

# 5

## SHEDDING ALL THE LIGHT? THE COMMISSION OF INQUIRY INTO THE CRIMES AND MISAPPROPRIATIONS OF HISSÈNE HABRÉ IN CHAD\*

---

### 1 Introduction

Writing about commissions of inquiry in Australia, where they have a long Commonwealth-indebted history, D.H. Borchardt remarks that they 'are in the first place political instruments used by the government of the day for its own ends. Be that to exculpate itself, to nail political enemies ... or to clean up an Augean stable in a government bureau or department.'<sup>1</sup> While the various cases covered in this volume reveal a broader set of possible motivations than Borchardt's triptych allows, the Chadian Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habré, His Accomplices and/or Accessories (Commission) readily aligns with Borchardt's assessment, at least in as much as its genesis and orientation were premised on the delegitimation of President Habré, and concomitant whitewashing of President Idriss Déby and his newly-instituted government.

Déby established the Commission by Presidential Decree on 29 December 1990,<sup>2</sup> less than a month after he had assumed office on 2 December. This was the first commission of its kind in Chad. Déby had taken power by overthrowing Habré, whose eight-year presidency saw an estimated 40 000 fatalities,<sup>3</sup> widespread sexual violence, torture,

\* This chapter has been written based on interviews conducted in Dakar and N'Djamena by a team comprising Thomas Probert, Kelly-Jo Bluen and Émile Ndiaye, with helpful subsequent input from Christof Heyns, Meetali Jain and Anyango Yvonne Oyieke.

1 D. H. Borchardt *Commissions of Inquiry in Australia: A Brief Survey* (Melbourne: La Trobe University Press, 1991).

2 Decree 014/P.CE/CJ/90, Republic of Chad (29 December 1990) (reprinted in Neil J. Kritz *Transitional Justice: How Emerging Democracies Reckon with Former Regimes; Volume 3. Laws, Rulings, and Reports* (Washington DC: United States Institute of Peace Press, 1995)).

3 This is the figure presented by the Commission; it is discussed in more detail below.

massacres of civilians, arbitrary execution, and imprisonment.<sup>4</sup> The Commission found Habré responsible for the violations committed during his presidency, in particular through his establishment and control over the *Direction de la documentation et de la Sécurité* (DDS).<sup>5</sup> A subsequent analysis of the DDS documentation by the Human Rights Data Analysis Group (HRDAG) was able to verify clear links between Habré's command and the violations in question.<sup>6</sup> This has been the subject of several trials both within and outside Chad and, most recently, in 2016, the African Union-mandated Extraordinary African Chambers (EAC) in Senegal held that Habré had the requisite knowledge and control over DDS actions such that his command responsibility was established,<sup>7</sup> a verdict confirmed on appeal in 2017.<sup>8</sup>

Both the verdicts of the trials, the findings of the Commission, and other reports and accounts indicate the violence of Habré's rule. Of course, Habré did not act alone. Throughout, his regime was armed and funded predominantly by the United States and France as part of a Cold War strategy to create a bulwark against Libyan leader Muammar Gaddafi's increasing strength in the region.<sup>9</sup> Moreover, it is notable that Idriss Déby himself had been Habré's chief of staff for the armed forces in 1984, a year which saw particularly egregious atrocities, especially in Southern Chad.<sup>10</sup> While the Commission was fairly unprecedented globally in highlighting the role of international actors in the atrocities,

4 *Report of the Commission of Inquiry into the Crimes and Misappropriations of Ex-President Hissène Habré, his Accomplices and/or Accessories* (7 May 1992) (Commission Report) (reprinted and translated in Kritz, *Transitional Justice, Ministère Public c Hissène Habré, Chambres Africaines Extraordinaires d'Assise* (30 May 2016) available at: [http://www.chambresafriaines.org/pdf/Jugement\\_complet.pdf](http://www.chambresafriaines.org/pdf/Jugement_complet.pdf) (accessed 14 September 2016).

5 *Commission Report*.

6 Romesh Silva, Jeff Klingner & Scott Weikart 'State-Coordinated Violence in Chad under Hissène Habré: A Statistical Analysis of Reported Prison Mortality in Chad's DDS Prisons and Command Responsibility of Hissène Habré, 1982–1990' Report by Benetech's Human Rights Data Analysis Group to Human Rights Watch and the Chadian Association of Victims of Political Repression and Crimes (3 February 2010) available at: <https://hrdag.org/wp-content/uploads/2013/02/State-Violence-in-Chad.pdf>.

7 *Ministère Public c Hissène Habré, Chambres Africaines Extraordinaires d'Assise* (30 May 2016).

8 *Le Procureur Générale c Hissène Habré, Chambres Africaines Extraordinaires d'Appel* (27 April 2017) available at: [http://www.chambresafriaines.org/pdf/Arr%C3%AAt\\_int%C3%A9gral.pdf](http://www.chambresafriaines.org/pdf/Arr%C3%AAt_int%C3%A9gral.pdf) (accessed 12 August 2017).

9 Bob Woodward *Veil: The Secret Wars of the CIA* (New York: Simon and Schuster, 2005); Marielle Debois *Living by the Gun in Chad: Combatants, Impunity and State Formation*, trans. Andrew Brown (London: Zed Books, 2016).

10 Debois, *Living by the Gun in Chad*.

its assessment of responsibility ultimately returns squarely to Habré, and there is no acknowledgment of Déby's role in any of the atrocities documented in the Commission's report.<sup>11</sup> In this regard, the singularity of focus on Habré by the Commission suggests an inchoate picture of accountability in such ways that whitewash the roles of others. Even the Commission's name signals a perpetrator predetermined. In her global study of truth commissions Priscilla Hayner notes that, from the outset, the motivations for the establishment of the Commission in Chad were questioned.<sup>12</sup> Indeed, some of our interlocutors highlighted the fact that the Commission was an integral part of Déby's election campaign: an overture to divorce Déby from the previous regime, and instead to depict his government as the instigator of liberty in juxtaposition with its repressive predecessor.<sup>13</sup>

At the same time, there is no shortage of historical examples of politically-motivated acts garnering unintended results. In this regard, in spite of (or, in some respects, because of) its orientation, the Commission produced a substantial report that formed an initial basis for a particular form of accountability in Chad. It documented many of the abuses of the period, and stands as the only government-authorized official record of the violations. The Commission's findings have been taken up by many civil society and legal groups, in particular to mobilise towards prosecutions of Habré and various DDS agents both within and outside Chad and to push for memorialisation and reparation.<sup>14</sup>

This chapter considers the extent and manner in which the Commission produced or facilitated accountability for right to life violations in Chad. The chapter begins by providing background to the context, the genesis and the mandate of the Commission. Thereafter it considers the Commission on its own terms by considering its independence, investigatory powers, and various other procedural aspects of its work. Finally, the chapter turns to questions of the Commission's legacy in terms of its contribution to accountability in Chad. It considers both the extent to which the Commission itself functioned as an accountability mechanism for the crimes committed as well as its influence on subsequent processes and

11 *Commission Report*.

