2020

Sexual Slavery and Customary International Law

Patricia Viseur Sellers

Jocelyn Getgen Kestenbaum

Sexual Slavery and Customary International Law

Patricia Viseur Sellers*
Jocelyn Getgen Kestenbaum**

I. Introduction

The Hissène Habré trial[1] and appellate[2] judgments represent watershed legal decisions rendering long-denied justice to victims of the brutal Chadian regime. Delayed charges of credible sexual violence[3] inflicted upon both males and females[4] challenged the judges of the Extraordinary African Court ("EAC") in Senegal. Legal characterizations of sexual assaults ultimately attributed to Habré represent significant jurisprudential advancements on rape, sexual slavery and torture as international crimes.

The EAC's observations acknowledge that sexual slavery constitutes part of the *actus reus* of enslavement as crime against humanity and of slavery as a war crime.[5] While agreeing with the Chambers that sexual slavery is anchored in customary international law, this Chapter deepens the inquiry into the international legal prohibition of sexual slavery. The authors posit that, in fact, the 1926 Convention to Suppress the Slave Trade and Slavery ("1926 Slavery Convention") proscribed what is identified as "sexual slavery" because sexual violence is and always has been part and parcel of both *de jure* (legal) and *de facto* (customary) slavery.

Accordingly, the Habré Trial Chamber might have refined its distillation of sexual slavery as customary international law by noting that it as an intractable component of slavery, which was outlawed in the 1926 Slavery Convention. Sexual slavery, often

* Patricia Viseur Sellers is Special Advisor on Gender Crimes to the Prosecutor of the International Criminal Court & Visiting Fellow at Kellogg College of Oxford University.
** Jocelyn Getgen Kestenbaum is Associate Professor of Clinical Law at the Benjamin N. Cardozo School of Law.

[1] *Ministère Public v. Hissène Habré,* Judgment 30 May 2016, <http://www.legal-tools.org/doc/98c00a/pdf/> (hereafter, *Hissène Habré* Trial Judgment)

[2] *Le Procureur v. Hissène Habré,* Judgment, 27 April 2017, <https://assets.budh.nl/tijdschriften/aj/hissein_habre_02.pdf> (hereafter, *Hissène Habré* Appeals Judgment)

[3] *See* Reed Brody, *Victims Bring a Dictator to Justice: The Case of Hissène Habré* (2017), <https://www.brotfuerdiewelt.de/fileadmin/mediapool/2_Downloads/Fachinformationen/Analyse/Analys 70-The_Habre_Case.pdf> accessed 5 April 2018 (recounting that victims' and Human Rights Watch reports told of Habré's policy of enslavement, which included transferring women to military camps where officers and guards detained and raped them). Additionally, the EAC found that prison guards forced women to have sex in exchange for access to basic necessities, such as water and medicine. *See,* Kim Thuy Seelinger, 'Rape and the President: The Remarkable Trial and Partial Acquittal of Hissène Habré,' (2017) WPJ, <https://www.law.berkeley.edu/wp-content/uploads/2015/04/World-Policy-Journal-2017-Seelinger-16-22-2.pdf> accessed 5 April 2018 (hereafter Thuy Seelinger, 'Rape and the President')

[4] *Hissène Habré* Trial Judgment (n 1) paras 610–20

[5] The authors posit that, more precisely, *sexual violence*—as opposed to "sexual slavery"—is part of the *actus reus* or indicia of slavery and enslavement.

mischaracterized as a recent or modern *form* of slavery, demands a more astute legal articulation. This Chapter clarifies the law on slavery, asserting that sexual violence or assaults on sexual integrity are integral to slavery in many—if not all—its forms. The authors endeavor to reorient the legal discussion toward a more nuanced, multidimensional understanding of the crimes of slavery and enslavement.

Part II of this Chapter focuses on the EAC's treatment of sexual violence and the crime of sexual slavery throughout the course of the Habré trial. Part III examines the customary law basis of slavery in all its forms as an atrocity crime, maintaining that the 1926 Slavery Convention is the proper place to begin such inquiries and to receive such grounding. Then, Part IV asserts that "sexual slavery"—or, more precisely, sexualized violence—comprises an *actus reus* or indicia of slavery whether it be *de jure* or *de facto* slavery; thus, when present, sexual violence and sexual integrity harms cannot be decoupled from manifestations of slavery. Part V concludes by suggesting legal and practical rationales—including correcting course in codified international criminal law—to reintegrate sexual violence and sexual integrity harms into our conceptualization of all forms of slavery as an international crime.

II. Sexual Slavery in the Hissène Habré Trial

The investigating magistrates' original referral order to the EAC in the Hissène Habré trial recognized evidence of sexual violence, such as rapes against detained women, sexualized torture against male prisoners and sexual violence against children.[6] Despite overwhelming proof of sexual violence, the resulting charges did not contain any explicit allegations of sexual and gender-based crimes.[7] Notwithstanding these omissions, victim-witnesses testified at trial that Habré and his soldiers detained them in secret prisons as sex slaves, perpetrating against them additional horrific acts of violence—including rapes, genital injuries, beatings, stabbings, forced nudity, electric shocks on sexual organs and forced contraception (*i.e.*, being forced to take birth control pills).[8] In the wake of this testimony, civil society groups urged the Trial Chamber to address fully the sexual

[6] *Hissène Habré* Trial Judgment (n 1) para 1480

[7] *Ibid*, paras. 96–97

[8] Thuy Seelinger, 'Rape and the President' (n 3); Testimony of Fatimé Sakine, 22 October 2015, Trust Africa, 'The Public Prosecution v. Hisséne Habré - Summary of the Thirty-First Hearing Held on 22 October 2015,' <http://www.trustafrica.org/images/ICJ_reports/EAC-%20Trial%20Hearing%20Report%20-%2022nd%20October%202015%20-%20English.pdf> accessed 4 April 2018; Testimony of Garba Akhaye, 28 September 2015, Trust Africa, 'The Public Prosecution v. Hisséne Habré - Summary of the Sixteenth Hearing Held on 28 September 2015,' <http://www.trustafrica.org/images/ICJ_reports/EAC-%20Trial%20Hearing%20Report%20-%2028th%20September%202015%20-%20English.pdf> accessed 5 April 2018; Testimony of Katouma Deffalah, Tuesday 20 October 2015, Trust Africa, 'The Public Prosecution v. Hisséne Habré - Summary of the Twenty-Ninth Hearing Held on 20 October 2015,' <http://www.trustafrica.org/images/ICJ_reports/EAC-%20Trial%20Hearing%20Report%20-%2020th%20October%202015%20-%20English.pdf> accessed 5 April 2018

violence, and international law experts filed an *amicus curiae* brief to aid the EAC in its legal analysis of potential charges.[9]

