

ANNEXE A

**RAPE AND OTHER FORMS OF SEXUAL VIOLENCE AS
CRIMES AGAINST HUMANITY, WAR CRIMES, AND TORTURE UNDER
CUSTOMARY INTERNATIONAL LAW**

***AMICUS CURIAE* BRIEF OF THE HUMAN RIGHTS CENTER AT THE
UNIVERSITY OF CALIFORNIA, BERKELEY, SCHOOL OF LAW,
AND INTERNATIONAL EXPERTS ON SEXUAL VIOLENCE UNDER
INTERNATIONAL CRIMINAL LAW**

**A FILING BEFORE THE EXTRAORDINARY AFRICAN CHAMBERS SEATED
AT THE COURT OF APPEALS, DAKAR, SENEGAL**

Case: Hissène Habré

Before: Judge Gberdao Gustave Kam (Presiding)
Judge Amady Diouf
Judge Moustapha Ba
Judge Pape Ousmane Diallo (Alternate)

Date: 8 December, 2015

Party Filing: *Amicus Curiae* Human Rights Center, University of California,
Berkeley, School of Law, and International Experts on Sexual
Violence Under International Criminal Law

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I. Introduction & Statement of Analysis

A. Introduction and Statement of Interest

1. This brief is submitted by the Sexual Violence Program of the Human Rights Center, University of California, Berkeley, School of Law, on behalf of a select group of international experts, who are leading academics, jurists, and practitioners specializing in the treatment of sexual violence under international criminal law¹:

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Prof. Olympia Bekou, Professor of Public International Law, University of Nottingham; Head, International Criminal Justice Unit, Human Rights Law Centre, United Kingdom

Dr. Anne-Marie de Brouwer, Associate Professor of International Criminal Law, Tilburg University, Netherlands

Prof. Christine Chinkin, Emerita Professor of International Law and Director, Centre for Women, Peace, and Security, London School of Economics, United Kingdom

Cllr. Felicia Coleman, Counsellor-at-Law, Former Chief Prosecutor, Sexual and Gender-Based Crimes Unit, Ministry of Justice, Liberia

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Justice Richard Goldstone, Supreme Court of South Africa, Constitutional Court of South Africa, and first Chief Prosecutor to ICTR / ICTY, South Africa

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¹ The views expressed herein are those of individual amici and do not necessarily reflect the views of their respective institutions.

UN International Criminal Tribunal for Rwanda (ICTR),² and Senior Adviser, Case Matrix Network

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Ms. Elvina Pothelet, University of Geneva, Switzerland

Ms. Madeleine Rees, OBE, Secretary General, Women's International League for Peace and Freedom, Switzerland; former gender expert and Head of Office in Bosnia and Herzegovina, Office of the United Nations High Commissioner for Human Rights

Ms. Kim Thuy Seelinger, Director, Sexual Violence Program, Human Rights Center, University of California, Berkeley, School of Law, United States of America

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Dr. Patricia Viseur Sellers, Special Advisor for Prosecution Strategies to the Prosecutor of the International Criminal Court; Visiting Fellow, Oxford University; Acting Senior Trial Attorney and Legal Advisor for Gender Crimes at the ICTY / ICTR, United States of America

2. *Amici* are deeply concerned by the allegations of rape and other forms of sexual violence raised in the proceedings of this case. The acts are all extremely serious. Some were allegedly committed against children. Extraordinarily, some even allegedly implicate Hissène Habré as a direct perpetrator.
3. *Amici* note that the current charges do not fully characterize these acts of rape or other forms of sexual violence as crimes.
4. In respectfully submitting this brief, *amici* seek to share their professional understanding of the ways acts of rape and other forms of sexual violence constituted crimes under customary international law at the time of the Habré regime. *Amici* urge the revision of the charges to reflect the full scope and gravity of the sexual violence described by victims who have come forward to testify before this Court. Many of the acts in evidence have not been included in the current charges. Ultimately, *amici* hope to assist this Court in meeting its responsibility to adjudicate acts of rape, sexual slavery, and other forms of sexual violence committed under the Habré regime and to properly characterize them as

² The views expressed herein are those of the individual amicus and do not necessarily reflect the views of the United Nations, the ICTY or the ICTR.

crimes against humanity, war crimes, and acts of torture under customary international law at the time of the alleged commission.

B. Summary of Analysis

5. *Amici* understand that the facts in the present case involve, *inter alia*, multiple incidents of rape, sexual slavery, genital injury, forced nudity, and violations of reproductive health by Hissène Habré or agents under his command and control. This Court has the power and responsibility to revise the charges against the defendant to include these acts of sexual violence, which constitute crimes under the Statute of this Court.
6. These acts were prohibited and criminalized under customary international law at the time Habré was in power (7 June 1982 to 1 December 1990).
7. The prohibition and criminalization of crimes of sexual violence over time has evolved from implicit to explicit. From the late 19th century through the mid-20th century, rape and other forms of sexual violence were often referred to as violations to family or a woman's honor, or as indecent assault. However, post-World War II, specific acts such as rape and enforced prostitution have been explicitly included in treaties and other international instruments prohibiting and criminalizing conduct during conflict periods.
8. Rape and many other acts of sexual violence can be characterized as various war crimes and crimes against humanity, as well as the independent crime of torture under the Statute. Specifically, this Court may find that, at the time of the Habré regime: (i) rape could qualify as the war crimes of "torture or inhuman treatment" and "outrages upon personal dignity", as a crime against humanity, and as a form of torture under customary international law; (ii) slavery, including sexual slavery, could qualify as a crime against humanity, while forced prostitution could qualify as a war crime and a crime against humanity; and (iii) other forms of sexual violence of comparable gravity could qualify as the war crimes of "torture or inhuman treatment" and "outrages upon personal dignity", as crimes against humanity, and as a form of torture.
9. Charging these acts as such under the Statute is supported by customary international law as it existed at the time of the Habré regime. In addition, jurisprudence of the *ad hoc* international criminal tribunals that emerged during the 1990s confirmed the customary status of these crimes under international law.
10. Characterizing the acts of rape, slavery, forced prostitution, and other forms of sexual violence in the record as international crimes listed in the statute of this Court would be in accordance with the principle of legality (*nullum crimen sine lege*), because these acts were prosecutable as war crimes, crimes against humanity, and crimes of torture at the time Hissène Habré was in power.

C. Summary of Relevant Facts

11. Trial testimony from September through November 2015 made clear that men, women, and children suffered multiple forms of sexual violence under the Hissène Habré regime. Predominant among these harms were accounts of rape, sexual slavery, and other forms of sexual violence.³
12. In terms of rape, Khadidja Hassan Zidane testified that Hissène Habré raped her on four separate occasions.⁴ Even children were allegedly raped: on 22 September, 2015, Bandjim Bandoum testified that when he was in Bodo, soldiers raped and killed a girl of seven or eight years of age.⁵ On 9 November, 2015, Clément Abaifouta testified to witnessing the repeated rape and gang rape of women at the prison Les Locaux, by security guards and high level officials.⁶ Human Rights Watch (HRW) reports also highlighted several cases of rape committed by Hissène Habré's agents. In *La Plaine des Morts*, HRW reports that rape by agents of the Direction de la documentation et de la sécurité (DDS) caused several women to become pregnant in detention.⁷ One child, Azina Sako, was detained with her mother. She was raped by DDS agents within a few days of her arrest; she was thirteen years old.⁸ The HRW report also notes that male guards forced female detainees to have sexual relations with them in exchange for necessities of survival, like food and medicine.⁹
13. Regarding slavery, both witness-victim testimony and HRW reports indicate that women were detained and used as sex slaves by agents of Hissène Habré. For example, on October 20, 2015, Katouma Deffalah testified that she was transferred to the desert camp in Ouadi Doum with other women, where they were used as sex slaves and domestic servants for a year.¹⁰ HRW reports confirm the

³ *Amici* did not have access to official transcripts of the court proceedings. As such, *amici* relied on publicly available videos of hearings, hearing summaries made available by trustafrica.org, public reporting, and notes taken by observers at the Extraordinary African Chambers. *Amici* do not wish to argue the specific facts here, but only to draw out general forms of harm for examination under the Statute and customary international law.

⁴ Testimony of Khadidja Hassan Zidane, Monday 19 October 2015, Trust Africa, 'The Public Prosecution v. Hissène Habré - Summary of the Twenty-Eighth Hearing Held on 19 October 2015' (2015) <<http://www.trustafrica.org/en/component/k2/item/3212-the-public-prosecution-versus-habre>> accessed 30 November 2015.

⁵ Testimony of Bandjim Bandoum, Thursday 22 October 2015.

⁶ Testimony of Clément Abaifouta, Tuesday 9 November 2015, Trust Africa, 'The Public Prosecution v. Hissène Habré - Summary of the Thirty-Sixth Hearing Held on 9 November 2015' (2015) <<http://www.trustafrica.org/en/component/k2/item/3212-the-public-prosecution-versus-habre>> accessed 30 November 2015.

⁷ Human Rights Watch, *La Plaine des Morts: Le Tchad de Hissène Habré* (2013), <https://www.hrw.org/sites/default/files/reports/chad1013frwebwcover_0.pdf> accessed 30 November 2015 [hereinafter HRW], at 236.

⁸ HRW, at 235.

⁹ HRW, at 234.

¹⁰ Testimony of Katouma Deffalah, Tuesday 20 October 2015, Trust Africa, 'The Public Prosecution v. Hissène Habré - Summary of the Twenty-Ninth Hearing Held on 20 October 2015' (2015)

transfer of two groups of women to the military desert camps, where they served the soldiers stationed there.¹¹

14. With respect to torture, witness-victim testimonies and HRW reports indicate that men and women alike suffered sexualized torture in the form of rape and intentional injury to the genitals. One victim of such torture was Fatimé Limane, who was pregnant in detention. Soldiers inserted bayonets into her vagina. Her baby did not survive.¹² Garba Akhaye testified about a female cellmate receiving electric shocks to her breasts and genitals, which left her unable to walk.¹³ Similarly, Ahmat Maki Outman observed DDS agents inserting pieces of wood into his cellmates' penises.¹⁴ Khadidja Hassan Zidane testified to being raped and tortured by Mahamat Djibrine el Djonto, who threatened her with a gun before raping her. She also described falling unconscious while being tortured.¹⁵ HRW reported that another woman, Ginette Ngarbaye, was two months pregnant when she was arrested. She was tortured in detention and gave birth with assistance only from other female detainees.¹⁶
15. Concerning other forms of sexual violence of comparable gravity, Dr. Hélène Jaffe noted that in the course of providing medical care to hundreds of survivors from Hissène Habré's prisons, she treated many men who bore injuries indicating they had suffered sexual violence.¹⁷ Other acts of sexual violence alleged include forced nudity in detention,¹⁸ forced administration of oral contraception,¹⁹ and the

<<http://www.trustafrica.org/en/component/k2/item/3212-the-public-prosecution-versus-habre>> accessed 30 November 2015.

¹¹ HRW, at 239.

¹² Testimony of Fatimé Sakine, Thursday 22 October 2015, Trust Africa, 'The Public Prosecution v. Hissène Habré - Summary of the Thirty-First Hearing Held on 22 October 2015' (2015) <<http://www.trustafrica.org/en/component/k2/item/3212-the-public-prosecution-versus-habre>> accessed 30 November 2015.