12 Priscilla B. Hayner *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, 2nd ed. (New York: Routledge, 2011).

13 Interviews with research team, May and June 2016.

14 The use of the Commission's findings in various cases in Senegal (2000), Belgium (2000), Chad (2000, 2008, and 2015) and at the Extraordinary African Chambers (2016) is discussed below in part 4.2.

mechanisms for accountability before considering its broader impact on narrations of accountability and violence.

Ultimately, it argues that while the Commission played a role in establishing some record of the violations of the Habré period, its capacity to function as a genuine accountability mechanism is limited by both the inadequacy of the implementation of its recommendations, and the singularity in the attribution of responsibility which, despite the broader possibilities envisaged by a commission (in contrast to the narrow strictures of a prosecutorial process) articulated a limited and individualised approach to accountability to which subsequent processes have been tethered. In this regard, while it played a role in delineating the culpability of Habré and several DDS agents for the atrocities committed during Habré's presidency, and in the process towards his prosecution, it has potentially overshadowed other possibilities for justice, including the structural, historical, socio-economic, reparative, redistributive, and reconciliatory possibilities.

To make this argument, the chapter draws on primary and secondary sources in the public record, including an analysis of trial judgments and reflections drawn from attendance at the judgment and opening of the trial of Hissène Habré at the Extraordinary African Chambers. It further draws on research conducted in Dakar, Senegal and N'Djamena, Chad in May and June 2016 which included semi-structured interviews and focus groups with former commissioners, lawyers and civil society actors who worked closely with the Commission, as well as lawyers, scholars and judicial actors involved with the Hissène Habré trial at the Extraordinary African Chambers. In addition, the researchers participated in two conferences including one on complementarity, universal jurisdiction and the Habré trial and hosted by African Legal Aid in Dakar from 30-31 May 2016 and one on transitional justice and reparations after the Habré case, hosted by *L'Association Tchadienne pour la Promotion et la Défense des Droits de l'Homme* and Human Rights Watch in N'Djamena, from 6-7 June 2016.

## **2 Background, establishment and mandate of the Commission**

### **2.1 Establishment of the Commission**

The Commission was both the first of its kind in Chad, and one of the earlier incarnations of contemporary truth commissions tethered to transitional processes. After its establishment at the end of 1990, it began its work

on 1 March 1991, led by Chadian lawyer, Mahamat Hassan Abakar.<sup>15</sup> It was initially given six months to submit its report but experienced delays owing to a lack of resources and office space, the turnover of several commissioners, and a lack of access to certain regions.<sup>16</sup> The final report was released on 7 May 1992.<sup>17</sup> The Commission was housed in the former DDS headquarters, a factor which, as discussed below, on the one hand provided for access to the DDS archives, thus facilitating the Commission's work, but, equally, the building's status as a site of much of the preceding period's most extreme abuses had a clear impact – at least initially – on people's willingness to testify.

When Déby took power in Chad, the visceral effects of Habré's repression were evident. The media were replete with condemnations of Habré and recrimination of his abuses was matched by a sense of volatility and fear of his return to power.<sup>18</sup> Compounding this was the continued presence of DDS agents in positions of state power.<sup>19</sup> In this context, Déby's motivation for the establishment of the Commission appears to have been twofold. On the one hand, the magnitude of the destruction and the public condemnation was such that there was a sense that the past could not be left without reckoning. As one interviewee noted, there was an overwhelmingly need for *something* to be done.<sup>20</sup> Another participant, who had been involved in documenting Habré's abuses throughout the 1980s, described Déby's decision to institute the Commission as reflective of a 'sensitivity to the trauma of the population'.<sup>21</sup> In his book about the process, Commission President Abakar suggests that the magnitude of the abuse was such that Déby could not avoid establishing a commission, not only on account of the extent of the atrocities, but specifically on account of the fact that many of his allies were victims of the Habré presidency's abuses.<sup>22</sup> He argues that

President Déby could not ... avoid [the establishment of the Commission] because thousands of members of his own clan and his allies who led him to

15 *Commission Report*.

16 *Ibid.*, p.54.

17 *Ibid.*

18 *Ibid.*, p.54.

19 *Ibid.*

20 Interviews with research team, May and June 2016.

21 *Ibid.*

22 Mahamat Hassan Abakar *Chronique d'une Enquête Criminelle Nationale: Le Cas Du Régime de Hisssein Habré, 1982-1990*, Pour Mieux Connaître Le Chad (Paris: L'Harmattan, 2006).

power had lost their lives in Habré's jails or had been summarily executed, [in addition to the countless] anonymous Chadians who had done the same.<sup>23</sup>

At the same time, the establishment of the Commission was clearly linked to a campaign by Déby to discredit the Habré presidency with a view to ushering in his own. Some have suggested that Déby's push for the Commission was related to his desire to improve his public perception.<sup>24</sup> Our interviews made clear that this was critical to the logic of the establishment of the Commission. One respondent described it as a 'a way of drawing a contrast between [Déby] and the previous regime'.<sup>25</sup> Operating on familiar good-versus-evil binary logics of justice,<sup>26</sup> one of Déby's key motivations was to foreground Habré's abuses in such a way that he was not only able to sanitise his own, but also to adopt a position as Chad's saviour, in his self-representation both as Chad's liberator from Habré and as the instigator of the specific commission that would shed light on his abuses. This is particularly pertinent in light of the use of the Commission as part of Déby's election campaign, whose slogan was *ni or, ni argent, mais la liberté* (not gold, not money, but liberty).<sup>27</sup> In this regard, the Commission was as much an exercise of whitewashing Déby's abuses as it was of documenting those of Habré.

The decision to proceed with a domestic commission of inquiry for these intersecting purposes, as opposed to other domestic and/or international transitional justice processes, appears to have rested on several factors. On the one hand, international prosecution, at that point, was not an option. The end of Habré's presidency predates both the establishment of the International Criminal Court (ICC) and the Pinochet precedent upon which much of the push for prosecution of former heads of state under the principles of universal jurisdiction is premised.<sup>28</sup> While

23 *Ibid.*

24 Priscilla B. Hayner 'Fifteen Truth Commissions – 1974 to 1994: A Comparative Study' *Human Rights Quarterly* 16 (1994), p.625.