Toward the close of trial, the EAC notified the parties of its duty to characterize the entirety of the criminal conduct, inclusive of sexualized and gender-based violence.[10] The victims' representatives then submitted a motion to the EAC, requesting that the Chambers consider sexual violence charges.[11] As a result, the EAC "re-qualified" the evidence and amended the charges to include rape and sexual slavery as crimes against humanity under Article 6(a) of the EAC Statute.[12] Further, the EAC rightly characterized the charges of war crimes and the autonomous crime of torture under Article 8 to comprise sexual violence acts committed against male and female detainees.[13]

On May 30, 2016, the EAC convicted Habré of rape and sexual slavery as crimes against humanity and of torture as both a war crime and a stand-alone crime.[14] The judgment declared that Habré was liable, not only for the rapes and sexual slavery his subordinates committed, but also for the rapes he directly perpetrated.[15] To establish that sexual slavery occurred, the Court intoned that:

> . . . [T]he Chamber is satisfied that the soldiers at the camp exercised the powers associated with property rights over them. The Chamber is also convinced that the military men deliberately forced the females to have sex with them. There is no doubt that [the soldiers] were conscious that the females, held captive in the camps, over a long period of time, with no ability to escape, had no autonomy over their lives, and that [the soldiers] exercised power over [the victims] such that, in reality, they were under their complete control, including control over their reproductive capacity.[16]

Thus, the Trial Chamber found that Habré was the "maestro of the orchestra of a repressive system"[17] and culpable for the sexual violence because he was "aware that women [and men] were held in a climate of generalized and institutionalized violence . . . in a state of extreme vulnerability, without any protection. He also knew that they were interrogated and monitored by male state agents, who used daily and with impunity, violence against

---

[9] *Hissène Habré*: Amicus Curiae Human Rights Center, University of California, Berkeley, School of Law, and International Experts on Sexual Violence Under International Criminal Law, <https://www.law.berkeley.edu/wp-content/uploads/2015/04/MICUS-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-Eng.pdf> accessed 5 April 2018

[10] *Hissène Habré* Trial Judgment (n 1) para 1481

[11] *Ibid*, para 168

[12] *Ibid*, para 179

[13] *Ibid*, para 1565. The trial judgment explains the EAC's ability to "re-qualify" the acts. It cites to the French law that inspired the Senegalese law, the practice of the Extraordinary Chambers in the Courts of Cambodia (ECCC), and the practice before the International Criminal Court (ICC). Evidence can be re-qualified, as long as the accused is duly informed. *Ibid*, paras 160–68. The judgment holds that sexual violence evidence can be the subject of requalification. *Ibid*, para 178

[14] *Ibid*, para 536

[15] *Ibid*, para 536

[16] *Ibid*, para 1536 (authors' translation)

[17] *Ibid*, para 2155

the detainees."[18] In light of the evidence, the EAC concluded that Habré knew or should have known that his subordinates would rape detainees under their complete control.[19]

On appeal, the EAC upheld Habré's conviction for crimes against humanity of sexual slavery and rape, and for the sexualized torture that his soldiers perpetrated.[20] The Appeals Chamber, however, overturned Habré's conviction for the four rapes and acts of torture that he physically perpetrated.[21] Despite the Appellate Chamber's finding that the victim-witness testimony was credible, the Court ruled that the investigating judges had not considered these sexual assaults in the *ordonnance de renvoi*; therefore, any change at that stage would have consisted of modifying (read supplementing)—not re-characterizing—the facts in the *ordonnance de renvoi*.[22] Indeed, Khadidja Hassan Zidane's recounting of theses incidences came to light only after the trial began.[23] Thus, the Court procedurally could not include the sexual violence perpetrated by Habré himself among the evidence eligible for re-qualification, and, consequently, those rapes could not be the basis of the amended charges nor of any ensuing conviction.[24]

Despite the meaningful—yet partial[25]—redress, the re-qualification of sexual and gender-based crimes recalibrated the narrative of Habré's ruthless reign by situating long-term, systematic sexual violence and slavery among the regime's most horrific crimes. Moreover, this consideration allowed for further judicial scrutiny of sexual slavery's proscription under international law. The case called upon the Trial Chamber to assess the legal status of sexual slavery at the time of the Habré regime. In other words, was sexual slavery a crime during the 1980s under international law? The Chamber rightly responded unequivocally in the affirmative. To reach the conclusion that the safeguards of *jus cogens* and customary international law condemned sexual slavery as a crime against humanity and a war crime at the operative time,[26] the Trial Chamber meticulously reviewed the applicable law.

The Trial Chamber noted first that customary law recognized the prohibition of slavery around 1926 to 1930,[27] and second that custom was evinced in the charters of the international military tribunals established after World War II that enumerated individual criminal liability for enslavement.[28] Likewise, the EAC recognized that slavery or enslavement found berth in Control Council Law No. 10 and in the provisions of the

---

[18] *Ibid*, para 2159
[19] *Ibid*, para 2160 (authors' translation). "[T]he crime of sexual slavery is charged in this case and its prohibition was foreseeable to the Accused at the time it was committed." *Ibid*, para 1498
[20] *Hissène Habré* Appeals Judgment (n 2) para 229
[21] *Ibid*
[22] *Ibid*, paras 522–26, 529–31
[23] Thuy Seelinger, 'Rape and the President' (n 3)
[24] *Hissène Habré* Appeals Judgment (n 2) paras 527–28; Thuy Seelinger, 'Rape and the President' (n 3)
[25] *Hissène Habré* Appeals Judgment (n 2) para 531
[26] *Hisènne Habré* Trial Judgment (n 1) para 1483
[27] *Ibid*, para 1484. Under the 1926 Slavery Convention, "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." The Convention to Suppress the Slave Trade and Slavery, art. 1(1) (adopted 25 September 1926, entered into force 9 March 1927) 60 LNTS 253 (hereafter 1926 Slavery Convention)
[28] *Hisènne Habré* Trial Judgment (n 1) para 1485

Nuremberg Principles.[29] The Chambers also acknowledged that the International Law Commission's Draft Code of Crimes Against the Security and Peace of Mankind dated the inclusion of its enslavement provision to at least the 1950s.[30] The Court cited to jurisprudence of the International Criminal Tribunal of the former Yugoslavia (ICTY) and the Extraordinary Chambers in the Courts of Cambodia (ECCC) as conclusive evidence of the crime against humanity of enslavement's customary status,[31] given that their exercise of jurisdiction was limited to crimes under customary law.