¹³ Testimony of Garba Akhaye, Monday 28 September 2015, Trust Africa, 'The Public Prosecution v. Hissène Habré - Summary of the Sixteenth Hearing Held on 28 September 2015' (2015) <<http://www.trustafrica.org/en/component/k2/item/3212-the-public-prosecution-versus-habre>> accessed 30 November 2015.

¹⁴ *Id.* Testimony of Ahmat Maki, Monday 28 September 2015.

¹⁵ Testimony of Khadidja Hassan Zidane, Monday 19 October 2015. Trust Africa, 'The Public Prosecution v. Hissène Habré - Summary of the Twenty-Eighth Hearing Held on 19 October 2015' (2015) <<http://www.trustafrica.org/en/component/k2/item/3212-the-public-prosecution-versus-habre>> accessed 30 November 2015.

¹⁶ HRW, at 237.

¹⁷ Testimony by Hélène Jaffe, Monday 12 October 2015, Trust Africa, 'The Public Prosecution v. Hissène Habré - Summary of the Twenty-Fourth Hearing Held on 12 October 2015' (2015) <<http://www.trustafrica.org/en/component/k2/item/3212-the-public-prosecution-versus-habre>> accessed 30 November 2015.

¹⁸ Testimony of Djasrangar Moudonan, HRW, at 233.

¹⁹ Testimony of Katouma Deffalah, Tuesday 20 October 2015, Trust Africa, 'The Public Prosecution v. Hissène Habré - Summary of the Twenty-Ninth Hearing Held on 20 October 2015' (2015) <<http://www.trustafrica.org/en/component/k2/item/3212-the-public-prosecution-versus-habre>> accessed 30 November 2015.

control of reproductive function that led to the birth and miscarriage of infants in detention without medical care.²⁰

II. This Court has Jurisdiction to Prosecute Rape, Sexual Slavery and Forced Prostitution, and Other Forms of Sexual Violence of Comparable Gravity

16. The *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 1^{er} décembre 1990* (hereinafter, “Statute”) provides jurisdiction to this court over acts of sexual violence evidenced in the present case. Specifically, the Statute provides jurisdiction to adjudicate these acts of sexual violence in a number of ways:
- a. Rape as crime against humanity (Art. 6(a)), as the war crimes of “torture or inhuman treatment” (Art. 7(1)(b)) and of “outrages upon personal dignity” (Art. 7(2)(e)), and as the crime of torture (Arts. 6(g), 7(1)(b), 7(2)(a), and 8);
 - b. Slavery, including sexual slavery, as a crime against humanity (Art. 6(f) and Art. 6(a)), and forced prostitution as a crime against humanity (Art. 6(a)) and a war crime (Art. 7(2)(e));
 - c. Other forms of sexual violence of comparable gravity as a crime against humanity (Art. 6(a)) as well as the war crimes of “torture or inhuman treatment” (Art. 7(1)(b)) and of “outrages upon personal dignity” (Art. 7(2)(e)).
17. This Court has the power and responsibility to prosecute the crimes enumerated in Articles 6-8 of its Statute with respect to acts of rape, sexual slavery, and other forms of sexual violence. In doing so, this Court should avail itself of the considerable developments under customary international law that shed light specifically on these crimes at the time of the Habré regime.

III. The Prosecution of Sexual Crimes Conforms with Customary International Law and the Principle of Legality

A. International Crimes and Customary International Law

18. Customary international law is a binding source of public international law consisting of “general practice accepted as law.”²¹ The existence of a rule under customary international law requires two elements: state practice and belief that such practice is required as a matter of law (*opinio juris*).²²

²⁰ HRW at 237-38.

²¹ Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993, art. 38.

²² *The North Sea Continental Shelf Cases (Germany v. Denmark; Germany v. Netherlands)*, 1969 I.C.J. 3, para. 77.

19. Evidence of custom can be found in a multitude of sources including decisions of international and national tribunals, national legislation or military manuals, international treaties, diplomatic correspondences, the practice of international organs, and official government statements.²³
20. As a branch of public international law, international criminal law can be based on customary international law (which applies to the entire international community of states) and conventional international law (through which criminalization provisions apply only to states party to a particular treaty).²⁴
21. For a specific conduct to be an international crime under customary international law, the violation of the rule must entail, under customary international law, the individual criminal responsibility of the person breaching that rule.²⁵
22. International humanitarian law governs armed conflict situations and addresses the legal protections owed to those not or no longer taking part in fighting and the regulation of particular means and methods of warfare.²⁶ The four Geneva Conventions of 1949 and their Additional Protocol I²⁷—which specifically address the treatment of wounded, sick and shipwrecked soldiers, prisoners of war, and civilians during armed conflict—make up the backbone of international humanitarian law, and apply in international armed conflict. The vast majority of codified rules of international humanitarian law apply only in international armed conflict.²⁸ While a more limited set of rules codified in Common Article 3 of the four Geneva Conventions and Additional Protocol II applies to non-international

²³ Ian Brownlie, *Principles of Public International Law*, 5th ed., Oxford: Clarendon Press, 1998, 7; see also Yearbook of the International Law Commission, *Report of the International Law Commission: Ways and Means for Making the Evidence of Customary International Law more Readily Available*, Vol. II, 2nd Session (1950), at 368-372.

²⁴ Antonio Cassese, *International Criminal Law* (Oxford University Press 2003) [hereinafter Cassese 2003], at 25-29.

²⁵ *Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 [hereinafter *Tadić* Appeal Decision 1995], para 94. See also Cassese, at 50.

²⁶ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law: Volume I, Rules* (Cambridge University Press 2009) [hereinafter ICRC 2009], at xv.

²⁷ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Adopted 12 August 1949, entered into force on 21 October 1950) 75 U.N.T.S. 31 [hereinafter Geneva Convention (I)]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Adopted 12 August 1949, entered into force on 21 October 1950) 75 U.N.T.S. 85 [hereinafter Geneva Convention (II)]; Geneva Convention relative to the Treatment of Prisoners of War (Adopted 12 August 1949, entered into force on 21 October 1950) 75 U.N.T.S. 135 [hereinafter Geneva Convention (III)]; Geneva Convention relative to the Protection of Civilian Persons in Time of War (Adopted 12 August 1949, entered into force on 21 October 1950) 75 U.N.T.S. 287 [hereinafter Geneva Convention (IV)]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (Adopted 08 June 1977, entered into force 7 December 1978) 1125 U.N.T.S. 609 [hereinafter Additional Protocol I].

²⁸ ICRC 2009, at xxxiv.

armed conflict,²⁹ it is increasingly recognized that most of international humanitarian law rules equally apply to non-international armed conflicts as a matter of customary international law.³⁰

23. In assessing whether violations of international humanitarian law are criminalized under customary international law, courts look at, in order of importance, other national and international tribunals, military manuals, national legislation of states or general principles of criminal justice, and the legislation and judicial practice of the state to which the accused belongs or where the crime occurred.³¹
24. For example, in *Prosecutor v. Duško Tadić*, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) examined military manuals, national legislation, national cases and UN Security Council resolutions in order to determine whether violations of international humanitarian law governing internal armed conflicts entail individual criminal responsibility under customary international law.³² Similarly, in *Prosecutor v. Anto Furundžija*, a trial chamber of the ICTY examined the development of the prohibition of rape between 1863 and 1946 and its criminalization by both national and international tribunals to conclude that the violation of the prohibition entailed criminal liability under customary international law.³³ This exercise is critical to remain faithful to the principle of legality, *nullum crimen sine lege*.

²⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (Adopted 08 June 1977, entered into force 7 December 1978) 1125 U.N.T.S. 609 [hereinafter Additional Protocol II], art. 4(2)(e)

³⁰ *Id.* It should be noted that many of the prohibitions contained in the Geneva Conventions now constitute war crimes regardless of whether they are committed in an international or a non-international armed conflict. See e.g. Jean-Marie Henckaerts, 'Annex. List Of Customary Rules Of International Humanitarian Law' (2005) 87 International Review of the Red Cross; ICRC 2009, at 568.

³¹ Cassese 2003, at 51.

³² *Tadić* Appeal Decision 1995, paras. 128-134.

³³ *Prosecutor v. Anto Furundžija* (Judgment), Case No. IT-95-17/1-T, Trial Chamber, 10 December 1998, [hereinafter *Furundžija*, Trial Judgment] paras. 168-69.

168. The prohibition of rape and serious sexual assault in armed conflict has also evolved in customary international law. It has gradually crystallised out of the express prohibition of rape in article 44 of the Lieber Code and the general provisions contained in article 46 of the regulations annexed to Hague Convention IV, read in conjunction with the 'Martens clause' laid down in the preamble to that Convention. While rape and sexual assaults were not specifically prosecuted by the Nuremberg Tribunal, rape was expressly classified as a crime against humanity under article II(1)(c) of Control Council Law No. 10. The Tokyo International Military Tribunal convicted Generals Toyoda and Matsui of command responsibility for violations of the laws or customs of war committed by their soldiers in Nanking, which included widespread rapes and sexual assaults. The former Foreign Minister of Japan, Hirota, was also convicted for these atrocities. This decision and that of the United States Military Commission in Yamashita, along with the ripening of the fundamental prohibition of "outrages upon personal dignity" laid down in Common Article 3 into customary international law, has contributed to the evolution of universally accepted norms of international law prohibiting rape as well as serious sexual assault. These norms are applicable in any armed conflict.

169. It is indisputable that rape and other serious sexual assaults in armed conflict entail the criminal liability of the perpetrators.

B. The Principle of Legality

25. The principle of *nullum crimen sine lege*, also known as the principle of legality, postulates that a person may only be held individually criminally responsible for an act if, at the time of its commission, that act was regarded as a criminal offence by the relevant legal order.³⁴
26. The purpose behind this principle is to protect citizens from the arbitrary exercise of state power, such as a state's attempt to punish them for actions that were legal when committed.³⁵ This principle is expressed in the majority of criminal law systems and is codified in key human rights treaties, including the International Covenant on Civil and Political Rights (Art. 15), the African Charter on Human and People's Rights (Art. 7(2)), the European Convention on Human Rights (Art. 7) and the American Convention on Human Rights (Art. 9).³⁶
27. As demonstrated in Sections IV to VI below, the acts of rape, sexual slavery and forced prostitution, and other forms of sexual violence of comparable gravity allegedly committed by Habré or his agents were crimes under customary international law before his regime came to power. Accordingly, and in full respect of the principle of legality, nothing prevents this Court from qualifying the acts of sexual violence in this case as crimes against humanity, war crimes, and a form of torture, at the time of the Habré regime.

IV. Rape Could Qualify as War Crimes, a Crime Against Humanity, and a Form of Torture at the time of the Habré Regime

28. The "Summary of Relevant Facts" in Section I.C above reflects numerous allegations of rape in the current record.

A. Definition of Rape

29. Throughout the latter half of the nineteenth century and the early twentieth century, the concepts of rape or other sexual assault were framed as violations of, or outrages upon, "family honour" or *women's* honor in particular.³⁷ Before the

³⁴ Cassese 2003, *supra* note 24, at 147.

³⁵ *Id.*

³⁶ See International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 U.N.T.S. 171 [hereinafter ICCPR]; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force on 21 October 1986) 1520 U.N.T.S. 217 [hereinafter African Charter]; Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force on 3 September 1953) 213 U.N.T.S. 221; American Convention on Human Rights "Pact of San Jose, Costa Rica" (adopted 22 November 1969, entered into force on 17 July 1978) 1144 U.N.T.S. 123 [hereinafter American Convention on Human Rights].