25 Interviews with research team, May and June 2016.

26 For a discussion, see, for example, Kirsten Ainley 'Individual Agency and Responsibility for Atrocity' in Renee Jeffery (ed.) *Confronting Evil in International Relations: Ethical Responses to Problems of Moral Agency* (Basingstoke: Palgrave Macmillan, 2008).

27 Gilbert Maoundonodji *Les enjeux géopolitiques et géostratégiques de l'exploitation du pétrole au Tchad*, Université Catholique de Louvain, Faculté des Sciences Économiques, Sociales et Politiques, (NS), 574 (Louvain-la-Neuve: Presses Univ. de Louvain, 2009).

28 For a discussion, see Naomi Roht-Arriaza 'The Pinochet Precedent and Universal Jurisdiction Symposium: Universal Jurisdiction: Myths, Realities, and Prospects: Panel Three: Contemporary Developments' *New England Law Review* 35 (2001) p.311; M. Cherif-Bassiouni 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice' *Virginia Journal of International Law* 42:1 (2001) p.81.

a similar timeframe saw international prosecutions, most notably at the International Criminal Tribunals for Rwanda and the former Yugoslavia, neither the geopolitical nor media interest present in the former Yugoslavia and Rwanda was replicated in Chad. With the end of the Cold War, what marginal international interest continued in Chad as a country as opposed to proxy battleground had depleted substantially and there was virtually no Western interest in furthering accountability mechanisms for Chad, not least, no doubt, on account of entangled US and French roles in installing and sustaining Habré's presidency. In terms of the decision to pursue a commission, it seems that it was, as one respondent described, a 'confluence of circumstance'.<sup>29</sup> Amnesty International had consistently advocated commissions of inquiry in response to mass violations<sup>30</sup> and on several occasions had done so with respect to Chad.<sup>31</sup> Déby was aware of Amnesty International's work throughout the 1980s and when he was arrested by Habré's forces in 1989, Amnesty International had pushed for his release.<sup>32</sup> In this regard, Amnesty International may have played some role in influencing the decision to establish the Commission.

## 2.2 Mandate of the Commission: 'casting light'

The Commission was mandated to establish a record of abuses carried out under Habré's presidency both related to direct physical violations and financial misappropriation. Ubiquitous in the discourse around the Commission's purpose, objectives and functioning, as well as the motivation for its establishment is the notion of 'casting light'. In his book Abakar describes the primary objective of the commission as *de faire la lumière*, or to cast light.<sup>33</sup> Almost all interviewees delineated this as a central purpose, or embodying function of the Commission.

Specifically, the Commission's mandate included:

- to investigate illegal imprisonment, detention, assassinations, disappearances, torture and practices of acts of barbarity, the mistreatment, other attacks on the physical or mental integrity of persons, and all violations of human rights and illicit trafficking in narcotics;
- to collect documentation and archives and exploit them;

29 Interviews with research team, May and June 2016.

30 See, for example, Amnesty International *Amnesty International Report 1988* (London: Amnesty International Publications, 1988).

31 Interviews with research team, May and June 2016.

32 *Ibid.*

33 Abakar, *Chronique d'une enquête* p.29.

- to confiscate and secure under seal all objects and premises required for elucidating the truth;
- to preserve in their present condition the torture chambers and equipment utilised;
- to hear testimony from all victims and invite them to produce documentation attesting to their physical and mental condition following their detention;
- to take testimony of interested parties and invite them to furnish any relevant or necessary documents;
- to hear testimony from any person whose deposition may be useful to the elucidation of truth;
- to determine the total cost of the war effort and how the money was spent beginning in 1986;
- to audit the financial operations and bank account of the ex-President and his accomplices and/or accessories; and
- to take inventory of all the goods and properties both in-country and abroad, belonging to or having belonged to the ex-President, his accomplices and/or accessories.<sup>34</sup>

It is notable that, distinct from many truth commissions, with more recent exceptions such as the Liberian Truth and Reconciliation Commission, there was a focus in the Chadian Commission on financial crimes and their intersections with other human rights violations. Many commissions before and since the Chadian Commission have focused predominantly on right to life violations, violations of bodily integrity, torture, crimes against humanity, rape and massacres, despite the latitude provided by commissions to look beyond international atrocity crimes. The Chadian Commission, on the other hand, was explicitly mandated to look at economic crimes committed by the Habré government in addition to direct physical violations. For transitional justice scholar Dustin Sharp, this is a reflection of two features. First, the Commission's existence outside of a dominant global narrative around transitional justice approaches meant that many of the available transitional justice 'toolkits' largely developed out of Latin American experiences were not directly involved in the process of establishment of the Commission.<sup>35</sup> Indeed, with the exception of some advisory role played by Amnesty International, there was very little international support for the Commission and there was little state-level support from other governments, including financially

34 *Commission Report*, p.53.

35 Dustin N. Sharp (ed.) *Justice and Economic Violence in Transition*, Springer Series in Transitional Justice (New York: Springer, 2014).



or in other formats. Sharp notes that '[the Commission] appears to have worked in such splendid isolation that it was not heavily influenced by the dominant script to begin with'.<sup>36</sup> Second, Sharp argues that the dire economic context of Chad in the early 1990s was such that the prospect of recouping some of the losses amassed through Habré-era corruption motivated the decision to include these crimes.<sup>37</sup> This focus on economic crimes is reflected in the Commission's approach to investigations as well as its report, and its staff complement.

### 2.3 Overview of the Commission's work, findings, and recommendations

The Commission heard 1 726 witnesses.<sup>38</sup> It interviewed 662 former political prisoners, 786 families of victims of extrajudicial executions, 236 former prisoners of war, and 30 former members of the DDS.<sup>39</sup> It also conducted three exhumations. It was able to outline and detail a significant number of atrocities. The Commission listed 3 806 people who had died in detention or been extrajudicially executed between 1982 and 1990.<sup>40</sup> The report noted that its findings were unlikely to have covered more than 10 per cent of the total number of deaths and hence projected that the total could have reached 40 000.<sup>41</sup> It counted 54 000 prisoners (dead and alive) during the same period. The report detailed open-air executions, acts of torture, disappearances and massacres, primarily of unarmed civilians.<sup>42</sup> The report directly implicated Habré and his associates, including the DDS, in the perpetration of these violations while also noting the role of foreign actors in arming and supporting Habré's government.<sup>43</sup>

The Commission was not initially mandated to provide recommendations. Despite this, it appears that over the course of its work commissioners came to feel that the provision of recommendations was a necessary inclusion.<sup>44</sup> The recommendations predominantly related to prosecution, security sector reform, and institution building. These included:

36 *Ibid.*, p.105.