To determine the international customary law basis of sexual slavery, the Trial Chamber appraised the international criminal jurisprudence. First, the Court examined *Prosecutor v. Kunarac et al*., an ICTY case in which the Tribunal convicted several accused for enslavement as a crime against humanity based upon the defendants' sexual control of detained Bosnian Muslim females during the war in the former Yugoslavia.[32] The Habré Trial Chamber cited to the *Kunarac* judgment's reasoning that enslavement could comprise acts of a sexual nature[33] and that such sexual control could be the means by which to carry out enslavement.[34] The Trial Chamber further noted that the ECCC confirmed in its arrest warrant in *Prosecutor v. Duch* that the exercise of sexual control could be considered part of the customary law of enslavement.[35] Accordingly, the Court concluded that international customary law recognized sexual slavery as a factual indicator of the crime of enslavement.

Turning its gaze on international humanitarian law, the Habré Trial Chamber scrutinized national military cases emanating from World War II and found that sexual slavery was perpetrated in many venues, including detention camps.[36] The Chamber noted the Batavia Temporary Military Court's case of Colonel Shoichi Ikeda for crimes committed in Dutch colonized Indonesia.[37] The Military Court convicted Ikeda for the abduction and forced prostitution of thirty-five Dutch female detainees who Ikeda coerced into sexual service of Japanese soldiers in a brothel.[38] The Trial Chamber also relied on analysis from the Appendix to the Report of the Special Rapporteur on Contemporary Forms of Slavery, observing that, by the 1940s, international customary law proscribed the wartime sexual slavery endured by the so-called "comfort women" of World War II.[39]

Moreover, the EAC noted Geneva Convention provisions—in particular Common Article 3 and Article 28 of the Fourth Geneva Convention—that prohibit rape and sexual slavery

[29] *Ibid*, para 1486
[30] *Ibid*, para 1487
[31] *Ibid*, paras 1487–88
[32] *Ibid*, para 1490
[33] *Ibid*
[34] *Ibid*, para 1491
[35] *Ibid*. *See Prosecutor v. Kaing Guek Eav alias Duch*, (Judgment) [2010] Case File No. 001/18-07-2007/ECCC/TC paras 147–54 (hereafter *Duch*)
[36] *Hisènne Habré* Trial Judgment (n 1) para 1493
[37] *Ibid*, para 1493
[38] *Ibid*
[39] *Ibid*

as *jus cogens* norms.[40] The Chambers cited international jurisprudence, such as the Guatemalan Sepur Zarco case and the ICTY's *Furundžija* case to support these findings.[41] The Trial Chamber cogently ascribed the wartime prohibition of sexual violence under customary international humanitarian law as descending from the Lieber Code, the 1907 Fourth Hague Convention, and Control Council Law No. 10.[42] Given the bevy of customary norms, international jurisprudence, treaty law, commentary and scholarly writings, the Trial Chamber concluded that, under international humanitarian law, sexual slavery, indeed, is a form of slavery.[43]

The Habré judgment's customary law grounding of sexual slavery as both a crime against humanity and a war crime is commendable. Most significant is the Trial Chamber's pronouncement that "sexual slavery . . . is an element to take into account to determine whether there was enslavement and the duration during which the powers of ownership have been exercised."[44] This Chapter, however, interrogates whether customary international law proscribed sexual slavery as a determinant of ownership earlier, under the 1926 Slavery Convention. If so, the crime that is now codified as "sexual slavery," begs reconsideration. The authors proffer that physical and psychological sexual violence acts were (and are) interconnected and inseparable from chattel and other forms of slavery. Thus, mischaracterizing sexual slavery as a recent or modern form of slavery ignores the historical realities of enslavement and misconstrues the legal abolition of slavery in all its forms.

III. Slavery in All Its Forms under the 1926 Slavery Convention

Consistent with the Habré Trial Chamber's analysis, the authors recognize that the prohibition against slavery, enslavement, and the slave trade is a non-derogable,[45] *jus*

[40] *Ibid*, paras 1494–95; *see also Prosecutor v Ntganda*, (Second Decision on the Defense's Challenge to the Jurisdiction of the Court in respect of Counts 6 and 9) [2017] ICC-01/04-02/06, para 51

[41] *Hisènne Habré* Trial Judgment (n 1) paras 1494–95

[42] *Ibid*, para 1496

[43] *Ibid*, para 1497

[44] *Ibid*, para 1504. The authors agree with the Habré Trial Chamber's observation and, as demonstrated below, offer that the more precise legal determination is that sexualized violence is an act that is evidence, or *indicia*, of slavery, which is present whenever the perpetrator exercises powers attaching to the right of ownership over a person. For a detailed analysis, *see* Section IV, *infra*

[45] *See, e.g.*, Universal Declaration of Human Rights, art. 4, G.A. Res 217A (III), U.N. Doc. A/810 at 71 (1948) ("No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms."); International Covenant on Civil and Political Rights (entered into force 16 December 1966) 999 UNTS 171 (Art. 8(1): "No one shall be held in slavery; slavery and slave-trade in all their forms shall be prohibited." Art. 8(2): "No one shall be held in servitude." Art. 8(3)(a): "No one shall be required to perform forced or compulsory labour."); European Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (Art. 4(1): "No one shall be held in slavery or servitude." Art. 4(2): "No one shall be required to perform forced or compulsory labour."); American Convention on Human Rights (opened for signature 22 November 1969, entered into force 18 July 1978) OEA/Ser.K/XVI/1.1, Doc. 65, Rev. 1, Corr. 1 (Art. 6(1): "No one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women." Art. 6(2): "No one shall be

cogens norm[46] with attendant *erga omnes* obligations.[47] Under international law, slavery was prohibited in times of war and peace; by 1945, twenty-six international instruments codified the prohibition of slavery and slavery-like practices.[48] Bassiouni posited the customary law basis of slavery crimes and similar practices, noting that:

> The cumulative effect of these [numerous international law] instruments established that slavery, slave-related practices and forced labor, were before 1945, prohibited under conventional international law, and . . . also establish the customary international law basis for the prohibition of these practices and for their inclusion as part of "crimes against humanity."[49]

The first international attempt at codifying the universal prohibition of slavery and the slave trade, the 1926 Convention to Suppress the Slave Trade and Slavery (1926 Slavery Convention), however, defines slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."[50] The 1926 Slavery Convention includes either "status" or "condition" in the definition and actually enlarged the prohibition to govern *de jure* slavery (evidenced by legal title) and *de facto* slavery (evidenced by customary practice).[51]

To grasp the breadth of slavery's operative definition, the 1926 Slavery

---

required to perform forced or compulsory labor."); African Charter on Human and Peoples' Rights (opened for signature 27 June 1981, entered into force 21 October 1986) OAU Doc. CAB/LEG/67/3/Rev. 5 (Art. 5: "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.")

[46] *See* Anthony D'Amato, *The Concept of Custom in International Law* (Cornell University Press 1971); Alfred Verdross, 'Jus Dispositivum and Jus Cogens in International Law' [1966] AJIL 58–59; *see also* Gay J. McDougall, *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict*, U.N. Doc. E/CN/Sub.2/1998/13, 22 June 1998, para 46 (hereafter McDougall Report)

[47] Barcelona Traction, Light and Power Company, Limited (*Belgium v Spain*) (Judgment) [1970] ICJ Rep 3, para 33–34. The International Court of Justice (ICJ) stated:

> In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes.* Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, [and] also from the principles and rules the basic human rights of the human person, *including protection from slavery* and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law . . . . [O]thers are conferred by international instruments of a universal or quasi-universal character.

Ibid (authors' emphasis); *see also* McDougall Report (n 46) para 74; M. Cherif Bassiouni, 'International Crimes: *jus cogens* and *obligatio erga omnes*' [1998] L & Contemp. Prob. 63–74

[48] M. Cherif Bassiouni, 'Enslavement as an International Crime' [1991] NYU JILP 445; McDougall Report (n 46) para 46; M. Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (Cambridge University Press 2011) 378 (hereafter Bassiouni, *Crimes Against Humanity*)

[49] Bassiouni, *Crimes Against Humanity* (n 48) 378; M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* 299 (Springer Netherlands 1992)

[50] 1926 Slavery Convention, (n 27) art 1(1)

[51] *Fazenda Verde*: Amicus Curiae Helen Duffy, <http://rightsinpractice.org/Brazil-Verde-Slavery-Amicus.pdf> accessed 5 April 2018

Convention's preparatory works,[52] as well as Viscount Cecil's Temporary Slavery Commission Report[53] are informative. Cecil's Report accompanying the proposed 1926 Slavery Convention demonstrates that slavery's operative definition is the exercise of "powers attaching to the right of ownership."[54] Thus, the factual and legal understanding of the 1926 Slavery Convention encompasses the exercise of powers of ownership based upon sexual access to an enslaved person—what is today referred to as "sexual slavery." As the Habré Trial Chamber observed, sexual slavery is a factor in determining the occurrence of enslavement.[55] In other words, sexual slavery is slavery when powers attaching to the right of ownership are exercised. Consequently, sexual slavery is not a distinct *form* of slavery; rather, any and all forms of slavery (*de jure* and *de facto*) can be—and often are—inclusive of sexual slavery whenever sexualized violence is integral to the exercise of powers attaching to the right of ownership over a person.

The objective of the League of Nations—which included several Colonial powers who engaged in slavery and other widespread exploitative labor practices—was narrowly tailored toward ending legal (*i.e. de jure*, or chattel) slavery and the slave trade.[56] Notwithstanding this narrow aim, independent expert-members of the Temporary Slavery Commission recommended a broad definition of slavery that encompassed nearly all contemplated forms of human exploitation.[57] In 1925, the Temporary Slavery Commission set forth that "debt slavery," the enslaving of persons disguised as the adoption of children, and the acquisition of girls by purchase disguised as payment of dowry, etc. constituted slavery whenever the definitional element of slavery—exercising any or all of the powers of ownership—were met.[58]

---

[52] *See* Jean Allain, *The Slavery Conventions, The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention* (2008) (hereafter Allain, *Travaux Préparatoires*); Jean Allain, 'A Legal Consideration Slavery in Light of the *Travaux Préparatoires* of the 1926 Convention' [2006] paper presented at the Twenty-First Century Slavery: Issues and Responses Conference, The Wilberforce Institute for the Study of Slavery and Emancipation (WISE) (hereafter Allain, 'Legal Consideration of Slavery')

[53] League of Nations, *Slavery Convention: Report presented to the Assembly by the Sixth Committee* [1926] A.104.1926.VI (hereafter Temporary Slavery Commission 1926 Report)

[54] *Ibid*; *see* Allain, 'Legal Consideration of Slavery,' p 11 (n 52)

[55] *Hisènne Habré*, Trial Judgment, para 1504 (n 1)

[56] Temporary Slavery Commission 1926 Report (n 53)

[57] Jean Allain, *The Law and Slavery* (Brill 2015) 423–24 (hereafter Allain, *The Law and Slavery*)

[58] League of Nations, *Annex: Draft Convention, League of Nations Official Journal (Special Supplement 33) Records of the Sixth Assembly: Text of Debates* (1925) 439; *see also* Temporary Slavery Commission's Second Session Minutes, (1925) para 55 <http://biblio-archive.unog.ch/Dateien/CouncilMSD/C-426-M-157-1925-VI_EN.pdf> accessed 4 April 2018 (hereafter Temporary Slavery Commission Second Session Minutes). Among the concerns Viscount Cecil addressed in the Report was the sale of children and servants in Hedjaz. The following passage illustrates the situation:

> The Temporary Slavery Commission is informed on authority which it regards as entirely trustworthy that many of the slaves of foreign origin in the Hedjaz are either young girls from the Far East who come as pilgrims or are smuggled for sale; or are persons coming from various countries accompanying their parents or masters in the pilgrimage to Mecca. The former case would seem to merit the attention of the Commissions concerned with the traffic in women, but there appears to be no doubt that they are sold as slaves. It is understood that certain Governments in the Far East insist that all persons, before sailing for the Hedjaz, shall provide themselves with

The following year, Cecil similarly hinged slavery's definition on the elements now expressed in Article 1 of the 1926 Slavery Convention. He recognized that "slavery in all its forms" required the demonstration of exercising any power attached to the right of ownership over an individual,[59] even in cases that did not require legal ownership. Conversely, when the conditions did not evidence the exercise of powers attaching to the right of ownership, then such acts would not constitute slavery.[60] Cecil's report proffered that "[a] legislative text which, as far as practicable, covers all offences against the liberty of the individual by a single, comprehensive sentence seems preferable to one attempting to enumerate all possible forms of slavery."[61] The Temporary Slavery Commission's 1925 Report stated:

> In order to eradicate practices restrictive of liberty so far as they may occur in connection with marriage, concubinage, and adoption, the first object should be to strengthen the law so as to enable the courts to repress all abuses, and, secondly and more especially, to take measures in order that everyone should be fully aware that the status of slavery is in no way recognised [*sic*] by law.[62]

The Commission's intent was to outlaw any manifestation of powers attaching to the right of ownership over a person, crafting the definition in such a way that any exercise of powers of ownership would comply with the general, inclusive definition of slavery[63] and contemplating future novel ways in which slavery might manifest. Accordingly, sexual acts that domestic slaves were constrained to perform owing to their enslaved status would come within the definition. The drafters' key concept was to condemn the exercise

---

> passports. It seems desirable that this procedure should be more generally adopted. As regards the second case, it also seems desirable that some restriction should be placed on the taking of children or young persons to the Hedjaz and that all persons travelling as servants of or as attendants on pilgrims should be given freedom papers and registered at the port of embarkation.

Ibid, 38–39

[59] Temporary Slavery Commission 1926 Report (n 53) 1–2

[60] Allain, *The Law and Slavery* 423–24 (n 57)

[61] Temporary Slavery Commission 1926 Report (n 53) para 25

[62] The Second Session meeting minutes of the Temporary Slavery Commission in 1925 describe that "concubinage" fits squarely within the intended meaning of slavery as it is distinguished from wives. Children are born to a master who are not free and thus the freeing of two people, the woman and the child, is of issue. This was stated within a discussion of outlawing sexual slavery. Also, Sir F. Lugard added that, with regard to concubines, those who bore children to their masters were set free and were considered to be free born. Children of concubines shared inheritance with the children of free-born wives. The result of freeing the concubines was that the children would become bastards and lose their inheritance and the women would degenerate into the position of "kept women." The Legal Adviser to the Sudanese Government vouched for this statement of Koranic law. Temporary Slavery Commission Second Session Minutes (n 58) para 62

[63] Allain, *The Law and Slavery* (n 57) 423–24. Neither the Commission nor subsequently the drafters of the 1926 Slavery Convention, however, intended to outlaw what was forced labor; drafters found that, although evidence of constrained conditions existed, no powers of *de jure* or *de facto* ownership were exercised over persons. Jean Allain, 'The Definition of "Slavery" in General International Law and the Crime of Enslavement within the Rome Statute,' Guest Lecture Series of the Office of the Prosecutor 5–6 (2007) <https://www.icc-cpi.int/NR/rdonlyres/069658BB-FDBD-4EDD-8414-543ECB1FA9DC/0/ICCOTP20070426Allain_en.pdf> accessed 4 April 2018 (hereafter Allain, 'The Definition of "Slavery"')

of powers attaching to the right of ownership, regardless of the acts that masters forced slaves to perform.

Prompted by the 1925 Temporary Slavery Commission Report, the ensuing modification to the 1926 Slavery Convention draft is singularly significant. The 1926 Slavery Convention omitted language of the types of slavery, such as "domestic slavery and similar conditions," from the text.[64] Unsurprisingly, the drafters deemed it too limiting to qualify specific forms of slavery, preferring to emphasize the abolition of slavery *in all its forms*.[65] This revision is consistent with the drafters' intent to eradicate any and all slavery falling under the article 1(a) definition.[66]

The next question is this: How did the legal understanding of the 1926 Slavery Convention encompass the factual exercise of powers of ownership based upon sexual access to an enslaved person—what today is referred to as "sexual slavery"? Part IV below advances, as pleaded by *amici* in the Habré case, the basis for sexual slavery as *indicia* of slavery, irrespective of its forms and, therefore, also as an atrocity crime under customary international law.

IV. "Sexual Slavery" as Slavery under Customary International Law

Recent international criminal law instruments have codified "sexual slavery" as a stand-alone crime, partially due to the failures of adequate acknowledgement, investigation, prosecution, adjudication, and redress for victims and partially due to a misconception of slavery. Wartime female slavery, which often includes sexual enslavement, has received pithy legal attention, even with the increased focus on conflict-related sexual and gender-based violence. Wartime male sexual slavery remains almost completely unaddressed. The Tokyo Tribunal's failure to prosecute perpetrators for the enslavement of tens of thousands of "Comfort Women" constitutes a lamentable omission in annals of international law's ability to redress mass atrocity crimes.[67] Even today, criminal conduct referred to as "sexual slavery" struggles against invisibility and impunity. The need to re-qualify the initial charges in the Habré case starkly illustrates this problem.