³⁷ 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* (Cambridge University Press 2011) [hereinafter Bassiouni 2011], at 428. Similarly, Kelly Askin noted that the rape of Belgian women by German soldiers during the First World War was referred to as "outrages upon the

1990s, military tribunals and conventions often recognized “rape” to be a war crime without defining it.³⁸

30. In the 1990s, the ICTY offered a set of definitions of rape that may be of interest to this court. First, in *Furundžija*, an ICTY trial chamber defined rape as follows: “(i) 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; (ii) by coercion or force or threat of force against the victim or a third person.”³⁹
31. Then, in *Prosecutor v. Dragoljub Kunarac et al.*, another ICTY trial chamber adopted the first part of the definition of rape which had been articulated in the *Furundžija* case, but replaced the second part of the definition with the following terms “where such sexual penetration occurs without the consent of the victim.”⁴⁰ In making this modification, it explained that, for this purpose, consent “must be consent given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances.”⁴¹
32. The Elements of Crimes accompanying the Rome Statute of the International Criminal Court (ICC) offers a definition of rape that draws from the jurisprudence of the ICTY. It is gender-neutral as to victim and perpetrator and defines rape in both Articles 7 (as a crime against humanity) and 8 (as a war crime) as follows:

The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.

The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment,

honor of women”. Kelly D. Askin, 'Prosecuting Wartime Rape And Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles' (2003) 21 Berkeley Journal of International Law [hereinafter Askin 2003], at 300 n. 61.

³⁸ See e.g. *Trial of General Tomyuki Yamashita*, United Nations War Crimes Commission, Law Report of Trials of War Criminals Vol. IV, Case No. 21, United States Military Commission, Manila 8th October-7th December, 1945 (1948) [hereinafter *Trial of Yamashita* 1945], at 35; *Trial of Takashi Sakai*, United Nations War Crimes Commission, Law Report of Trials of War Criminals Vol. XIV, Case No. 83, Chinese War Crimes Military Tribunal of the Ministry of National Defense, Nanking, 29th August, 1946 (1949) [hereinafter *Trial of Takashi Sakai* 1946], at 7; *Trial of Washio Awochi*, United Nations War Crimes Commission, Law Report of Trials of War Criminals Vol. XIII, Case No. 76, Netherlands Temporary Court-Martial at Batavia, Judgment Delivered on 25th October, 1946 (1949) [hereinafter *Trial of Washio Awochi* 1946], at 123.

³⁹ *Furundžija*, Trial Judgment, para. 185.

⁴⁰ *Prosecutor v. Dragoljub Kunarac et al.* (Judgment), Case Nos. IT-96-23-T & IT-96-23/1-T, Trial Chamber, 22 February 2001 [hereinafter *Kunarac et al.* Trial Judgment] para. 460.

⁴¹ *Id.*

or the invasion was committed against a person incapable of giving genuine consent.⁴²

33. As this Court considers the definition of rape in the case before it, *amici* urge inclusion of the following elements:

(i) 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;

(ii) by coercion, force, or threat of force against the victim, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another third person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

Notions of consent and coercion must be interpreted in light of factors such as the age of the individuals and surrounding context. For example, prison should be regarded as an inherently coercive environment for detainees.

B. Rape as Multiple War Crimes

34. Under the Court's Statute, rape can amount to war crimes committed in both international and non-international armed conflict.

35. First, Article 7(1)(b) of the Statute draws from the 1949 Geneva Conventions, which governs conduct in the context of international armed conflict. It provides for the prosecution of the war crime of "torture or inhuman treatment" in that context. Rape is a form of torture and inhuman treatment as a grave breach of the Geneva Conventions of 1949.⁴³

36. Separately, Article 7(2) of the Statute draws from Common Article 3 to the 1949 Geneva Conventions and of Additional Protocol II, which apply to non-international armed conflicts. Specifically, Article 7(2)(e) of the Court's Statute provides for prosecution of the war crime of "outrages upon personal dignity." Rape is a form of outrages upon personal dignity as a violation of Common Article 3 to the 1949 Geneva Conventions and of Additional Protocol II.⁴⁴

⁴² Elements of Crimes of the International Criminal Court, ICC-ASP/1/3 at 108, U.N. Doc. PCNICC/2000/1/Add.2 (2000) [hereinafter Elements of Crimes of the ICC], arts. 7(1)(g)-1, 8(2)(b)(xxii)-1, 8(2)(e)(vi)-1. Although the Elements of Crimes are not binding to this court, they are instructive.

⁴³ See, e.g., *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21/T, Trial Chamber, Judgment, 16 November 1998 [hereinafter *Delalić et al.* Trial Judgement], paras. 96-943, 955-965, 1010-1011, 1237, 1253, 1262-1263, 1285

⁴⁴ See, e.g., *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Judgement and Sentence, 14 July 2011, paras 2781, 6183, 6186.

37. These provisions are reflected in customary international law, which has for decades criminalized these acts in the context of international and non-international armed conflicts.

1. Rape as the war crime of “torture or inhuman treatment” (Art. 7(1)(b))

38. When committed in the framework of an international armed conflict, and against protected persons, the Geneva Conventions provide for a list of grave breaches and for a duty of States to punish the perpetrators of these particularly serious violations.⁴⁵ Grave breaches include “torture or inhuman treatment.”⁴⁶ This offence is reflected in Article 7(1)(b) of the Statute.

39. In 1958, the International Committee of the Red Cross (ICRC), the authoritative entity for 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 direct prohibition of rape.⁴⁷

40. In light of the above, the alleged rapes in the record of proceedings could clearly be characterized as the war crime of torture or inhuman treatment in the context of an international armed conflict.⁴⁸

⁴⁵ Geneva Convention (I), arts. 49, 50; Geneva Convention (II), arts. 50, 51; Geneva Convention (III), arts. 129, 130; Geneva Convention (IV), arts. 147, 148, Additional Protocol I, arts. 85, 86.

⁴⁶ Geneva Convention (I), art. 50; Geneva Convention (II), art. 51; Geneva Convention (III), art. 130; Geneva Convention (IV), art. 147.

⁴⁷ See Oscar M. Uhler and Henri Coursier, *Commentary On The Geneva Conventions Of 12 August 1949: Geneva Convention Relative To The Protection Of Civilian Persons In Time Of War* (International Red Cross 1958) [hereinafter ICRC Commentary 1958], at 598.

⁴⁸ Ill-treatment is also prohibited in the framework of non-international armed conflicts, similar to what is provided by art. 7(2)(a) of the Statute. Conventional law regulating conduct in the context of non-international armed conflict is contained in Article 3 common to the 1949 Geneva Conventions and Additional Protocol II, under the heading “cruel treatment.” Common Art. 3 to the Geneva Conventions prohibits “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and degrading treatment”. Art. 4(2)(a) of the Additional Protocol II reproduces this terminology. While Art. 3 does not contain an explicit reference to criminal responsibility – contrary to the “grave breaches provisions” – there is a strong argument to be made that if a violation of international humanitarian law is considered sufficiently serious to constitute a war crime in an international armed conflict, it is also to be considered a war crime in non-international armed conflicts. The nature of the armed conflict in the framework of which an unlawful act takes place has no bearing on the degree of harm caused to the victim and his/her community. This reasoning is in fact reflected in the finding of the ICTY’s Appeals Chamber in the *Tadić* case, which, less than a decade after the end of the Habré régime, in 1995, found that: “[...] customary international law imposes criminal liability for serious violations of Common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.” See *Tadić* Appeal Decision 1995, para. 134.

2. Rape as the war crime of “outrages upon personal dignity” (Art. 7(2)(e)).

41. “Outrages upon personal dignity”, as provided in Article 7(2)(e) of this Court’s Statute, have long been criminalized under customary international law in the context of non-international armed conflicts.
42. The main law governing conduct in the context of non-international armed conflicts is Common Article 3 to the 1949 Geneva Conventions and of Additional Protocol II. Unlike the majority of the Geneva Conventions, Common Article 3 establishes the prohibition of certain conduct in conflicts “*not* of an international character.”⁴⁹ These include Article 3(1)(c), “outrages upon personal dignity, in particular humiliating and degrading treatment.”⁵⁰ Article 3(1)(c) easily encompasses acts constituting rape and other forms of sexual violence.⁵¹ Common Article 3 to the 1949 Geneva Conventions and of Additional Protocol II has crystallized into customary international law.⁵² This was also confirmed by the ICTY in 1995.⁵³
43. In addition to Common Article 3, Protocol II (1977) to the 1949 Geneva Conventions also provides that “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault” shall remain prohibited at any time and in any place whatsoever.⁵⁴ This exact language is used in the Statute of this Court.

3. Historical treatment of rape as a war crime under customary international law

44. It bears noting that longtime developments in customary international law support the characterization of rape as a war crime.
45. One of the earliest examples of individual and independent criminalization of rape in the context of armed conflict can be found in United States Army General Order No. 100 of 1863. Known as the “Lieber Code”, this United States army regulation codified international customary laws of war in place at the time and became the basis of codification of the customary laws of war into the next century.”⁵⁵ Article 44 of the Lieber Code expressly prohibited “all rape,

⁴⁹ Geneva Convention (IV), art. 3.

⁵⁰ *Id.* art. 3(1)(c).

⁵¹ See ICRC 2009, *supra* note 26, at 323-324.

⁵² *Id.* at 590. It should be noted that in the case of *Nicaragua v. United State of America* (1986), the International Court of Justice found that Common Article 3 represents ‘elementary consideration of humanity’ and as such applies to both non-international and international armed conflicts. See *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 1986 I.C.J. 14, para. 218.

⁵³ *Tadić* Appeal Decision 1995, paras. 128-134.

⁵⁴ Additional Protocol II, 4(2)(e).

⁵⁵ Bassiouni 2011, *supra* note 37, at 427.

wounding, maiming, or killing... under the penalty of death.”⁵⁶ Article 37, which applied during military occupation, required the protection of “persons of the inhabitants, especially those of women; and the sacredness of domestic relations.”⁵⁷ Violations of Article 37 were also, at a maximum, punishable by death. Though originally drafted for domestic application, the Lieber Code became a foundational part of customary international law regarding conduct in war, including the criminalization of rape.

46. Then, established in 1919 to report on the creation of an international war crimes tribunal for atrocities committed during the First World War, the Commission on the Responsibility of the Authors of War and on Enforcement of Penalties (hereinafter “1919 World War I Commission”) included rape and forced prostitution on a list of thirty-two crimes constituting violations of the customary international laws of war.⁵⁸ Rape was ranked as fifth in terms of gravity.⁵⁹
47. A World War I criminal tribunal was never created. However, the United Nations War Crime Commission (UNWCC) (1943-1948) relied on the World War I Commission’s definition of war crimes and explicitly found rape to be such a crime. The UNWCC assisted national governments in trying war criminals after World War II.⁶⁰ A number of UNWCC-related war crime trials in Europe, the United States, and Australia were brought based on sexual violence charges alone, indicating the status of rape as a war crime under customary international law.⁶¹
48. Notably, commanders who failed to prevent the commission of rape by subordinates were also charged with war crimes as early as the 1946 *Yamashita* case, where an American Military Tribunal tried a Japanese General for war crimes committed by his troops in the Philippines. The Tribunal held that, “[w]here murder and rape and vicious, revengeful actions are widespread

⁵⁶ U.S. War Department, 'Instructions For The Government Of Armies Of The United States In The Field, General Orders No. 100' (1863), art. 44.

⁵⁷ *Id.* art. 37.