37 *Ibid.*

38 *Commission Report*, p.57.

39 *Ibid.*, p.57.

40 *Ibid.*, p.80.

41 *Ibid.*, p.81.

42 *Ibid.*

43 *Ibid.*, p.88.

44 Interviews with research team, May and June 2016.

- the establishment of a ‘real democracy’ with an independent and sovereign judiciary;
- the establishment of a National Human Rights Commission to investigate human rights violations, to promote human rights at the national level, and to issue advisory opinions or bring legal suits for human rights violations;
- the cessation of illegal occupation of houses and confiscation of others’ possessions;
- the establishment of a commission to restore illegally-confiscated or plundered property to its rightful owners (including of property confiscated by the ‘current regime’);
- the sequestration of goods belonging to former DDS agents implicated in crimes and looting to be held by the Ministry of Justice pending the outcome of legal proceedings;
- the prosecution of ‘the authors of this horrible genocide, who are guilty of crimes against humanity’;
- the construction of a monument honouring the memory of the victims and the designation of ‘a day for prayer and remembrance for the said victims’;
- the conversion of the DDS headquarters (and particularly the detention facility in a converted swimming pool, known as the piscine) into a museum; the re-examination of the powers and structures of the General Directorate of the Centre de Recherches et de Coordination de Renseignements (CRCR) (the new incarnation of the DDS) so as to recreate it as ‘an instrument in the service of the people and their well-being, not a machine of oppression and torture’;
- the removal from their positions of all former DDS agents who have been ‘rehabilitated and employed’ by the CRCR;
- the elimination of criminal detention centres, maintaining only those provided for by the Chadian Code of Criminal Procedures;
- respect for and enforcement of current laws regarding offences against the security of the state;
- the teaching of human rights in schools, police academies, universities and in the army;
- the taking of steps by the President to impartially punish those responsible for human rights violations.<sup>45</sup>

45 *Commission Report*, p.93.

For the most part, there has been little done to implement the recommendations, with the notable exception of prosecutions. There have been several cases in Chad, also against Habré *in absentia*, including one for which he was sentenced to death in 2008, and against several DDS officers in 2015. Moreover, Hissène Habré was convicted in 2016 for crimes against humanity and torture at the East African Community (EAC) in Dakar, Senegal, a conviction upheld on appeal in 2017. Chad provided US \$3,75 million for the trial, which amounts to approximately one-third of the trial's budget,<sup>46</sup> and oscillated between cooperation (including through a judicial cooperation agreement) and resistance (including by refusing to extradite several of those initially indicted) in the course of the trial. Much of the impetus for prosecution has emerged from victims' groups in Chad, including the Chadian Association of Victims of Crimes and Political Repression (AVCRP) and in particular the work of Souleymane Guengueng, Clement Abaïfouta, and the indefatigable commitment of Chadian lawyers, particularly Jacqueline Moudeïna and Delphine Djiraïbé. Many of the victims' groups were provided support by Human Rights Watch.

### 3 Independence and procedural aspects of the Commission

#### 3.1 Independence

The Commission appears to have been given, on the one hand, substantial independence to investigate Habré and the DDS's abuses. President Déby's support for the Commission, and the perception of it as a source of his legitimacy, provided it with latitude to investigate Habré's crimes including those that implicated personnel in the CRCR and other government positions.<sup>47</sup> Indeed, there had been resistance to testifying before the Commission on the part of CRCR personnel.<sup>48</sup> It appears that Déby's support for the Commission was such that Commission president Abakar was able to approach the President directly in instances where there was refusal to testify, and Déby was able to ensure testimony and participation.<sup>49</sup>

46 Human Rights Watch 'Q&A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal' (3 May 2016) available at: <https://www.hrw.org/news/2016/05/03/qa-case-hissene-habre-extraordinary-african-chambers-senegal> (accessed 17 May 2017).

47 Interviews with research team, May and June 2016.

48 *Commission Report*, p.54.

49 Interviews with research team, May and June 2016.

However, it appears that the President's support was linked to the assuredness that the Commission would not investigate atrocities that might implicate him. Of particular significance here is the omission of investigation of the events of Black September in 1984, a time during which Déby was chief of staff of the armed forces, and which saw systematic attacks on villages in the south of Chad, targeting, arrests and executions of Chadians from the south.<sup>50</sup> It is worth noting that events of Black September formed part of victims' testimony at the EAC<sup>51</sup> but in which, perhaps in a similar set of interactions between power politics and justice processes, Déby was not implicated, a factor which speaks to the Commission's legacy, in ways discussed below in part 4.

The exclusion of Déby's complicity was not explicitly delineated in the Commission's mandate. While, as other chapters in this volume illustrate, some commissions have extremely narrow mandates, designed to exclude accountability for certain powerful actors, in this case, on paper it would have been geographically and temporally within the Commission's mandate to investigate Déby's responsibility.<sup>52</sup> The lack of focus on Déby's crimes appears to have resulted from the acceptance of the implication that investigating Déby's role was not a political possibility, rather than from a set of mandate-driven parameters. Research participants who were involved in the Commission's work indicated that investigating such crimes would not have been feasible, neither politically nor pragmatically. One respondent noted that the Commission would not have been able to carry out its work had it implicated the President, suggesting a strategic decision to avoid these subjects in order to maintain the potential of the Commission to carry out its other work.<sup>53</sup> This contention is further supported by the role of the President in ensuring testimony of CRCR personnel. Another respondent, when asked about this omission, argued that the Commission was established to investigate civilian crimes, and not those of the military.<sup>54</sup>

The Commission's report is indicative of these omissions and paints an inchoate record of atrocity and accountability in this regard.

50 See Debos, *Living by the Gun in Chad*, p.61.

51 Testimony from 26-29 October 2015. For a summary, see Interactive Forum on the Extraordinary African Chambers, 'Summary – "Black September" victims testify' (October 2015) available at: <http://forumchambresafraicaines.org/summary-black-september-victimstestify/?lang=en> (accessed 12 September 2017).