Assaults on sexual integrity often have been an integral aspect of the crime of slavery.[68] United Nations Special Rapporteur Gay McDougall has found that the "term

---

[64] At the time of the drafting of the 1926 Slavery Convention, drafters used the term "domestic slavery" to refer to "non-Western slavery," "African Slavery," "indigenous slavery," or slavery as practiced in the colonies of Africa (as opposed to imported slavery practices of European powers in the trans-Atlantic slave trade). *See* Susan Miers, *Britain and the Ending of the Slave Trade* (Africana Publishing Corporation 1975) 118

[65] Allain, 'The Definition of "Slavery"' (n 63) 5–6 (emphasis added)

[66] *Ibid*

[67] *See, e.g.*, Patricia Viseur Sellers, 'Wartime Female Slavery: Enslavement?' (2011) 44 CILJ 115, 118 (hereafter Sellers, 'Wartime Female Slavery'); Kelly Dawn Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals* 73–75 (1st edn, Martinus Nijhoff Publishers 1997)

[68] Orlando Patterson, *Freedom in the Making of Western Culture* 50–51 (Basic Books 1991) (noting that circa 700 B.C.E., the Greek city-states would capture enemy females in order to replenish the slave

'sexual' is [. . .] an adjective to describe a form of slavery, not to denote a separate crime. In all respects and in all circumstances, sexual slavery is slavery."[69] Notably, neither the 1926 Slavery Convention nor the 1956 Supplemental Convention specifies that slavery be restricted to a certain sex or gender, nor does it proscribe a particular purpose for which a person is enslaved.[70] Any person, regardless of sex, age, or other status, can be enslaved. A slave is enslaved irrespective of labor, work, or service exerted from them, meaning that a person can be enslaved and not be required to perform any toil. Slavery is the status or condition to which a person is reduced.

Under international law, the predominant concept of slavery emerged as a result of the trans-Atlantic and East African Slave Trades. Slavery was characterized as an institution based upon chattel. Chattel slavery was *de jure* slavery that recognized the legal title or ownership of persons. Chattel slavery inherently included all forms of proprietary rights over a slave's body.[71] Ownership over slaves extended to whatever labor or service that masters forced slaves to render; thus, slave ownership included complete sexual and reproductive proprietorship.[72]

Sexual access and reproductive control may be the *indicia* of the slavery in question. Although much historical research remains ongoing, the practice of chattel slavery in North and South America and the Caribbean from the 17th to the 19th Centuries was rife with disregard for the sexual integrity of female and male slaves alike.[73] Slave auctions, for example, would advertise and sell both female and male slaves referred to as "breeders" based on their perceived or real abilities to reproduce and bear children who would be born into slavery.[74] Slaveholders bred child-slaves through their sexual ownership over female and male slaves.[75] Breeding slaves allowed for masters to increase their wealth and slave labor force.

In addition to breeding, slaveholders themselves impregnated, raped, sexually mutilated, ordered the sexual assaults of slaves, conducted sexual medical experiments on

---

population that was overwhelmingly female); Orlando Paterson, 'Trafficking, Gender and Slavery: Past and Present, in Jean Allain (ed), *The Legal Understanding of Slavery: From the Historical to the Contemporary* (1st edn, Oxford University Press 2012)

[69] McDougall Report (n 46) para 30. The authors go further, arguing that sexual slavery is not a "form" of slavery at all; rather, sexualized violence, including attacks on sexual integrity, is part of the *actus reus* of slavery *in all its forms*.

[70] Sellers, 'Wartime Female Slavery' (n 67) 123

[71] Daina Ramey Berry, *The Price for Their Pound of Flesh: The Value of the Enslaved, from Womb to Grave, in the Building of a Nation* (Beacon Press 2018) (hereafter Ramey Berry, *The Price for Their Pound of Flesh*)

[72] Minutes of the Temporary Slavery Commission's 17th Meeting show that M. Roncagli interrogated: "Was it also certain, as had been said, that the only object of slavery in Africa was to obtain labour? It enslaved the whole material and moral life of the individual. It could not therefore be concluded that at the present time slavery only existed for the purpose of obtaining labour." Temporary Slavery Commission Second Session Minutes (n 58) 87

[73] *See* Peter Kolchin, *American Slavery* (Penguin History 1995) 124–25

[74] Sellers, 'Wartime Female Slavery' (n 67) 122; Donna Wyant Howell, *I Was a Slave: True Life Stories Dictated by Former Slaves in the 1930's, Book Four: The Breeding of Slaves* (Am. Legacy Books 1996) 11–12

[75] Ramey Berry, *The Price for Their Pound of Flesh* (n 71)

slaves, or otherwise abused them sexually.[76] Slave brothels or the housing of "fancy [slave] girls" existed for owners' and associates' sexual entertainment.[77] State laws that prohibited the legal recognition of rape for female slaves reinforced sexual ownership.[78] Whether evidenced by breeding, impregnation, rapes, selling of sexual access, impregnations, sexual mutilation, or other violations of sexual integrity,[79] exercising powers over the reproduction and sexual integrity of slaves was inherent to chattel (*de jure*) slavery.

Sexual access through—and rules for access to—"sexual wives," such as in Zanzibar, the East African Slave Trade, or Arab slavery, provide further examples of sexualized violence as inherent in other, Eastern institutions of slavery.[80] Today, the Islamic State ("IS") has even revived the past practice of legal enslavement of women and girls, which includes sexual access under specific conditions as part of the group's assertion of the Caliphate in Iraq and Syria.[81] According to IS publications, fighters have captured, sorted, sold or gifted Yazidi women and children as "spoils of war" or *sabaya*.[82] The IS Committee for the Buying and Selling of Slaves has organized the Yazidi slave markets and allowed a local committee and commander to preregister IS fighters before placing their bids to purchase slaves.[83] Enforced rules on reselling Yazidi women or girls as slaves prohibit slave trading between brothers and require that slaves complete a menstrual cycle to demonstrate they are not pregnant prior to sale.[84] Such regulations

---

[76] House slaves were exposed to sexual violence. *See, e.g.*, Diana Ramey Berry, *Swing the Sickle for the Harvest is Ripe: Gender and Slavery in Antebellum Georgia*, (University of Illinois Press 2007) 37

[77] Tiye A. Gordon, *The Fancy Trade and the Commodification of Rape in the Sexual Economy of 19th Century U.S. Slavery* (2015) <https://scholarcommons.sc.edu/cgi/viewcontent.cgi?referer=https://www.google.be/&httpsredir=1&article=4647&context=etd> accessed 5 April 2018

[78] From the US Colonial period through Abolition, many states penalized the rape of female slaves. Although impunity was the norm, slave owners could sue offenders if offenders damaged slave owners' proprietary interests. *See* A. Leon Higginbotham, Jr., *In the Matter of Color: Race and the American Legal Process: The Colonial Period* (Oxford University Press 1978) 282

[79] For a discussion on using female slaves in the U.S. to conduct medical experiments often without anesthesia to develop surgical procedures, including fistula and other gynecological maladies, *see* Harriet A. Washington, *Medical Apartheid: The Dark History of Medical Experimentation on Black Americans from the Colonial Times to the Present* (Doubleday Press 2006) 64–68