⁵⁸ Report Presented to the Preliminary Peace Conference by the Commission on the Responsibilities of the Authors of the War and on Enforcement of Penalties (Carnegie Endowment for International Peace, Division of International Law Pamphlet No 3, 1919), reprinted in 14 American Journal of International Law 95 (1920) [hereinafter 1919 Commission Report], at 114, 127.

⁵⁹ Kelly D. Askin, *War Crimes Against Women* (M. Nijhoff Publishers 1997) [hereinafter Askin 1997], at 42 n. 148.

⁶⁰ Dan Plesch, Susana Sácouto and Chante Lasco, 'The Relevance Of The United Nations War Crimes Commission To The Prosecution Of Sexual And Gender-Based Crimes Today' (2014) 25 Criminal Law Forum [hereinafter Plesch 2014], at 350-352.

⁶¹ *Id.* at 359, citing to the following examples Australia: Japanese man charged for the rape and related torture of a woman, at 359, n. 13 & 38; Greece: Bulgarian man charged with raping two women. Greek Charges Against Bulgarian War Criminals (Greece) n. 39; U.S.: Case against Japanese soldiers for rape and assault with intent to commit rape on an American Nurse. US Charges Against Japanese War Criminals, at 360, n. 40; Yugoslavia: Lieutenant in charge of food distributions raped 13 year old girl, noting that the latter was charged as a violation of Yugoslav Penal Code and art. 46 of Hague Convention of 1907 at 360 n. 41.

offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible.”⁶²

49. After World War II, the 1949 Geneva Conventions referred to rape more explicitly in their prohibitions. Article 27 requires that “[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.”⁶³
50. Protocol I (1977) to the 1949 Geneva Conventions then reinforced the prohibition against rape and sexual violence, with Article 76(1) providing that women “shall be protected in particular against rape, forced prostitution and any other form of indecent assault.”⁶⁴
51. More recently, the Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC) found rape to be a war crime in the period between 1975 and 1979. In Case No. 002, the bench found the following:

The offence of rape has long been prohibited as a war crime, dating back at least to the Lieber Code of 1863. The Oxford Manual, drafted by the Institute of International Law in 1880, states that “family honour and rights”, a phrase understood to encompass a prohibition on rape and sexual assault, must be respected as part of the laws and customs of war. The 1899 and 1907 Hague Conventions repeat the same requirement, reinforced by the general protection afforded by the Martens Clause. Rape was then explicitly prohibited in the Geneva Conventions of 1949, Additional Protocol I of 1977, and Additional Protocol II of 1977. It is thus clear that rape was a war crime before 1975, and was confirmed as such by the Additional Protocols during the ECCC’s temporal jurisdiction.⁶⁵

52. State practice, military manuals and penal codes issued around the world well before the Habré regime demonstrate that rape could qualify as a war crime by the time Hissène Habré came to power in Chad. In particular, between 1945 and 1960, a number of countries including Australia, China, Ethiopia, the Netherlands, and the United Kingdom passed legislation or issued rules of military conduct specifically criminalizing rape as a war crime.⁶⁶

⁶² *Trial of Yamashita* 1945, at 35.

⁶³ Geneva Convention (IV), art. 27.

⁶⁴ Additional Protocol I, art. 76(1).

⁶⁵ *Case No. 002*, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 145 & 146), Pre-Trial Chamber, Decision on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order, 15 February 2011, para. 151.

⁶⁶ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law: Volume 2, Practice* (Cambridge University Press 2005) at 2193-2202. Netherlands, *Definition of War Crimes Decree* (1946), art. 1; China, *Law Governing the Trial of War Criminals* (1946), art. 3(3), 17; United Kingdom, *Military Manual* (1958), § 626; Argentina, *Law of War Manual* (1969), § 4.010.

53. With respect to acts of rape and other forms of sexual violence, the seminal study of the ICRC on customary international humanitarian law found that “[s]tate practice establishes [the prohibition on rape and other forms of sexual violence] as a norm of customary international law applicable in both international and non-international conflicts.”⁶⁷
54. Developments in international instruments, tribunal jurisprudence, and state practice reflected a growing understanding of rape as a war crime by the time of the Habré regime. These developments should assist the Court in qualifying acts of rape as the war crimes of “torture or inhuman treatment” (Art. 7(1)(b)) or of “outrages upon personal dignity” (Art. 7(2)(e)), as discussed above.

C. Rape as a Crime Against Humanity

55. This Court’s Statute also criminalizes rape as a crime against humanity under Article 6(a).
56. This provision is reflected in customary international law, which has for decades criminalized rape as a crime against humanity.

1. Crimes against humanity under customary international law (Art. 6)

57. The term “crimes against humanity” has been used since the dawn of the twentieth century. The term first appeared in a joint declaration by France, Russia and the United Kingdom in 1915 denouncing the massacre of Armenians by the Turkish government and announcing that “[i]n view of these new crimes of Turkey *against humanity and civilization*” the Allied governments “will hold personally responsible [for] these crimes all members of the Ottoman government and those of their agents who are implicated in such massacres.”⁶⁸
58. The report of the 1919 World War I Commission enumerated a list of “violations of the laws and customs of war *and the laws of humanity*.”⁶⁹
59. By 1945, crimes against humanity became an international crime through Article 6(c) of the Charter of the International Military Tribunal at Nuremberg.⁷⁰ The 1945 Allied Control Council Law No. 10 (CCL 10), a law empowering Allied forces to try suspected war criminals in their zones of occupation, also

⁶⁷ ICRC 2009, at 323.

⁶⁸ Telegram from Secretary of State to American Embassy, Constantinople, May 29, 1915, U.S. National Archives, R.G. 59, 867.4016/67 (1915) <http://www.armeniangenocide.org/popup/affirmation_window.html?Affirmation=160> accessed 30 November 2015.

⁶⁹ 1919 Commission Report, *supra* note 58, at 114, 127.

⁷⁰ Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Charter of the International Military Tribunal (entered into force 8 August 1945) 82 U.N.T.S. 279 [hereinafter Nuremberg Charter], art. 6.

criminalized crimes against humanity.⁷¹ In 1946, the Charter of the International Military Tribunal for the Far East Charter included crimes against humanity within the tribunal's jurisdiction.⁷² Crimes against humanity were prosecuted under all three instruments.

60. According to Bassiouni, crimes against humanity had become custom by 1945:

The modern significance of Article 6(c) of the [Nuremberg Charter] is evident in the basic structure of the definitions of [crimes against humanity] found in its progeny: Article 5 of the ICTY Statute; Article 3 of the ICTR Statute; and Article 7 of the Rome Statute. In other words, *a custom had emerged in 1919, which though not fully recognized at that time, had ripened in 1945.*⁷³

61. The criminalization of crimes against humanity under customary international law is also evidenced by state practice. Domestic courts have convicted individuals for crimes against humanity. For example, France, Canada and Israel have all tried individuals for crimes against humanity between 1946 and 1998.⁷⁴

2. Rape as a crime against humanity (Art. 6(a))

62. Rape as a crime against humanity finds its origins in the 1919 World War I Crimes Commission. The Commission's report explicitly included rape in a list of "violations...of the laws of humanity."⁷⁵ Rape was ranked fifth on the list, which ranked thirty-two crimes that began with the gravest crimes against the person and closed with property crimes.⁷⁶
63. The Recommendations of the 1919 Commission were the basis of Control Council Law No. 10, which specifically listed rape as a crime against humanity under article II(1)(a):

Crimes against Humanity. Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, *rape*, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds

⁷¹ Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945, 3 Official Gazette Control Council for Germany 50-55 (1946) [hereinafter CCL10], art. II(1)(b).

⁷² Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589, 4 Bevens 20 (as amended Apr. 26, 1946, 4 Bevens 27) [hereinafter Tokyo Tribunal Charter], art. 1

⁷³ Bassiouni 2011, *supra* note 37, at xxxi (emphasis added).

⁷⁴ Bassiouni 2011, at 355. ("Israel prosecuted Adolf Eichmann in 1960, France prosecuted Klaus Barbie in 1988, Paul Touvier in 1994, and Maurice Papon in 1998, and Canada prosecuted Imre Finta in 1989.")

⁷⁵ 1919 Commission Report, *supra* note 58, at 114, 127.

⁷⁶ Askin 1997, *supra* note 59, at 42 n.148; 1919 Commission Report, at 114, 127.

whether or not in violation of the domestic laws of the country where perpetrated.⁷⁷

Using CCL 10 as a legal basis, victorious allies prosecuted dozens of mid- and lower-level perpetrators in their respective zones of occupation.⁷⁸

64. The prosecution of rape as a crime against humanity also occurred in domestic courts well before the Habré regime. In the case of *Takashi Sakai* from 1946, a war tribunal conducted under Chinese jurisdiction found a Japanese military commander guilty of war crimes and crimes against humanity for allowing his brigade to engage in rape, amongst other acts.⁷⁹
65. The *Takashi Sakai* case was one of many UNWCC-supported cases⁸⁰ that charged and convicted for rape in post-war tribunals in various countries including Australia, China, Italy, the United States, Yugoslavia, Denmark, France, Greece and Poland.⁸¹ Although the majority of those cases addressed rape as a war crime, it is important to note that there was significant overlap between crimes against humanity and war crimes generally at the time.⁸² These cases clearly demonstrate that rape occurring within the context of widespread violence against a civilian population entailed individual criminal responsibility well before the Habré regime.⁸³
66. Additionally, a number of national laws list rape as a distinct crime against humanity. For example, in Bangladesh, the International Crimes (Tribunals) Act of 1973 lists rape as a crime against humanity in section 3(2)(a).⁸⁴ Similarly, when German courts were granted jurisdiction to prosecute crimes committed by Nazis against German citizens, courts were required to prosecute crimes against humanity using the definition of crimes against humanity provided in CCL 10, which includes rape.⁸⁵

⁷⁷ CCL10, art. II(1)(a) (emphasis added).

⁷⁸ See Askin 1997, at 121-26; Bassiouni 2011, *supra* at note 37, 156-58.

⁷⁹ *Trial of Takashi Sakai* 1946, *supra* note 38, at 7.

⁸⁰ For a discussion on the UNWCC, see para. 47.

⁸¹ See Plesch 2014, *supra* note 60, at 358.

⁸² See *Complete History of the United Nations War Crimes Commission and the Development of the Laws of War, Chapter 9*, United Nations War Crimes Commission, His Majesty's Stationary Office (1948), at 188-89 <<http://www.cisd.soas.ac.uk/documents/un-war-crimes-project-history-of-the-unwcc,52439517>> accessed 30 November 2015.

⁸³ See Plesch 2014, at 358.

⁸⁴ The International Crimes (Tribunals) Act, 1973 (Act No. XIX of 1973). Since the establishment of the Bangladeshi International Crimes Tribunal in 2009, which was set up to address war crimes during the 1971 Bangladesh Civil War, there have been a number of convictions for rape as a crime against humanity for acts committed in 1971. See e.g. *The Chief Prosecutor v. Delowar Hossain Sayeedi*, ICT-BD Case No. 01 of 2011 (Feb. 28, 2014), charges no. 16 and 14, at 117; *The Chief Prosecutor v. Zahid Hossain Khokon*, ICT-BD Case No. 4 of 2013 (Nov. 11, 2014), charges no. 4, at 104.

⁸⁵ See Bassiouni 2011, *supra* note 37, at 665.