52 The Commission's mandate would not have explicitly excluded Déby's accountability; see *Commission Report*, p.53.

53 Interviews with research team, May and June 2016.

54 Interviews with research team, May and June 2016.

Ironically, with the implied eschewing of consideration of Déby's role, the latter's support enabled freedom and capacity as regards Habré's abuses. While various follow-up reports and investigations by judicial and non-governmental organisation (NGO) entities have produced assessments of many components of the era's abuses,<sup>55</sup> the Commission stands out as having garnered some of the most significant testimony from DDS agents, a factor likely linked to the support for the Commission by the President. As such, an expansive independence, on the one hand, in terms of access and powers, was linked to an implicitly agreed exercise of that independence within a narrowed scope.

### 3.2 Resourcing, staffing and logistics

The Commission faced significant obstacles related to its resourcing and logistics. As the report notes, 'neither the time given to the Commission, nor the means at its disposal nor its access to victims was sufficient to carry out such an exhaustive labour'.<sup>56</sup> Perhaps among its most substantial constraints was a lack of access to vehicles at the start of its work and, to a lesser, but still significant extent throughout its operation. Until 25 August 1991, when it received an off-road vehicle, the Commission had access only to urban vehicles and was unable to travel to the provinces or indeed beyond the outskirts of N'Djamena.<sup>57</sup> The off-road vehicle and an additional vehicle it received in August were taken by combatants in October 1991; the former was recovered a month later, while the latter was only recovered in January 1992.<sup>58</sup> This had an impact on the Commission's capacity to carry out its work and created delays in its processes. Specifically, it was to have an impact on the Commission's capacity to reach areas in which abuses occurred outside of N'Djamena.

Further, the Commission operated on a limited budget, and faced significant bureaucratic obstacles in terms of access to finance. Initially, all of the Commission's financial transactions, regardless of how minor, had to be approved by the Minister of Finance.<sup>59</sup> This was a substantial impediment, and Abakar notes that had it been left unchanged, it would

55 See, for example, Human Rights Watch *Chad: The Victims of Hissène Habré Still Awaiting Justice* (July 2005); Silva, Klingner, & Weikart, 'State-Coordinated Violence in Chad under Hissène Habré'; Amnesty International *Chad: The Habré legacy*, 16 October 2001, AFR 20/004/2001, available at: <http://www.refworld.org/docid/3bcee8567.html> (accessed 2 October 2017).

56 *Commission Report*, p.57.

57 *Ibid.*, p.54.

58 *Ibid.*

59 Abakar, *Chronique d'une enquête*, p.27.

have resulted in a highly-protracted process.<sup>60</sup> After many demarches to the authorities concerned, the Commission was able to secure a cash advance for the allocated 4,8 million francs to be disbursed in three instalments, which facilitated the Commission's work.<sup>61</sup> Despite this, the lack of resourcing curtailed some aspects of the investigation and, in particular, vehicular and security constraints meant that certain areas of the country were not reached.

In many ways it was the tenacity of Commission president Abakar that facilitated a Commission whose investigations, despite limitations, were as substantial as they were. The Commission was initially composed of 12 members; two judges, four police officers, two administrators and two secretaries.<sup>62</sup> After six months of operation, Abakar called for the replacement of a number of commissioners, whose work he considered inadequate. He suggested that the commissioners in question were insufficiently committed or interested in the Commission and were purely interested in the benefits and compensation.<sup>63</sup> Several of the initial commissioners failed to appear at the Commission altogether, while others reappeared only at the end of the month to collect their pay cheques.<sup>64</sup> Abakar attributes this in part to a fear of repercussions related to the work of the Commission.<sup>65</sup> The commissioners appointed after the dismissal of some of the original commissioners were divided along expertise, with some designated to assessing financial misappropriation and the designated related to assessment of criminal violations more related to right to life violations.<sup>66</sup> For Abakar, the new commissioners brought enthusiasm, work ethic and drive, and did much to foster a more robust and effective Commission.<sup>67</sup>

Security of the commissioners, however, was a serious concern. There was ongoing public fear that Habré would return to N'Djamena.<sup>68</sup> Moreover, former DDS agents, now integrated into the CRCR, refused to cooperate with the Commission throughout.<sup>69</sup> This seems to have

60 *Ibid.*, p.28.

61 *Commission Report*, p.54.

62 *Ibid.*

63 Abakar, *Chronique d'une enquête*, p.25.

64 *Ibid.*, p.25.

65 *Ibid.*, p.26.

66 *Commission Report*, p.54.

67 Abakar, *Chronique d'une enquête*, p.26.

68 *Commission Report*, p.57.

69 *Ibid.*

compromised the independence of certain commissioners during the early work of the Commission and, indeed, this was one of the factors that directly led to the replacement of the initial group of the commissioners.<sup>70</sup> It is not clear, however, that this had an effect on those commissioners involved in the later stages of the Commission's work, who indeed wrote openly about the intimidation in the Commission's report.<sup>71</sup>

### 3.3 Investigatory powers

The Commission's report describes the process of investigations as akin to those followed in criminal judicial proceedings.<sup>72</sup> The Commission took testimony from interested parties, victims, relatives of the deceased, former DDS agents, and anyone able to shed light on the abuses.<sup>73</sup> It also collected written and material evidence including lists of people who died in prison and photographic evidence of torture and burial grounds.<sup>74</sup> Investigators took individual depositions, but when a witness was thought to be concealing information, a team of investigators, often headed by the Chairperson of the Commission, would conduct cross-examination.<sup>75</sup> Several survivors and DDS agents were cross-examined.<sup>76</sup> The Commission had the power to compel testimony, but was often met with resistance from DDS agents which, as indicated above, President Déby was instrumental in overcoming.

After several months of operation, the Commission developed a series of questionnaires, customised for former DDS agents, former political detainees, relatives of those who died in detention or were executed, and prisoners of war, which accelerated the Commission's work.<sup>77</sup> Several respondents noted that, while housing the Commission in the former DDS headquarters had serious ramifications for victim participation, from an investigatory perspective it facilitated the Commission's inquiry, as it had direct access to an archive of Habré-era documentation.<sup>78</sup> This documentation housed at the DDS headquarters comprised much of what

70 *Ibid.*

71 *Ibid.*

72 *Ibid.*, p.55.

73 *Ibid.*

74 *Ibid.*

75 *Ibid.*

76 *Ibid.*

77 *Ibid.*, p.56.

78 Interviews with research team, May and June 2016.

was later analysed by the Human Rights Data Analysis Group,<sup>79</sup> and used by Human Rights Watch, as well as several Chadian victims' groups in developing a subsequent case against Habré at the EAC.