[80] Abdulaziz Y. Lodhi, *The Institution of Slavery in Zanzibar and Pemba* (Cambridge University Press 1973) 20 (hereafter Lodhi, *The Institution of Slavery in Zanzibar and Pemba*). For example, social science defines slavery as the control of one person (the slave) by another (the slaveholder). Control transfers agency, freedom of movement, access to the body, and labor and its products and benefits, from the slave to the slaveholder, and violence supports and sustains such control. The aim of this control is primarily economic exploitation, but also may include sexual use or psychological benefit. *See* Kevin Bales, *Disposable People: New Slavery in the Global Economy* (University of California Press 1999) 6; Kevin Bales, 'Slavery in its Contemporary Manifestations,' in Jean Allain (ed), *The Legal Understanding of Slavery: From the Historical to the Contemporary* (1st edn, Oxford University Press 2012) 285.

[81] *See* IS. D.013, IS D.014; U.N. Human Rights Council, *"They came to destroy": ISIS Crimes Against the Yazidis*, U.N. Doc. A/HRC/32/CRP .2 (15 June 2016) para 55 (hereafter UN HRC Report, *"They came to destroy"*). The United States, Syria and Iraq are all states parties to the 1926 Slavery Convention.

[82] UN HRC Report, *"They came to destroy"* (n 81) para 75

[83] *Ibid* para 58

[84] UN HRC Report, *"They came to destroy"* (n 81) para 75

delimiting sexual access to a slave and controlling a slave's reproduction demonstrate sexualized violence as integral to and permissive as part of enslavement.

Indeed, sexual slavery—or, more precisely, sexual violence and attacks on sexual integrity—have been understood under customary international law to fall squarely within the *actus reus*—the exercise of any or all powers attaching to the right of ownership—of slavery as an atrocity crime well before its enumeration in the Rome Statute. The outlawing of slavery in Zanzibar, and the delayed outlawing of slaves who were "sexual wives," or concubines,[85] for example, illustrates that sexual violence always has been a part of the *actus reus* of slavery under the 1926 Slavery Convention definition.

Take the Temporary Slavery Commission's 1925 Report, for instance, in which experts found that, "[a]ccording to the Koranic law, if strictly observed, a free woman cannot be a concubine . . . . The abolition of the legal status of slavery gives to the concubine the right to claim her freedom."[86] Finally, under the institution and practice of slavery, a master had unfettered sexual access to a slave whether or not such power was exercised.[87] Indeed, for female slaves or their children to become kin in many kinship-based societies would have been unfathomable due to the nature of some strict hereditary kingdoms.[88] Sexual access, therefore, was an absolute right as an exercise of power of ownership.

In 1950, the UN Secretary-General appointed an *Ad Hoc* Committee on Slavery to suggest ways of eradicating slavery.[89] In its second Report in 1951, the Committee recommended adopting a supplementary convention to the 1926 Slavery Convention that would be "more precise than that instrument in defining the exact forms of servitude dealt

---

[85] *See, e.g.*, Lodhi, *The Institution of Slavery in Zanzibar and Pemba* 20; *see generally* Jonathon Glassman, 'Racial Violence, Universal History, and Echoes of Abolition in 20th Century Zanzibar,' in Derek R. Peterson (ed), *Abolitionism and Imperialism in Britain, Africa, and the Atlantic* (Ohio University Press 2010); League of Nations, *Report of the Temporary Slavery Commission,* [1925] A.19.1925.VI para. 58 ("The custom of *concubinage under Moslem law and according to certain local practices is, on the contrary, much more likely to lead to slave-dealing*, since the acquisition of a concubine is generally effected by means of payment of a sum of money by whatever name—"present" or "dowry"—it may be called, which in this case is, in fact, a real purchase.") (hereafter Temporary Slavery Commission 1925 Report)

[86] Temporary Slavery Commission 1925 Report (n 85) para 59 ("*According to the Koranic law, if strictly observed, a free woman cannot be a concubine*. Concubines have a status which gives them certain privileges: for instance, a concubine cannot be repudiated if she bears a child to her master, a concubine having in this respect a more privileged position than a wife. Her children are free and share the inheritance with the children of the free-born wife. 60. *The abolition of the legal status of slavery gives to the concubine the right to claim her freedom*, though she may remain with her master if she wishes.")

[87] In the 1800s and early 1900s in the Great Lakes region of Africa, female slaves were used for reproduction to meet demands for labor needs, or to perform domestic chores as "cook wives." *See Slavery in the Great Lakes Region of East Africa*, Henri Mêdard & Shane Doyle (eds) (Ohio University Press 2007) 31–33

[88] *Ibid* 181

[89] Economic and Social Council, Res. No. 238(IX), 20 July 1949; *see* Jean Allain, *The Law and Slavery: Prohibiting Human Exploitation* 431 (2015)

with [in the 1926 Slavery Convention]."[90] Resisting this recommendation, the Secretary-General reiterated the inclusive purpose of general language in the 1926 Convention, quoting again the Cecil Report, that the 1926 Convention "applies not only to domestic slavery but to all those conditions mentioned by the Temporary Slavery Commission . . . i.e., 'debt slavery', the enslaving of persons disguised as the adoption of children, and the acquisition of girls by purchase disguised as payment of dowry, etc."[91] That "sexual slavery" was never mentioned as a specific addition demonstrates an understanding that sexual and reproductive access to and use of enslaved persons was accepted as an inherent and integral aspect of slavery—either a power attaching to the right of ownership or an indication of enslavement.

Additional evidence of sexual slavery as an integral part of the prohibition of slavery is the UN Secretary-General's 1953 Memorandum, which considers the characteristics of the powers attaching to the right of ownership in the definition of slavery.[92] The Secretary-General included that the "master may use the individual of servile status, and in particular his [or her] capacity to work, in an *absolute manner, without any restriction* other than that which might be expressly provided by law."[93]

Furthermore, Article 1 of the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956 Supplementary Convention) prohibits four enumerated servile statuses—debt bondage, serfdom, forced marriage, and child exploitation—"whether or not they are covered by the definition of slavery contained in Article 1 of the Slavery Convention."[94] Thus, the 1956 Supplementary Convention expressly finds that any of these enumerated—or any other—statuses where the powers attached to the right of ownership are exercised is covered under the 1926 Slavery Convention.[95] The 1956 Supplementary Convention does not directly prohibit sexual slavery because it does not need to prohibit specific *indicia* of or acts that evidence slavery. The explicit mention of certain forms of slavery in the 1956 Supplementary Convention serve to increase the visibility and emphasize the enforcement of particular persistent manifestations of slavery, but did not prohibit any new forms of enslavement. The definition of slavery persists as hinging on the exercise of any and all of the powers attaching to the right of ownership over another person.