67. It should be noted that the Pre-Trial Chamber and the Appeals Chamber of the ECCC declined to find rape to be a crime against humanity under customary international law between 1975 and 1979. However, these limited decisions were not dispositive of the issue generally because the Courts found that the parties had simply not met their burden of proof on this issue. In Case No. 002, the pre-trial chamber stated:

The Co-Investigating Judges and the Co-Prosecutors have not referred this Chamber to any other sources [other than the Control Council Law 10] indicative of the customary criminalisation of rape as a crime against humanity in its own right prior to, or during, the period 1975 to 1979.⁸⁶

The Appeals Chamber in Case No. 001 similarly rejected the argument due to prosecutor's reliance on material that fell outside of the temporal jurisdiction of the court.⁸⁷ It appears that the ECCC was not aware of, *inter alia*, the many UNWCC-supported cases addressing rape.⁸⁸

68. In light of the above, rape had been recognized as a crime against humanity under customary international law at the time of the Habré regime.

D. Rape as Torture

69. *Amici* note with approval that the Court has included rape and sexual abuse as material acts of torture (“les actes matériels de torture”) in its Ordonnance, citing as an example of sexual abuse the practice of applying hot pepper to genitals (“Exemple: introduction de piment dans les parties intimes.”)⁸⁹ The facts in the present case involve multiple incidents of rape, including rape perpetrated against detained, pregnant, and under-aged persons. Witness-victim testimonies and HRW reports further indicate that men and women alike suffered sexualized torture in the form of rape and intentional injury to the genitals. The acts of rape and sexual abuse alleged in the “Summary of Relevant Facts” in Section I.C above may be found to constitute a form of the independent crime of torture under customary international law.
70. Many acts of sexual torture not amounting to rape are treated along with rape as torture in the instruments and jurisprudence in the paragraphs below. This Court has the discretion to characterize acts of rape and other forms of sexual violence as the independent crime of torture under article 8 of this Court's Statute, when

⁸⁶ *Case No. 002*, Case File No. 02/19-09-2007-ECCC/OCIJ (PTC75), Pre-Trial Chamber, Decision on Ieng Sary's Appeal against the Closing Order, 11 April 2011 [hereinafter Decision on Ieng Sary's Appeal], para. 369.

⁸⁷ *Case No. 001*, Case File No. 01/18-07-2007-ECCC/SC, Supreme Court Chamber, Appeal Judgment, 3 February 2012 [hereinafter *Case No. 001* Appeal Judgment], paras. 177-78.

⁸⁸ Neither ECCC judgment refers to any UNWCC-supported trials and the majority of UNWCC cases were not part of the public record at the time of the ECCC decisions. See Plesch, at 358.

⁸⁹ Ordonnance De Non-Lieu Partiel, De Mis En Accusation Et De Renvoi Devant La Chambre Africaine Extraordinaire d'Assises, at 136.

the elements of the crime of torture are met. Alternative characterizations of acts of other forms of sexual violence apart from rape are discussed below, in Section VI.

1. Torture as a crime under customary international law (Arts. 6(g), 7(1)(b), 7(2)(a), and 8)

71. This Court is empowered to prosecute acts of rape constituting the independent crime of torture under article 8 of the Statute. The Court is also empowered to prosecute torture as a crime against humanity under article 6(g) of the Statute and as a war crime committed in an international armed conflict under Article 7(1)(b) of the Statute as well as a war crime committed in a non-international armed conflict under Article 7(2)(a) of the Statute.
72. Torture perpetrated as part of a widespread or systematic attack against a civilian population can qualify as a crime against humanity⁹⁰ and torture perpetrated during armed conflict can qualify as a war crime⁹¹ if the contextual, or *chapeau*, elements of these two crimes are met.⁹² Torture also exists as an independent crime under customary international law.
73. Few international norms are more firmly established than the prohibition against torture. This prohibition is recognized in every major human rights instrument.⁹³ The prohibition against torture is also codified in several regional human rights agreements.⁹⁴ Each of these international instruments makes clear that the prohibition against torture is absolute. It allows for no derogation.

⁹⁰ “Although torture was not prohibited as a crime against humanity under the IMT [Nuremberg] or IMTFE [Tokyo] Charters, Article II(1)(c) of the Control Council Law No. 10 included torture within the definition of ‘Crimes against Humanity’ as follows: ‘Atrocities and offenses, including but not limited to [...] torture [...]’ Under that law, convictions were reached for torture as a crime against humanity in a number of cases before the NMTs.” *Case No 001* (Appeal Judgment), Case File No. 01/18-07-2007-ECCC/SC, Supreme Court Chamber, Appeal Judgment, 3 February 2012, paras. 185, citing *U.S. v. Brandt et al., “Judgment”*, 19 August 1946, reprinted in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Vol. II, (“Medical Case”)*, at 198, 216-217, 240, 247-248, 271 [hereinafter *Medical Case*]; *U.S. v. Altstoetter et al., “Judgment”*, 3-4 December 1947, reprinted in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Vol. III, (“Justice Case”)*, at 3-4, 23-25, 1087-1088, 1092-1093, 1107, 1155-1156, 1166, 1170; *U.S. v. Pohl et al., “Judgment”*, 3 November 1947, reprinted in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, at 965-966, 970-971, 1036-1038.

⁹¹ Torture is explicitly proscribed under the laws of war. See e.g., Geneva Convention (IV), arts. 3, 27, 32, 147; Geneva Convention (III), arts. 3, 13, 130.

⁹² As of November 2010, 8 individuals in ICTY proceedings and 4 in ICTR proceedings have been convicted for torture as a crime against humanity. Bassiouni 2011, *supra* note 37, at 419.

⁹³ See, e.g. Universal Declaration of Human Rights, G.A. Res. 217A U.N.Doc.A/810 (Dec. 12, 1948), art. 5; ICCPR, art. 7; Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Adopted 10 December 1984, entered into force 26 June 1987) 1465 U.N.T.S 85 [hereinafter *Convention Against Torture*], art. 2.

⁹⁴ See, e.g., European Convention for the Protection of Human Rights and Fundamental Freedoms, (Adopted 4 November 1950, entered into force Sept. 3, 1953), 213 U.N.T.S. 221, art. 3; American Convention on Human Rights, art. 5(2); African Charter, art. 5.

74. Under the 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Declaration Against Torture”), the elements of torture are as follows:

a) any act causing severe pain or suffering, whether physical or mental (*actus reus*);

b) that is intentionally inflicted upon on a person (*mens rea*);

c) by or at the instigation of a public official;

d) for such purposes as obtaining information or a confession; punishment; or intimidation from him or other persons.⁹⁵

75. The Supreme Court Chamber at the ECCC found that torture existed as an international crime by 1975 and held “the definition and elements of torture provided in the 1975 Declaration on Torture were declaratory of customary international law at that time.”⁹⁶ In making that determination, the Chamber examined “the [Nuremberg Tribunal’s] jurisprudence from 1946-1949 on torture as a crime against humanity under the Control Council Law No. 10; the ICRC Commentary to the 1949 Geneva Convention IV; the 1969 Greek Case by the European Commission on Human Rights; and the process surrounding the adoption of the 1975 Declaration on Torture.”⁹⁷

76. The Supreme Court Chamber likewise acknowledged that the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Convention Against Torture”) was declarative of customary international law at that time.⁹⁸

77. The Convention Against Torture (1984) defines the crime of torture as:

Any act by which severe pain or suffering, whether mental or physical, 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

⁹⁵ Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452 (XXX), annex, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975).

⁹⁶ *Case No. 001* Appeal Judgment, paras. 188, 196, 205.

⁹⁷ *Id.* at para.196-204.

⁹⁸ *Id.* at para.194. Although there are differences between the definition of torture in the 1984 convention and the 1975 declaration, they strongly resemble each other. *Id.* at paras. 184-205.

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.⁹⁹

78. Further, in the British House of Lord's 1998 decision in the Pinochet Extradition Case, Lord Millet found:

the systematic use of torture on a large scale and as an instrument of state policy had joined piracy, war crimes and crimes against peace as an international crime of universal jurisdiction well before 1984. I consider that it had done so by 1973.... The Convention against Torture (1984) did not create a new international crime. But it redefined it. Whereas the international community had condemned the widespread and systematic use of torture as an instrument of state policy, the Convention extended the offence to cover isolated and individual instances of torture provided that they were committed by a public official.¹⁰⁰

79. This Court can assess the acts of rape alleged in the "Summary of Relevant Facts" in Section I.C in light of both the 1975 and 1984 definitions of torture.
80. Torture was clearly prohibited as a crime against humanity, a war crime and an independent crime under customary international law at the time of the Hissène Habré regime in this case.

2. Rape as a form of torture under customary international law

81. International criminal tribunals have widely recognized rape as a form of torture under customary international law. As discussed below, the ICTY and ICTR consistently held rape to be a form of torture.¹⁰¹
82. Regional institutions such as the European Court of Human Rights (ECHR) and the Inter-American Court of Human Rights (ICHR) have likewise recognized rape as a form of torture.¹⁰²

⁹⁹ Convention Against Torture, art. I.

¹⁰⁰ *Regina v. Bow Street Metropolitan Stipendiary Magistrate And Others, Ex parte Pinochet Ugarte (No. 3)* [2000] 1 A.C. 147, 276.

¹⁰¹ See e.g., *Prosecutor v. Dragoljub Kunarac et al.* (Judgment), Case No. IT-96-23/I-A, Appeals Chamber, 12 June 2002 [hereinafter *Kunarac et al.* Appeal Judgment], paras. 134-156, 185; *Delalić et al.* Trial Judgement, para. 496; *Furundžija* Trial Judgement, para. 113.

¹⁰² See, e.g. *Aydin v. Turkey*, Eur. Ct. H.R. 23178/94 (1997) ECHR 75 (25 September 1997) [hereinafter *Aydin v. Turkey*], para 84-86; *Mejia v. Peru*, Case 10.970, Report 5/96, Inter-Am. C.H.R., OEA/Ser.L./V/II. 91 Doc. 7 at 157 (1996) [hereinafter *Mejia v. Peru*] Part V.B.3.a ("...Article 27 of the Fourth Geneva Convention of 1949 concerning the protection due to civilians in times of war explicitly

a. *Rape causes severe physical and mental pain and suffering*

83. Rape meets the torture requirement of infliction of severe physical and mental suffering. In *Kunarac et al.*, the ICTY Appeals Chamber confirmed the Trial Chamber's characterization of rape as torture with respect to the element of pain and suffering and held that the enormity of the suffering inflicted by rape *per se* meets the severity of pain and suffering required by the norm of torture:

[S]ome acts establish *per se* the suffering of those upon whom they were inflicted. Rape is obviously one of those acts. Sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterization as an act of torture... Severe pain or suffering, as required by the definition of the crime of torture, can thus be said to be established once rape has been proved, since the act of rape necessarily implies such pain or suffering.¹⁰³

The ICTY trial chamber in that case had found that “[t]he acts of the accused caused his victims severe mental and physical pain and suffering. Rape is one of the worst sufferings a human being can inflict upon another [...]”¹⁰⁴ Accordingly, it held that, “[b]y raping D.B. himself and bringing her and FWS-75 to Ulica Osmana ikica no 16, the latter at least twice, to be raped by other men, the accused Dragoljub Kunarac thus committed the crimes of torture and rape”.¹⁰⁵

84. In *Prosecutor v. Zejnil Delalić et al.*, among others, Hazim Delić was charged, *inter alia*, with the grave breach of torture for the rape of two women.¹⁰⁶ The ICTY trial chamber in that case found Hazim Delić guilty of torture for the rape of Ms. Čeček, finding that “there can be no question that these rapes caused severe mental pain and suffering to Ms. Čeček. The effects of the rapes that she suffered at the hands of Hazim Delić are readily apparent from her own testimony and included living in a state of constant fear and depression, suicidal tendencies, and exhaustion, both mental and physical.”¹⁰⁷
85. In *Prosecutor v. Laurent Semanza* before the ICTR in 2003, Victim A was raped after the accused encouraged a crowd to rape Tutsi women before killing them.¹⁰⁸ The trial chamber, “[n]oting, in particular, the extreme level of fear occasioned by

prohibits sexual abuse. Article 147 of that Convention which lists acts considered as ‘serious offenses’ or ‘war crimes’ includes rape in that it constitutes ‘torture or inhuman treatment.’ ”).