Most of the Commission's investigations took place in N'Djamena. Beyond this, the Commission had broad potential geographic access but was hamstrung by pressures of time, as well as the vehicular and logistical constraints discussed above. Nevertheless, a team of investigators spent a month in Southern Chad, where it visited four prefectures and 10 sub-prefectures and heard 700 testimonies.<sup>80</sup> The Commission also spent three weeks in Central, North East and East-Central Chad, where it heard 143 testimonies.<sup>81</sup> For security reasons the Commission was unable to visit the Guerra region, which the report describes as 'the victim of an odious genocide that lasted several years'.<sup>82</sup> To compensate, the Commission heard testimony from individuals from Guerra living in N'Djamena.<sup>83</sup> The team located two mass graves and three exhumations were conducted at the behest of the Commission, which revealed sites of open-air executions, and corpses of those killed by DDS agents.<sup>84</sup> Several respondents took issue with the lack of methodical practice in evidence taking by the Commission, undermining the report's reliability, while others noted that some of the exhumations compromised the forensic integrity of the burial sites in such a way that the EAC was unable to investigate them during the course of the Habré trial.<sup>85</sup>

### 3.4 Participation

The Commission heard more than 1 700 witnesses, interviewing former political prisoners, families of victims of extrajudicial executions, former prisoners of war, and former members of the DDS.<sup>86</sup> Initially, there was widespread scepticism about the Commission, and an unwillingness to participate on the part of victims. The Commission's report acknowledges that many people 'had doubts about the Commission's precise mission'.<sup>87</sup> Some victims believed that the Commission might identify them with the

79 Silva, Klingner, & Weikart, 'State-Coordinated Violence in Chad under Hissène Habré'.

80 *Commission Report*, p.56.

81 *Ibid.*

82 *Ibid.*

83 *Ibid.*

84 *Ibid.*

85 Interviews with research team, May and June 2016.

86 *Commission Report*, p.56.

87 *Ibid.*, p.54.



purpose of later persecution; others believed, in the context of political volatility and Habré's long presidency, that Habré would return and that participation could consequently have negative repercussions.<sup>88</sup> The attacks launched in late 1991 at Lake Chad by Habré loyalists appear to have created a heightened sense of fear and volatility, which inhibited many from providing testimony.<sup>89</sup> Coupled with this, many individuals were reluctant to testify, in light of the traumatising effects of testimony. The Commission report notes that many were 'loath to revive the trauma and shocks they endured'.<sup>90</sup>

The Commission's location in the former DDS headquarters had a significant effect on dissuading people from testifying, at least in the beginning. The report acknowledges this as a shortcoming, noting that '[i]t must also be conceded that the location of the Commission headquarters itself was not such as to encourage victims to come forward with depositions'.<sup>91</sup> It notes that '[it] took a great deal of tactful persuasion to reassure and allay the anxieties of a hesitant, frightened people'.<sup>92</sup> This, adjacent to the witness intimidation by former DDS agents, made victim participation a complex challenge. However, it appears that as the Commission gained momentum, many people decided to testify.<sup>93</sup> As is the case for much of the process of garnering accountability for Habré-era abuses, a significant impetus came from the victims. Victims' rights groups, and particularly individuals such as Clement Abaïfouta and Souleymane Guengueng, who were instrumental in the push for accountability at the EAC in 2015, were involved in encouraging victims to appear before the Commission.

Many former DDS agents, now integrated into the CRRC, were interviewed, which was challenging. The Commission's report describes the process as a 'gruelling ordeal'.<sup>94</sup> In the view of the Commission the former agents did not believe that they had to account to anyone as they had been 'rehabilitated', a belief it describes wryly, as one held, 'with good

88 *Ibid.*

89 Interviews with research team, May and June 2016.

90 *Commission Report*, p.54.

91 *Ibid.*

92 *Ibid.*

93 Interviews with research team, May and June 2016.

94 *Commission Report*, p.54.

reason'.<sup>95</sup> As indicated above, Abakar was able to raise concerns related to the reluctance to testify with President Déby.

### 3.5 Release of report and public access

The report was presented to President Déby and the government, along with a film detailing abuses.<sup>96</sup> Upon completion of the report, the Commission's headquarters were opened to the public for several days to view the film produced and to see a display of pictures prepared by the Commission.<sup>97</sup> Human Rights Watch reports that it was widely attended and that the report was extensively covered in the national press.<sup>98</sup> The report itself was not initially published, with the Déby government arguing that it had insufficient funds to publish it.<sup>99</sup> The publication of the report was eventually arranged by Abakar with support from Jamal Benomar, then with Amnesty International as well as with assistance from Helene Jaffre.

## 4 Reliable records: *Toute la lumière?*

Transitional processes are complex, and face a variety of countervailing objectives related to obtaining truth, providing justice and reparation, fostering accountability, and the (sometimes contradictory) relationships between these goals.<sup>100</sup> It would be uncharitable to evaluate mechanisms established to document events and produce a record on the basis of their success in facilitating prosecutions, although this may be considered part of their broader impact. Perhaps, as a starting point, it is necessary to evaluate these processes against the objectives they set for themselves.<sup>101</sup> In this regard, it sometimes is argued that commissions, with their non-prosecutorial nature, can provide greater opportunities for establishing a record of violations, on account of the fact that, unlike prosecutorial processes, they function to establish truth rather than to impose punishment, sometimes potentiating greater access to information. In

95 *Ibid.*

96 Human Rights Watch, *Victims of Hissène Habré Still Awaiting Justice*.

97 *Ibid.*

98 *Ibid.*

99 Hayner, *Unspeakable Truths*, p.246.

100 See Bronwyn Anne Leebaw 'The Irreconcilable Goals of Transitional Justice' *Human Rights Quarterly* 30:1 (2008) pp.95–118.

101 See, for example, José Zalaquett's discussion of balancing ethical and political objectives in transitional processes in 'Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations' *Hastings Law Journal* 43 (1991–92).

light of the central objective of the Commission to establish a record of the abuses of Habré's presidency, and its frequent self-presentation in terms of 'casting light', it thus is useful to consider the extent to which the Commission established a record of the abuses of the period.