---

[90] United Nations Economic and Social Council, *Report of the* Ad Hoc *Committee on Slavery (Second Session)*, UN Doc E/AC.33/13, 4 May 1951, 16–17

[91] Temporary Slavery Commission 1925 Report 439

[92] United Nations Economic and Social Council, *Slavery, the Slave Trade, and other forms of Servitude (Report of the Secretary-General)*, UN Doc. E/2357, 27 January 1953, 28 (hereafter UN Secretary-General's 1953 Report); *see* Allain, 'The Definition of "Slavery"' (n 63) 13

[93] UN Secretary-General's 1953 Report (n 92) 28 (emphasis added). The phrase "other than that which might be expressly prohibited by law" could include rules for enslavement. The IS enslavement of women and girls as *sabaya*, for instance, includes specific prohibitions as to who may be enslaved, for example, by religious belief, status, and age, which is largely based on when a slave may be raped or otherwise accessed sexually. *See* IS. D.013, IS D.014 (n 81); UN HRC Report, "*They came to destroy"* (n 81) para 55

[94] Allain, *Travaux Préparatoires* (n 52) 18

[95] *Ibid*

The ICTY's *Kunarac* case exemplified a form of ownership illustrating customary international law: the accused held sixteen victims for months in captivity and subjected them to rape, including multiple gang rapes.[96] Here, the ICTY clarified that the work or tasks slaves are forced to perform may be factors or *indicia* to determine whether the crime of enslavement occurred, but do not constitute *per se* the elements of the crime of enslavement under customary international law.[97] According to the Court, factors indicative of enslavement include *inter alia* control of sexuality and forced labor.[98]

While enumeration of sexual slavery as a separate crime *does* emphasize its visibility and initiates momentum toward its eradication, this more contemporary legal separation may hinder a fuller comprehension of slavery in all of its dimensions. Sexual access is inherent in—or at times is the *raison d'être* of certain forms of—slavery. Historically, as explained *supra*, the slavery endured by females and males in the New World often enmeshed manual labor, sexual access and, reproductive control under powers exercised by a perpetrator-slave owner.[99] The specific codification today in international criminal law tends to decouple hard manual slave labor, often misconceived of and conflated with the term chattel slavery, from physical or psychological sexual violence that a "manual" slave must endure. Such decoupling can be problematic in that it fails to understand the nature of slavery in all its forms, and that sexualized violence is but one mechanism of exercising control (*i.e.* powers attaching to the right of ownership) over a person.

The desuetude of redressing slavery based upon sexual access and violence accounts for a legally and practically misguided extraction of sexual slavery from the crimes of slavery and enslavement. Even if pragmatically successful in combating impunity for sexual and gender-based crimes in international criminal law in the short term, such a divergence from customary international law must be corrected going forward to avoid long-term fragmentation of the international law on slavery. The Rome Statute's confusing enumeration of both enslavement and sexual slavery as a crime against humanity, and its omissions of enslavement under war crimes while listing sexual slavery, are incoherent, yet not dispositive of the customary law basis of sexualized violence—what is characterized today as "sexual slavery"—as part of the prohibition of the crime of slavery.[100]

V. The Habré Judgment: Positive Steps Toward Clarity

[96] *Prosecutor v Kunarac, Kovač and Vuković*, (Trial Judgment) [2001] IT-96-23-T & IT-96-23/1-T (hereafter *Kunarac*)
[97] *Ibid*, 542–43
[98] *Ibid*, para 543
[99] Sellers, 'Wartime Female Slavery' (n. 67) 115
[100] Additionally, the drafters of the Rome Statute notably omitted the customary war crime of the "slave trade" and, as a consequence, muddled what could be understood as "slave trading" under the crime against humanity of enslavement. The problem with this conflation is that, in systems crimes like slavery, many perpetrators engage in different aspects of the crimes. Inadvertently, the consequence of enslavement encompassing both the crimes of slavery and the slave trade can be an under-emphasis on prosecuting and punishing perpetrators who trade in slaves, but do not engage in the practice of slavery or slaveholding.

In light of the discussion above, the recognition of sexual violence and attacks on sexual integrity as part of the customary international law safeguard on slavery is indelible. Given that an act of a sexual nature—what is enumerated in some international instruments as "sexual slavery"—has been recognized as indicia of slavery and part of customary international law since 1926, sexual slavery was an international crime under customary international law during the time of the Habré regime.

Regrettably, the EAC overlooked an opportunity to deepen further a legal understanding of slavery in international law. Sexual violence and attacks on sexual integrity are essential indicia of slavery. Such a legal pronouncement would have lent itself to combating both male and female slavery in times of armed conflict or other atrocious political settings. Moreover, it would have assisted in increasing visibility for, among other victims, child-slaves born enslaved as a result of sexualized slavery.

Finally, Habré's conviction might have delivered a more refined gendered analysis of the sexual enslavement that occurred in Chad, thus helping to clarify the crime's place in customary international law generally. Specifically, the Court might have examined the gender dimensions of slavery, including what is now codified as "sexual slavery," by explaining the ways in which female and male slaves experience slavery. These nuanced analyses are fundamental to rectifying discriminatory application of the law on slavery. A lack of further exploration of sexual slavery as the *actus reus* or indicia of any and all forms of slavery under customary international law, for instance, generally neglects gendered roles of women, girl, men and boy-victims of sexualized violence and slavery. As a legal matter, recognizing the customary international law basis of sexual slavery also allows for the redress for men and boys—boy soldiers or "Bacha bazi" in Afghanistan, for example—under slavery as a war crime and enslavement as a crime against humanity. In the Habré case, this lack of gendered recognition was detrimental to the Chadian and international communities' understanding of the scope and scale of Habré's ruthless reign.