¹⁰³ *Kunarac et al.* Appeal Judgment, paras.150-151.

¹⁰⁴ *Kunarac et al.* Trial Judgment, para. 655.

¹⁰⁵ *Id.* para. 656.

¹⁰⁶ *Delalić et al.* Trial Judgement, paras. 942-943.

¹⁰⁷ *Id.*

¹⁰⁸ *Prosecutor v. Laurent Semanza* (Judgment and Sentence), Case No. ICTR 97-20-T, Trial Chamber, 15 May 2003, para. 481.

the circumstances surrounding the event and the nature of the rape of Victim A,” found that “the perpetrator inflicted severe mental suffering sufficient to form the material element of torture.”¹⁰⁹

86. In *Case No. 001* at the ECCC, the Supreme Court Chamber agreed with the Trial Chamber that “[c]ertain acts are considered by their nature to constitute severe pain and suffering. These acts include rape [...]’ Thus, ‘it is undisputed that rape may also constitute torture where all other elements of torture are established.’”¹¹⁰
87. In *Mejia v. Peru*, before the Inter-American Court of Human Rights in 1996, the Commission held that rape had caused Mejia’s physical and mental pain and suffering.¹¹¹ With respect to the physical and mental pain and suffering element, the Commission explained that “[t]he International Committee of the Red Cross ICRC has declared that the ‘serious offense’ of ‘deliberately causing great suffering or seriously harming physical integrity or health’ includes sexual abuse. Moreover, Article 76 of Additional Protocol I to the 1949 Geneva Conventions expressly prohibits rape or other types of sexual abuse.”¹¹²
88. In *Aydin v. Turkey*, before the European Court of Human Rights in 1997, the applicant reported that she had been tortured in detention by being beaten and raped.¹¹³ In finding that rape amounted to torture, the ECHR emphasized that the “[r]ape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence.”¹¹⁴
89. Among other physical and mental ailments, victims of rape can suffer from severe psychological impacts such as Post Traumatic Stress Disorder.¹¹⁵

b. Rape is intentionally inflicted for impermissible purpose

¹⁰⁹ *Id.* para. 482.

¹¹⁰ *Case No. 001* Appeal Judgment, para 207, *citing to* Trial Judgment, at para. 355.

¹¹¹ *Mejia v. Peru*, Part V.B.3.a.

¹¹² *Id.*

¹¹³ *Aydin v. Turkey*, para. 83.

¹¹⁴ *Id.*

¹¹⁵ *See e.g. Delalić et al.* Trial Judgement, para. 495 (rape inflicts particularly severe psychological suffering that “may be exacerbated by social and cultural conditions and [that] can be particularly acute and long lasting.”); *Mejia v. Peru* (rape causes “psychological trauma...from having been humiliated and victimized....”); Radhika Coomaraswamy, Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, UN Doc. E/CN.4/1997/47 ¶19 (12 February 1997) (stressing the frequency of post-traumatic stress disorder as a result of rape).

90. To be liable for torture under customary international law, the alleged act must be inflicted as a means to accomplish a particular end. Rape clearly satisfies the purpose requirements for torture under customary international law.
91. In *The Prosecutor v. Jean-Paul Akayesu*, the Trial Chamber held “[l]ike torture rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment control or destruction of a person. Like torture rape is a violation of personal dignity, and rape in fact constitutes torture when 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.”¹¹⁶
92. In *Furundžija*, the Trial Chamber explained that, “among the possible purposes of torture one must also include that of humiliating the victim. [...] The notion of humiliation is, in any event close to the notion of intimidation, which is explicitly referred to in the Torture Convention’s definition of torture.”¹¹⁷
93. In *Kunarac et al.*, the ICTY Appeals Chamber held “the Trial Chamber rightly concluded that the Appellants deliberately committed the acts of which they were accused and did so with the intent of discriminating against their victims because they were Muslim.”¹¹⁸ The Appeals Chamber further noted “the acts were committed against one of the victims with the purpose of obtaining information” and “all acts were committed for the purpose of intimidating or coercing the victims.”¹¹⁹ In response to Appellant’s argument that his avowed purpose of sexual gratification is not listed in the definition of torture, the Appeals Chamber upheld the conclusion of the Trial Chamber “that acts need not have been perpetrated solely for one of the purposes prohibited by international law. If one prohibited purpose is fulfilled by the conduct, the fact that such conduct was also intended to achieve a non-listed purpose (even one of a sexual nature) is immaterial.”¹²⁰
94. Similarly, in *Delalić et al.*, the Trial Chamber explained:

The use of the words “for such purposes” in the customary definition of torture, indicate that the various listed purposes do not constitute an exhaustive list, and should be regarded as merely representative. Further, there is no requirement that the conduct must be solely perpetrated for a prohibited purpose. Thus, in order for this requirement to be met, the prohibited purpose must simply be part of the

¹¹⁶ *The Prosecutor v. Jean-Paul Akayesu* (Judgment), Case No. ICTR-96-4-T, Trial Chamber, 2 September 1998 [hereinafter *Akayesu* Trial Judgment], para. 597.

¹¹⁷ *Furundžija* Trial Judgment, para. 162. This was affirmed by the ICTY Appeals Chamber. See *Prosecutor v. Anto Furundžija* (Appeal Judgment), Case No. IT-95-17/1-A, Appeal Chamber, 21 July 2000, para. 111.

¹¹⁸ *Kunarac* Appeal Judgement, para. 154.

¹¹⁹ *Id.*

¹²⁰ *Id.* para. 155, citing to Trial Judgement, paras. 486 and 654.

motivation behind the conduct and need not be the predominating or sole purpose.¹²¹

95. This Court has the authority to find that the acts of rape alleged in the “Summary of Relevant Facts” in Section I.C satisfy both the severity of pain and suffering as well as purpose requirements of the independent crime of torture under customary international law. Accordingly, this Court can find that the facts in this case—which include the rape intentionally inflicted by or at the instigation of a public official—support consideration of rape as the independent crime of torture.

V. Slavery¹²² Could Qualify as a Crime Against Humanity and Forced Prostitution¹²³ Could Qualify as a Crime Against Humanity and a War Crime at the Time of the Habré Regime

96. Both witness testimony and HRW reports in the present case indicate that women were transferred to military camps where they were detained and raped. The facts also include allegations that prison guards forced women to have sexual relations in exchange for necessities such as access to water and medicine. These acts constituted the crime of slavery, including sexual slavery, under customary international law. They can be charged as crimes against humanity under Articles 6(a) and 6(f) of the Statute.
97. Alternatively, the alleged transfer and detention of women to sexually service Habré’s soldiers in the desert, or the coercive exchange of sex for necessities such as food, water, and medication required by detainees, can also be charged as forced prostitution under Article 6(a) of the Statute.

A. Slavery as a Crime Against Humanity under Customary International Law (Art. 6(f))

98. Under the Court’s Statute, slavery can amount to a crime against humanity under Article 6(f).
99. Slavery is prohibited under customary international law. The prohibition against slavery and slavery-like practices was among the first prohibitions under customary international law to achieve the status of *jus cogens*.¹²⁴
100. The prohibition against slavery emerged in the nineteenth century, and “by the beginning of the twentieth century it had already become evident that international prohibitions concerning slavery and the slave trade had attained the status of

¹²¹ *Delalić et al.* Trial Judgment, para. 470.

¹²² The terms “slavery” and “enslavement” are used interchangeably.

¹²³ The terms “forced prostitution” and “enforced prostitution” are used interchangeably.

¹²⁴ *Contemporary Forms of Slavery: Systematic rape, sexual slavery and slavery-like practices during armed conflict*, Final report submitted by Ms. Gay J. McDougall, Special Rapporteur, U.N. Doc. E/CN/Sub.2/1998/13, 22 June 1998 [hereinafter McDougall Report], para. 46.

customary international law.”¹²⁵ By 1945, twenty-six international instruments prohibited slavery and slavery-like practices.¹²⁶

101. Historically, slavery has been criminalized as a crime against humanity. In the aftermath of World War II, the Nuremberg Charter criminalized enslavement as a crime against humanity.¹²⁷ Under Article 6(c) of the Nuremberg Charter, the International Military Tribunal convicted thirteen defendants of enslavement as a crime against humanity.¹²⁸
102. Similarly, the Tokyo Charter included enslavement as a crime against humanity.¹²⁹
103. CCL 10 also criminalized enslavement as a crime against humanity.¹³⁰ In the *Milch* case, the defendant was convicted of enslavement as a crime against humanity under Control Council Law No. 10 for his role in the Nazi’s slave labor practices.¹³¹
104. The criminalization of enslavement as a crime against humanity under customary international law was confirmed by the ECCC, which found that “the record of charges and convictions for enslavement as a crime against humanity under customary international law were well established by 1975.”¹³²

B. Sexual Slavery as a Form of Slavery Under Customary International Law (Arts. 6(a), (f))

105. In addition to its characterization as the general crime of slavery under Article 6(f), the Statute further provides for the prosecution of sexual slavery as a crime against humanity under Article 6(a).
106. The 1926 Slavery Convention provided the first definition of slavery in international law. Under Article 1(1), slavery is defined as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”¹³³ The customary international law status of this definition of slavery is evidenced by “the central role that the definition of slavery in particular

¹²⁵ *Id.*

¹²⁶ Bassiouni 2011, *supra* note 39, at 378.

¹²⁷ Nuremberg Charter, art. 6(c).

¹²⁸ *Trial of the Major War Criminals Before the International Military Tribunal*, Nuremberg, 14 November-1 October 1946, Vol. 1, at 279-282, 288-301, 304-307, 317-322, 327-333, 338-341.

¹²⁹ Tokyo Tribunal Charter, art. 5(c).

¹³⁰ CCL10, art. II,1(c).

¹³¹ *Trial of Erhard Milch*, United Nations War Crimes Commission, Law Report of Trials of War Criminals Vol. VII, Case No. 21, United States Military Tribunal, Nuremberg 20 December, 1946-15 April 1947 (1948) [hereinafter *Trial of Milch* 1945], at 27.

¹³² *Case No. 001* Appeal Judgment, para. 161.

¹³³ Slavery Convention (Adopted 25 September 1926, entered into force 9 March 1927), 60 L.N.T.S 254, art. 1(1). Senegal acceded to the 1926 Slavery Convention on 2 May 1963.

has come to play in subsequent international law developments in the field.”¹³⁴ The 1956 Supplementary Slavery Convention expressly adopted the definition of slavery under the 1926 Convention,¹³⁵ as did subsequent instruments with regards to further substantive provisions of the 1926 Slavery Convention.