#### 4.1 Findings

On the one hand, the Commission provided a broad overview of the conflict and the gravity of the right to life violations. Almost all respondents, many of whom were involved in investigations around Habré-era violations (including the Commission and subsequent prosecutions) were aligned in agreement that the discoveries delineated in the report reflected realities.<sup>102</sup> To some extent, in uncovering mass graves, and in garnering a sense of crimes committed through testimony, it seems that the Commission was able to construct a picture of violations committed during Habré's presidency. Moreover, by investigating and discussing specific incidents, it provides a record of some individual acts of abuse, thus providing for victims and their loved ones a degree of recognition of the atrocities suffered.<sup>103</sup>

The central concern with the Commission expressed by many research participants was around the extent to which the Commission was able to establish only a small proportion of the extent of Habré's violations.<sup>104</sup> While few respondents disputed the veracity of the findings, many suggested that they were merely a few of the many incidences of violence that occurred. The report itself concedes that it covers only an 'infinitesimal' proportion of the crimes committed by Habré or, in its own estimation, 'only ten percent'.<sup>105</sup> In the Commission's report it is stipulated that the figure of 40 000 consequently is an extrapolation from this.<sup>106</sup> Abakar details the ways in which this extrapolation was calculated on the basis of numbers available of fatalities in prisons and detention centres in the geographic areas for which information was available, for which inferences of fatalities were then drawn to other areas.<sup>107</sup>

While the report attributes the difficulty in calculating a concrete total primarily to the shortage of time and resources, it should also be noted that the Habré government had been notorious for its secrecy; it is likely

102 Interviews with research team, May and June 2016.

103 *Ibid.*

104 *Ibid.*

105 *Commission Report*, p.80.

106 *Ibid.*

107 Abakar, *Chronique d'une enquête*, p.74.

that much documentation was destroyed. In this regard, while the report certainly provided some indication, the extent to which it might function as a comprehensive record is limited, albeit for reasons beyond its control. Thus, perhaps its value as a source of record is embedded more in its narrative description as a means of delineating the abuses than as a full record of a period in history. It is noted, however, that a full and complete record of any period of abuses is elusive; there will always be subjectivities, focuses and omissions in any mechanism or process that might highlight some abuses while negating others, or might be limited by its scope in such a way as to exclude some abuses.

#### 4.2 (Non)-attribution of responsibility

While providing an account of the crimes of Habré and the DDS, the Commission and its report's capacity to delineate responsibility is fettered by its Habré-centricism. As is discussed below, the Commission attributes responsibility, in its final evaluation, to Hissène Habré and several DDS officers, while noting the role of international actors.<sup>108</sup> Responsibility for all conflicts – indeed all violence – is complex, and the appropriateness of a focus on single individuals for domestic oppression, in the context of conflicts that almost always in some ways are internationalised, and in which there almost always is a multiplicity of intersecting enabling factors, has been the subject of substantial debate.<sup>109</sup> In Chad in particular, historically (and presently) a site of much geopolitical power play, the complexities of conflict and oppression, the intersections between direct orders, enabling conditions and broader complicities are patent. In light of the interaction of Habré's leadership with global political dynamics as part of a Cold War effort to stymie Gaddafi, as well as the variegated complicities within Chad, many of these intersections extend beyond Habré's leadership in more complex ways than are presented in the report.<sup>110</sup>

The singular fixation on Habré and some of those under his command meant that, in contrast to the latitude allowed to the Commission in its mandate, its appraisal of responsibility was fairly linear and singular. In

108 *Commission Report*.

109 See, for example, Ainley, 'Individual Agency and Responsibility for Atrocity'; Mark Drumbl 'Collective Violence and Individual Punishment' *Northwestern University Law Review* 99 (2005) pp.539–610; Mahmood Mamdani *Saviours and Survivors: Darfur, Politics and the War on Terror* (London: Knopf Doubleday, 2009); Kamari Maxine Clarke 'Refiguring the Perpetrator: Culpability, History and International Criminal Law's Impunity Gap' *The International Journal of Human Rights* 19:5 (2015) pp.592–614.

110 Debos, *Living by the Gun in Chad*.

this regard, it is worth reading this attribution through the lenses of one of the objectives of the establishment of the Commission, that is, the delegitimation of Habré with a view to elevating Déby.

#### 4.2.1 *Hissène Habré and the DDS*

The report clearly and without reservation implicates Habré in the right to life violations that occurred during his presidency. There is a direct link drawn between Habré and the abuses committed. The report details the ways in which patrimonial politics shaped Habré's presidency, specifically in his installation of nationals of the Gorane ethnic group in key positions of power.<sup>111</sup> It further details the ways in which, through his direct control over the DDS, the ruling (or state) party, the National Union for Independence and Revolution (UNIR) and the Presidential Investigation Service (SIP), Habré was able to control the country in such a way as to ensure the silencing of opposition, through oppression, executions and confiscations, while maintaining secrecy about operations. While the Commission's report delineates the ways in which torture was standard practice, it notes that the President often gave direct instructions to torture specific individuals or groups.<sup>112</sup> The report further elucidates discoveries made in documents from the DDS archives which detail physical eliminations, arrests, poisonings, the destruction of villages, or executions for which Habré gave direct instructions.<sup>113</sup> The report accuses Habré of genocide.<sup>114</sup>

The DDS was found by the Commission to be the primary security organ responsible for much of the repression of Habré's presidency. The report describes it as unique in its 'its cruelty and contempt for human life'.<sup>115</sup> The DDS was created by presidential decree on 26 January 1983 and with direct accountability to the presidency on account of the confidential nature of its activities. The report discusses at length the torture, repression and execution committed by the DDS, with either the direct instruction of the President, or on account of such activities being norms under Habré's presidency.<sup>116</sup> The Commission was particularly significant in being the first globally to provide names of perpetrators and to publish photographs of those named.<sup>117</sup> Some high officials in the

111 *Commission Report*, p.59.

112 *Ibid.*, p.70.

113 *Ibid.*, p.77.

114 *Ibid.*

115 *Ibid.*

116 *Ibid.*

117 Hayner, *Unspeakable Truths*, p.246.

new government were included in the list. One of the central calls of the Commission in its recommendations was for the removal of reintegrated DDS agents from official posts.

Much of this attribution has subsequently been expanded upon in judicial processes,<sup>118</sup> and human rights literature.<sup>119</sup> A Human Rights Watch report details the activities of the DDS as including primarily ‘the collection and centralisation of all intelligence information ... that threatens to compromise the national interest ... and collaboration in suppression through the creation of files concerning individuals, groups, collectivities, suspected of activities contrary to or merely detrimental to the national interest’.<sup>120</sup> The role of Habré in directing or orchestrating the violence has been further elaborated by research by the Human Rights Data Analysis Group which, through statistical analysis of documents in the DDS archive, indicates sufficient evidence to establish command responsibility owing, in particular, to the tight presidential control exercised over the DDS, and the reporting obligations to Habré, as well as his clear knowledge of the atrocities being committed.<sup>121</sup> The EAC has similarly affirmed the command responsibility of Habré for the violations of the period and the extent of Habré’s knowledge of and frequently direct involvement in the abuses of the DDS officials.

