hybridized Senegalese court convicted a former head of state by means of universal jurisdiction, but it had done so at a moment of tension between many African states and the International Criminal Court—for a fraction of the time and cost required by international tribunals. Many asked whether this was what an “African solution to an African problem” might look like. Furthermore, the decision had not just included, but centered on, crimes of sexual violence—a rare outcome at war crimes tribunals.

In the wake of the trial chamber’s decision, both victims’ counsel and Habré’s court-appointed defense lodged appeals. While the victims’ lawyers focused on aspects of the reparations order, the defense counsel diligently raised a number of procedural issues. Defense specifically appealed the conviction related to the direct commission of rape of Zidane, arguing that her account of being raped by Habré himself had not been raised before the investigating judges, so those new facts could not be “requalified” through the amended charges or be the basis of conviction.

On April 27, 2017, the appeals judges agreed in part. Again sitting in the Dakar courtroom, many of us listened as Judge Ougadeye acknowledged but dismissed most of the defense counsel’s procedural concerns, explaining how each had been remedied. However, he announced that the appeals chamber acquitted Habré of personally raping Zidane.

Judge Ougadeye went to great pains to emphasize that Zidane’s testimony was deemed credible and the acquittal was on purely procedural grounds: Zidane’s account was entirely new and departed from any evidence that had come before the investigating judges. It was thus out of bounds for consideration by the trial judges. Habré’s conviction for the rape and

sexual slavery committed by his DDS agents—as well as his life imprisonment—would remain intact. He would go down as guilty of failing to prevent the savagery of his subordinates, but not as a rapist.

Across the courtroom, most of us struggled to interpret the decision and its implications. Those familiar with Zidane’s testimony shared a flicker of mourning—she had overcome so much to come to this foreign courtroom and to utter her violation to a room full of strangers and in front of her former president. But we were buoyed by two things: First, the Chadian

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## “WE WON, WE WON!”

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victims who had traveled to Dakar for the appeals judgment were standing up in the chamber, chanting, “*On a gagné! On a gagné!*” or “We won, we won!” After everything they had been through, the judgment was still a massive triumph. Second, Zidane had done the unimaginable by standing before Habré in court and telling the entire world what he had done to her. Regardless of the acquittal, the judges had heard her, believed her, and thanked her.

### LESSONS

Unlike other witness and victim testimony about sexual abuse by DDS agents, which served to bolster prior allegations, the appeals judges found that Zidane’s account could not be used to convict Habré of rape. She had spoken up too late.

The unsurprising truth is that disclosure of sexual violence can take a long time, if it happens at all. Slowed by factors like stigma, fear of retaliation, or lack of confidence in the judicial system, it is not easy for many survivors to share their experiences of rape or other sexual abuse. Most survivors will only disclose

## REPORTAGE | JUSTICE DENIED

if and when they feel ready. This was likely true for Zidane who, despite having access to a committed and sensitive team of lawyers, did not mention certain details of her experience until the last minute. It is not hard to imagine the reluctance she and many others felt about divulging their personal experiences when interviewed by Chadian police, human rights defenders, or Senegalese investigating judges years earlier. Even had those interviewers been perfectly sensitive to sexual violence and trained in its investigation, survivors like Zidane still faced fears of testifying against the powerful and a lack of confidence that reporting would lead to justice after so many years.

So among the many lessons to unpack from the Habré trial lies a challenge regarding sexual crimes and the balance between victim's rights and rights of the accused: How can we better enable survivors to speak on their own terms while also ensuring that their experiences are captured early enough to be properly charged along with other crimes?

At international tribunals, where charges of sexual violence have often been added late to an indictment, we have taken a few steps forward to better practice. Between the *Policy Paper on Sexual and Gender-based Crimes* (2014) issued by the Office of the Prosecutor of the International Criminal Court and the revised *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict* (2017), fact-finders have more guidance than ever. The ICC Prosecutor's policy paper proposes concrete ways to integrate sexual crimes at the begin-

ning of an investigation strategy. The Protocol, on the other hand, introduces the legal framework relevant to the investigation of sexual violence as a war crime, crime against humanity, or other serious violation of international law. It then offers researchers and human rights defenders practical tips for interviewing survivors, collecting forensic material, and transmitting evidence to authorities responsible for accountability for conflict-related sexual violence. Providing supportive conditions such as well-trained interviewers, confidential spaces for communication, and even safe shelter can improve survivors' willingness to report sexual violence at the earliest stages of investigation, which can in turn minimize the need to amend charges or factual record later on.

Despite Habré's acquittal for raping Zidane, the rest of his conviction stands—including for the sexual violence committed by his agents. His case remains a milestone in terms of the capacity of "internationalized" domestic courts to exercise universal jurisdiction, try former heads of state, and secure strong jurisprudence for sexual violence as a violation of international criminal law. Yet as scholars and practitioners move on to the next trial, they should be mindful of the dilemma Zidane presented: While parts of her testimony raised a procedural concern, she had understandable difficulty accusing her former president of rape when speaking with investigators and even her own lawyers. To prevent another case like Zidane's, we must do more to support earlier disclosure of sexual violence. ●