107. Significantly, the 1926 Slavery Convention does not prohibit slavery by gender, nor does it prescribe a particular purpose for which one must be enslaved.¹³⁶ Thus, the US Military Tribunal in the *Pohl* case held that “[i]nvoluntary servitude, even if tempered by humane treatment, is still slavery.”¹³⁷ The *actus reus* of the crime of slavery under customary international law is “the exercise of any or all powers attaching to the right of ownership.”¹³⁸ As to the *mens rea*, it is “the intentional exercise of a power attaching to the right of ownership.”¹³⁹ The tasks that a slave may be required to perform, or the conditions in which a slave may be held, are only factors indicative of enslavement but are not constitutive of the crime of enslavement under customary international law.¹⁴⁰
108. The 1926 Convention definition of slavery was informed by the notion of chattel slavery and thus “proscribes sexual slavery as well as any other actions whereby a master could exercise powers attaching to the right of ownership over a person.”¹⁴¹
109. Historically, sexual slavery was integral to slavery. For example, slaves were often advertised, sold, and bought based on their ability to bear children who were then themselves born into slavery.¹⁴²
110. The ICTY confirmed that, under the customary international law definition of slavery as enshrined by the 1926 Slavery Convention, “control of sexuality” is a factor in determining whether a person is enslaved.¹⁴³ Moreover, in her report on systematic rape, sexual slavery and slavery-like practices during wartime, the Special Rapporteur of the UN Human Rights Commission concluded that “sexual slavery is slavery.”¹⁴⁴

¹³⁴ *Kunarac* Trial Judgement, para. 520.

¹³⁵ 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (Adopted 30 April 1956, entered into force 30 April 1957) 266 U.N.T.S 3. Senegal acceded to the 1956 Supplementary Convention on 19 July 1979

¹³⁶ Patricia Viseur Sellers, 'Wartime Female Slavery: Enslavement' (2011) 44 Cornell International Law Journal) [hereinafter Sellers 2011], at 123.

¹³⁷ *Kunarac*, Appeal Judgment, para. 123, citing to *US v. Oswald Pohl and Others*, Judgment of 3 November 1947, reprinted in *Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council No. 10*, Vol 5, (1997), 958 para. 970.

¹³⁸ *Id.* para. 117.

¹³⁹ *Id.* para. 122.

¹⁴⁰ *Kunarac* Trial Judgment, paras. 542-543.

¹⁴¹ Sellers 2011, at 122.

¹⁴² *Id.* at 122-123.

¹⁴³ *Kunarac et al.* Appeal Judgement, para. 119.

¹⁴⁴ McDougall Report, *supra* note 124, para. 30.

111. In light of the above, sexual slavery had been recognized as a form of slavery at the time of the Habré regime.

C. Forced Prostitution as a Crime Against Humanity Under Customary International Law (Art. 6(a))

112. The crime of forced prostitution, included as a crime against humanity in Article 6(a) of the Statute, has been recognized in international law since the early 1900s.¹⁴⁵ However, the term comes with some controversy because some find the term “forced prostitution” to be inaccurate and stigmatizing.¹⁴⁶ On the other hand, others argued in favor of including the distinct crime of forced prostitution in addition to the crime of sexual slavery under the Rome Statute. For example, the Women’s Caucus for Gender Justice in the International Criminal Court explained:

Women may be forced to submit to serial rape in exchange for their safety or that of others or the means of survival. Even though the women would not, strictly speaking, be prostitutes, they would be forced to engage in an exchange of sex for something of value for one or more men in a dominant position of power. But even in cases where women are free to go home at night or even to escape, the conditions of warfare might nonetheless be so overwhelming and controlling as to render them little more than sex slaves.¹⁴⁷

Accordingly, the Rome Statute retained both sexual slavery and enforced prostitution as crimes against humanity and as war crimes.¹⁴⁸ Similarly the Statute of this Court contains both sexual slavery and enforced prostitution as crimes against humanity under Article 6(a).

113. As discussed above, “sexual slavery encompasses most, if not all forms of forced prostitution.”¹⁴⁹ Historically, instances of forced prostitution, such as the example of comfort women held by the Japanese military during World War II, would satisfy the elements of crime against humanity of sexual slavery.¹⁵⁰

114. Although contemporary instruments of international criminal law, including the Rome Statute, have retained the distinct crimes of sexual slavery and enforced

¹⁴⁵ Valerie Oosterveld, 'Sexual Slavery And The International Criminal Court: Advancing International Law' (2004) 25 Michigan Journal of International Law [hereinafter Oosteverld 2004], at 616.

¹⁴⁶ Carmen M. Argibay, 'Sexual Slavery And The "Comfort Women" Of World War II' (2004) 21 Berkeley Journal of International Law, at 387.

¹⁴⁷ Women’s Caucus for Gender Justice in the International Criminal Court, Recommendations and Commentary for December 1997 Prep. Com., Part III: War Crimes, Recommendation, at 5.6-12

¹⁴⁸ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 U.N.T.S. 90 [hereinafter Rome Statute], 7(1)(g), 8(2)(b)(xxii).

¹⁴⁹ McDougall Report, *supra* note 134, para. 31.

¹⁵⁰ McDougall Report, at Appendix, *An Analysis of the Legal Liability of the Government of Japan for “Comfort Women Stations Established During the Second World War*, para. 24.

prostitution, negotiations towards the drafting of these provisions reveal that these crimes may often be charged in the alternative.¹⁵¹ Thus, insofar as sexual slavery is recognized as a crime against humanity under customary international law, the crime of forced prostitution is also a crime against humanity under customary international law.

D. Forced Prostitution as the War Crime of “Outrages Upon Personal Dignity” Under Customary International Law (Art. 7(2)(e))

115. As noted above in Section IV.B.2, “outrages upon personal dignity” have long been prohibited and criminalized under customary international law in the context of non-international armed conflicts. Article 7(2)(e) of the Statute of this Court specifically provides for the prosecution of forced prostitution as a war crime of “outrages upon personal dignity,” echoing the language of Article 4(2)(e) of the 1977 Additional Protocol II.¹⁵²
116. It should further be noted that forced prostitution has historically been criminalized as an independent war crime under customary international law. Although not treated as such by the Statute of this Court, the strong historical record on the characterization of forced prostitution as an independent war crime confirms the gravity of this violation of international criminal law.
117. The prohibition against forced prostitution is rooted in international instruments designed to combat human trafficking. The 1904 International Agreement for the Suppression of the White Slave Traffic,¹⁵³ the 1910 International Convention for the Suppression of the White Slave Traffic,¹⁵⁴ the 1921 International Convention for the Suppression of the Traffic in Women and Children,¹⁵⁵ and the 1933 Convention for the Suppression of the Traffic in Women of Full Age¹⁵⁶ gradually expanded the class of protected persons and the scope of prohibited acts to the procurement of women for the purpose of forced prostitution.

¹⁵¹ Oosteverld 2004, at 621.

¹⁵² Protocol II, art. 4(2)(e).

¹⁵³ International Agreement for the Suppression of the White Slave Traffic, May 18, 1904 (Adopted 18 May 1904, entered into force 18 July 1905) 1 L.N.T.S. 83. Historically, white slavery described prostitutes.

¹⁵⁴ International Convention of the Suppression of the White Slave Traffic of 1910 *amended* by Protocol Amending the International Agreement for the Suppression of the White Slave Traffic, and Amending the International Convention for the Suppression of the White Slave Traffic (Adopted May 4, 1949, entered into force June 21, 1951) 30 U.N.T.S. 23.

¹⁵⁵ International Convention for the Suppression of the Traffic in Women of Full Age (adopted Oct. 11, 1933, entered into force Aug. 24, 1934) 150 L.N.T.S. 431.

¹⁵⁶ International Convention for the Suppression of the Traffic in Women of Full Age (adopted Oct. 11, 1933, entered into force Aug. 24, 1934) 150 L.N.T.S. 431.

118. In international humanitarian law, the prohibition against forced prostitution was first codified by the 1919 World War I Commission. The Commission listed the “abduction of girls and women for the purpose of enforced prostitution” as sixth on its list of thirty-two war crimes, ranked from the most serious crimes against the person to lesser offences against property.¹⁵⁷
119. The prohibition on forced prostitution was enshrined in Article 27 of the Geneva Convention (IV),¹⁵⁸ and again in Articles 75 and 76 of the 1977 Additional Protocol I to the Geneva Convention.¹⁵⁹ Furthermore, the ICRC’s Commentary provides that this prohibition applies “in all places and in all circumstances”¹⁶⁰ and, with regards to Article 76 of Additional Protocol I, “it applies both to women affected by the armed conflict, and to others.”¹⁶¹
120. Hence, the prohibition against forced prostitution under international humanitarian law applies equally in both international and non-international armed conflict.
121. Although rarely prosecuted, forced prostitution was recognized as a war crime by post-World War II international and national tribunals. For example, a Dutch Temporary Court Martial in Batavia (Jakarta) created to address the treatment of Dutch women in Indonesia by the occupying forces, found Washio Awochi guilty of “the war crime of enforced prostitution.”¹⁶² In subsequent years, the war crime of forced prostitution has been recognized by the International Criminal Court.¹⁶³

VI. Other Forms of Sexual Violence of Comparable Gravity Could Qualify as Crimes Against Humanity, War Crimes, and a Form of Torture at the Time of the Habré Regime

122. The factual record before this Court includes indication of other forms of sexual violence aside from rape and sexual slavery. They include forced nudity in detention, forced contraception, and injury to male and female genitalia.
123. This Court has great discretion in characterizing the facts before it. Where many acts of a sexual nature present in the evidence may qualify as rape, slavery, or forced prostitution as discussed above, some forms of sexual violence may warrant treatment in a residual category of harm. The Statute of this Court and customary international law support several alternative characterizations of these other acts of sexual violence as war crimes, crimes against humanity, or forms of torture.

¹⁵⁷ 1919 Commission Report, *supra* note 58, at 127.

¹⁵⁸ Geneva Convention (IV), art. 27.

¹⁵⁹ Additional Protocol I, art. 75(2)(b), 76(1).

¹⁶⁰ ICRC Commentary 1958, *supra* note 47, at. 206.

¹⁶¹ Jean Pictet, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (International Red Cross 1987), para. 3151.

¹⁶² *Trial of Washio Awochi* 1946, *supra* note 38, at 123.

¹⁶³ Rome Statute, art. 8(2)(b)(xxii).

A. Definition of sexual violence

124. As with the crime of rape, discussed above, sexual violence has long been prohibited or criminalized in military manuals, conventions, and jurisprudence by way of euphemisms such as outrages upon women's honour,¹⁶⁴ violations of "family honour and rights",¹⁶⁵ and "indecent assault"¹⁶⁶. For example, the Regulations to the IV Hague Convention of 1907 asserted that "family honour" must be respected during military occupations.¹⁶⁷ "Family honour" was one of many euphemisms used to describe otherwise undefined acts of sexual violence.
125. In the 1990s, both ICTR and ICTY adjudicated cases involving allegations of sexual violence that did not constitute either rape or sexual slavery. In *Akayesu*, the ICTR offered the following definition of sexual violence:

The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.¹⁶⁸

In *Prosecutor v. Miroslav Kvočka et al.*, an ICTY trial chamber endorsed this definition.¹⁶⁹

126. Today, the Elements of Crimes accompanying the Rome Statute of the International Criminal Court defines sexual violence as:

an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.¹⁷⁰

127. Article 7(1)(g) of the Rome Statute provides for the prosecution of several forms of sexual violence, including rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and "any other form of sexual violence of

¹⁶⁴ Askin 2003, *supra* note 37, at 300 n. 61.

¹⁶⁵ Bassiouni 2011, *supra* note 37, at 428.

¹⁶⁶ Geneva Convention (IV), art. 27; *see also* Additional Protocol I, arts. 75(2)(b), 76(1).

¹⁶⁷ Regulations concerning the Laws and Customs of War on Land, Hague (IV) (Adopted 18 October 1907, entered into force 26 January 1910), 36 Stat. 2277, §III. art. 46.

¹⁶⁸ *Akayesu* Trial Judgment, para. 688.

¹⁶⁹ *Prosecutor v. Miroslav Kvočka et al.* (Judgment), Case No. IT-98-30/1-T, Trial Chamber, 2 November 2001, para 180.

¹⁷⁰ Elements of Crimes of the ICC, art. 7(1)(g)-6.

comparable gravity.”¹⁷¹ However, this list is not exhaustive.¹⁷² The term “sexual violence” should be understood to be a residual category of harm that can include a wide range of harmful, unwanted acts that are either sexualized or that relate to the genital organs. As such, sexual violence can be physical or psychological.

B. Sexual Violence as a Crime Against Humanity (Art. 6(a))

128. Article 6(a) of this Court’s Statute provides for the prosecution of rape, sexual slavery, forced prostitution, forced sterilization, and *all other forms of sexual violence of comparable gravity* as crimes against humanity.
129. Forced sterilization, for example, has been recognized as a crime against humanity since 1945, when the Nuremberg tribunals oversaw cases involving four years of sterilization experiments conducted in Nazi concentration camps.¹⁷³ Experiments were conducted using X-rays, surgery, and drugs, causing thousands of victims to become sterilized and to suffer “great mental and physical anguish.”¹⁷⁴
130. Separately, under customary international law, acts of sexual violence have often been characterized as the crime against humanity of “other inhumane acts” as well.¹⁷⁵
131. “Other inhumane acts” have been included as an independent crime against humanity since 1945, appearing in most international instruments addressing crimes against humanity including the Nuremberg Charter, the Tokyo Charter, CCL No. 10, the ICTY Statute, the ICTR Statute, the SCSL Statute, and the Rome Statute.¹⁷⁶

¹⁷¹ *Id.* art. 7(1)(g).

¹⁷² In its 2001 *Kvočka et al.* judgment, the ICTY trial chamber noted that sexual violence can include rape, molestation, sexual slavery, sexual mutilation, forced marriage, forced abortion, enforced prostitution, forced pregnancy, and forced sterilization. *Prosecutor v. Kvočka et al.* (Judgment), Case No. IT-98-30-T, Trial Chamber, 2 November 2001, para 180, n. 343.

¹⁷³ *Medical Case*, *supra* note 90, at 48-50.

¹⁷⁴ *Id.* at 13 “(I) Sterilization Experiments. From about March 1941 to about January 1945 sterilization experiments were conducted at the Auschwitz and Ravensbrueck concentration camps, and other places. The purpose of these experiments was to develop a method of sterilization which would be suitable for sterilizing millions of people with a minimum of time and effort. These experiments were conducted by mean of X-ray, surgery, and various drugs. Thousands of victims were sterilized and thereby suffered great mental and physical anguish.”

¹⁷⁵ Article 6(g) of this Court’s Statute provides for the prosecution of “inhumane acts” as a crime against humanity. However, the jurisdiction of this Court is limited to such acts when “*inspirés par des motifs d’ordre politique, racial, national ethnique, culturel, religieux ou sexiste*”. See Article 6(g) of the Statute. *Amici* are of the view that this last part of Article 6(g) is not an element of inhumane acts as a crime against humanity under customary international law.

¹⁷⁶ See e.g. Nuremberg Charter, art. 6(c); Tokyo Tribunal Charter, art. 5, CCL10, art. II(1)(b), Rome Statute, art. 7(1); Statute of the International Criminal Tribunal for the Former Yugoslavia, UNSC Res. 827 (25 May 1993) UN Doc S/RES/827, art. 5; Statute of the International Criminal Tribunal for Rwanda (ICTR), UNSC Res. 955 (8 November 1994) UN Doc S/RES/955, art. 3; Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the

132. It may thus be helpful to this Court to consider how, in addition to rape and sexual slavery discussed above, many forms of sexual violence have been found to constitute “(other) inhumane acts” as a crime against humanity under customary international law.
133. Forced sterilization or experimentation with reproductive function is one example of sexual violence deemed to be an inhumane act rising to the level of a crime against humanity. As noted above, the International Military Tribunal tried former Nazi officials for sterilization experiments conducted at concentration camps between 1941 and 1945. Thousands of victims were sterilized through experimental surgery and drugs, suffering great mental and physical anguish. The tribunal found this forced sterilization to constitute a crime against humanity.¹⁷⁷ Similarly, the forced ingestion of oral contraception alleged before this Court can be found to constitute the crime against humanity of inhumane acts.
134. Forced nudity is another example of an act of sexual violence deemed to be an inhumane act rising to the level of a crime against humanity. For example, the ICTR found Akayesu guilty of the crime against humanity of “other inhumane acts” under Article 3(i) of the Court’s Statute for having forced victims to undress and, in one case, perform exercises in public while naked.¹⁷⁸ Similarly, an ICTR trial chamber found the undressing of a dead Tutsi woman in the *Prosecutor v. Eliézer Niyitigeka* case to be acts of sexual violence of comparable gravity to other acts in Article 3’s list of crimes against humanity.¹⁷⁹
135. Mutilation of, or intentional injury to, the genitals has also been found to be an inhumane act rising to the level of a crime against humanity. The ICTR found the castration of a male victim to constitute other inhumane acts as a crime against humanity in its *Niyitigeka* case.¹⁸⁰ The ICTY reached a similar conclusion in its *Tadić* case, in which it convicted Tadić of other inhumane acts as a crime against humanity for, *inter alia*, forcing one prisoner to sexually mutilate another prisoner.¹⁸¹

C. Sexual Violence as Multiple War Crimes (Arts. 7(1)(b), 7(2)(e))

136. Under the Court’s Statute, sexual violence can qualify as war crimes in both international and non-international armed conflict.

Period of Democratic Kampuchea (2001) (Cambodia), as amended by NS/RKM/1004/006 (Oct. 27, 2004) (unofficial translation), art. 5; Statute of the Special Court for Sierra Leone (SCSL), art. 2 (adopted 16 January 2002, entered into force 12 April 2002) 2178 UNTS 138, art. 5.

¹⁷⁷ *Medical Case*, *supra* note 90, at 13.

¹⁷⁸ *Akayesu* Trial Judgement, para. 697.

¹⁷⁹ *The Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-T, Judgement and Sentence, 16 May 2003, para 316.

¹⁸⁰ *Id.* paras 462-467, 480.

¹⁸¹ *Prosecutor v. Dusko Tadić* (Judgment), Case No. IT-94-1-T, Trial Chamber, 7 May 1997, paras.198, 670, 692, 726, 730.

137. First, Article 7(1)(b) of the Statute provides for the prosecution of the war crime of “torture or inhuman treatment” in the context of international armed conflict. Like rape, discussed in Section IV.B(1) above, acts of sexual violence may amount to torture or inhuman treatment as a war crime under Article 7(1)(b).

138. As noted above, Article 27 of the Fourth Geneva Convention provided the following with respect to protected members of a civilian population in the context of international armed conflict:

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights... They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity. Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or *any form of indecent assault*.¹⁸²

139. From 1946-1948, sexual violence was addressed as a war crime before the International Military Tribunal for the Far East, where sexual aggressions in addition to rape were included in indictments for “inhumane treatment,” “ill-treatment,” and “failure to respect family honour and rights.”¹⁸³ Judges at the Tokyo tribunal issued convictions addressing evidence of sexual violence, though nesting them under war crimes of “murder, rape, and other cruelties.”¹⁸⁴

140. As discussed above in Section IV.B.2, this Court’s Statute provides for the prosecution of the war crime of “outrages upon personal dignity” in the context of non-international armed conflict (Art. 7(2)(e)).

141. Article 4(2)(e) of the 1977 Additional Protocol II to the Geneva Conventions sheds some light on the interpretation of this provision. It provides that “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault” shall be prohibited at any time and in any place.¹⁸⁵ These references to “humiliating and degrading treatment.... and any form of indecent assault” include sexual violence as noted by Patricia Viseur Sellers:

This was Victorian code language, that alluded to sexual violations and reproductive experiments. It was purposely drafted with flexible

¹⁸² Geneva Convention (IV), art. 27 (emphasis added).

¹⁸³ International Military Tribunal of the Far East, *reproduced in* The Tokyo War Crimes Trial: The Complete Transcripts of the International Military Tribunal for the Far East (R. Pritchard & S. Zaide eds., 22 vols, 1981) Vol 1, at 1029.

¹⁸⁴ *Id.*

¹⁸⁵ Additional Protocol II, art. 4(2)(e).

wording to cover whatever future acts could be prompted by the bestial instincts of torturers.¹⁸⁶

142. Thus, the “indecent” sexual assaults and other sexual aggressions present in the facts before this Court that do not technically constitute rape may still rise to the war crimes of “torture or inhuman treatment” in the context of international armed conflict (Art. 7(1)(b) or of “outrages upon personal dignity” in the context of non-international armed conflict (Art. 7(2)(e)).

D. Sexual Violence as Torture (Arts. 6(g), 7(1)(b), 7(2)(a), 8)

143. As noted in Section IV.D.2 above, acts of sexual violence such as intentional injury to genitals may also constitute the crime of torture for the same reasons than the ones mentioned above explaining why acts of rape would qualify under this crime.

VII. Conclusion

144. The record of the case against Hissène Habré includes ample evidence of rape, sexual slavery, sexual torture, and other serious forms of sexual violence committed either by Habré himself or by his agents.
145. Under the Statute of this Court, rape, slavery and forced prostitution, and other forms of sexual violence can be charged as crimes against humanity and war crimes. Rape and other forms of sexual violence of comparable gravity can also constitute torture. Specifically, if all relevant contextual elements are met, rape can be charged as a crime against humanity under Article 6(a), the war crimes of “torture or inhuman treatment” under Article 7(1)(b) and “outrages upon personal dignity” under Article 7(2)(e), and a form of torture as a crime against humanity under Article 6(g), war crimes under Articles 7(1)(b) and 7(2)(a), and independently under Article 8. Sexual slavery can be charged as a crime against humanity under Articles 6(a) and 6(f). Forced prostitution can be charged as a crime against humanity under Article 6(a) or a war crime of “outrages upon personal dignity” under Article 7(2)(e). Finally, other acts of sexual violence can be charged similarly to rape as a crime against humanity under Article 6(a), as war crimes under Articles 7(1)(b) and 7(2)(e), and as a form of torture under Articles 6(g), 7(1)(b), 7(2)(a) and 8.
146. Customary international law at the time of Hissène Habré’s regime supports and clarifies the interpretation of these characterizations.

¹⁸⁶ Viseur Sellers, *The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation*. Women’s Human Rights and Gender Unit (WRGU), 2007 [hereinafter Sellers 2007], Sellers 2007, at 9.

147. This Court has both the power and responsibility to ensure that its charging, trial processes, and jurisprudence reflect the fullness of customary international law with respect to all victims before it, including those men, women, and children subjected to sexual violence by Hissène Habré and his agents.
148. In light of the above, *amici* respectfully express their support for the requalification of charges so as to more fully account for the rape, sexual slavery, forced prostitution, and other forms of sexual violence present in the factual record before this Court.

Dated: December 8, 2015

Respectfully,



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¹⁸⁷ The views expressed herein are those of individual amici and do not necessarily reflect the views of their respective institutions.

¹⁸⁸ The views expressed herein are those of the individual amicus and do not necessarily reflect the views of the United Nations, the ICTY or the ICTR.

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