#### **4.2.2 International actors**

The Commission was one of the first of its kind to implicate international actors in domestic atrocities. It not only noted that the United States was the principal supplier of financial, military and technical aid, as well as training and information sharing to the DDS, but also delineated United States financial backing for Habré’s presidency.<sup>122</sup> It further accused France, Egypt, Iraq and then Zaire of helping to finance, train and equip the DDS and noted that the DDS head office, and its notorious torture site, the *piscine*, were directly opposite the USAID office.<sup>123</sup>

As part of a large-scale effort to create a bulwark against Libya’s Gaddafi, the support of Western powers not only in installing, but also in

118 See, for example, the cases at the Extraordinary African Chambers, and in Senegal in 2000, discussed below.

119 Human Rights Watch, *Victims of Hissène Habré Still Awaiting Justice*.

120 *Ibid.*

121 Silva, Klingner, & Weikart, ‘State-Coordinated Violence in Chad under Hissène Habré’.

122 Human Rights Watch, *Victims of Hissène Habré Still Awaiting Justice* p.15.

123 *Commission Report*.

financially and militarily supporting Habré, was immense. In addition to covert financing, the US provided an estimated \$182 million in military and economic assistance during Habré's presidency. It provided machine guns, jeeps, missiles, surveillance aircraft and other military hardware.<sup>124</sup> A document from the DDS archive details training in the US given to Chadian security agents in 1985.<sup>125</sup> Two of those who underwent this training were described by the Commission as having been among Chad's 'most feared torturers'.<sup>126</sup> The continued programme of torture and massacres was with knowledge and finance of international actors.<sup>127</sup> Likewise, France provided extensive military support and financing to Habré's government, in many respects a continuation of its colonial presence in the country.<sup>128</sup>

While noting international complicity, the Commission's report, in its concluding pages, does not go as far as it might in drawing lines of complicity, instead ultimately circling back to Habré. The report asks, '[w]ere they willingly deluded by Hissène Habré into letting him do whatever he wanted or did they willingly close their eyes to what was transpiring because their own interests were not threatened and the massacre of innocent victims was not a compelling enough argument to move them?'<sup>129</sup> It responds, '[t]he answer probably lies in the Machiavellianism of Hissène Habré ... Their guard lowered, Western countries and the United States thought they had found in him a solid ally.'<sup>130</sup> While accounts indeed suggest Habré's expansive ability to manipulate, this assessment is insufficiently comprehensive regarding Habré's importance to US interests in the course of the Cold War and the US's role in his trajectory to and maintenance of power in a sustained attempt to thwart Gaddafi.<sup>131</sup> It seems indicative of the broader *zeitgeist* of singularity discussed above.

124 Woodward, *Veil*; Kelly-Jo Bluen, 'Justice But Only for Some' *Justice in Conflict*, (July 2015) available at: <https://justiceinconflict.org/2015/07/30/justice-but-only-for-some-the-trial-of-hissene-habre/>.

125 Human Rights Watch, *Victims of Hissène Habré Still Awaiting Justice*.

126 Human Rights Watch *Enabling a Dictator The United States and Chad's Hissène Habré 1982-1990*, 28 June 2016, available at: <https://www.hrw.org/report/2016/06/28/enabling-dictator/united-states-and-chads-hissene-habre-1982-1990> (accessed 12 September 2017).

127 Human Rights Watch, *Enabling a Dictator*.

128 Human Rights Watch *Allié de la France, condamné par l'Afrique Les relations entre la France et le régime tchadien de Hissène Habré (1982-1990)* (28 June 2016) available at: <https://www.hrw.org/fr/report/2016/06/28/allie-de-la-france-condamne-par-lafrique/les-relations-entre-la-france-et-le> (accessed 12 September 2017).

129 *Commission Report*, p.87.

130 *Ibid.*, p.88.

131 Woodward, *Veil*.

Moreover, in singularly focusing on Habré, the Commission omits from purview questions related to broader historical trajectories of violence in Chad. Debos, for example, remarks that ‘armed violence is one of several modes of intervention in the political field ... engaging in politics by force of arms is neither more nor less commonplace than engaging in politics without arms’.<sup>132</sup> Habré’s presidency not only ought to be located within broader Cold War geopolitics, but also within a history of French colonialism which imposed new forms of violence on Chad, and whose economic violence was violence in itself, but was also concomitant with forced labour, and physical violence, as well as divisive policy.<sup>133</sup>

#### 4.2.3 *Idriss Déby*

Of course, among the significant omissions are discussed above in the shape of the eschewing of any investigations or commentary on Déby’s actions. In its discussion of Southern Chad, the Commission report notes that ‘throughout the entire south, arrests, executions and exactions were carried out with such fury, such murderous madness, during the month of September 1984, that it was called “Black September”’.<sup>134</sup> During this time, as indicated above, Déby was commander in chief of the armed forces, but does not feature in the discussion. This is, of course, related to the role of the Commission in the view of the President as a mechanism of sanitising his own image. In effect, Déby’s actions and his role in fomenting abuse is effaced from the official narrative of the era.

### 4.3 **In the half light**

The Commission thus can be credited with establishing a record of *some* of the horrific abuses of the era. It is notable that, considering its severe timing and resourcing limitations, any capacity it might have had to establish a more comprehensive record was severely limited. However, as it relates to attribution of responsibility, it is lacking as a complete picture of the period, subscribing to a particularly narrow scope of accountability, which sought clearly to focus on Habré, while at the same time negating an account implicating other actors or more complex explanations.

In concert with effacing the role of Déby, it is notable that the actions of the military are all but erased from the Commission’s record. In this regard, the language of the report evades military complicity for the violence. In the discussion of ‘Black September’, for example, the events

132 Debos, *Living by the Gun in Chad*, p.5.

133 *Ibid.*, p.38.

134 *Commission Report*, pp.84–85.



are recorded in the passive voice without a subject: ‘arrests, executions, exactions *were carried out*’.<sup>135</sup> The massacres in the south were committed by government troops, the *Forces Armées Nationales Tchadienne* (FANT), the national army Habré had consolidated in 1984 uniting the *Forces Armées du Nord*, the armed group Habré had founded in 1976 and others who had defected to his forces as a brutal repression of the *codos* or those who had organised as self-defence movements in the south.<sup>136</sup> When juxtaposed with the aforementioned comment from one of our interlocutors who noted that the omission of Déby from investigation was related to the Commission’s focus on civilian crimes, it is worth considering that Déby’s role in the armed forces, coupled with the Commission’s imperative to avoid the implication of Déby, might have reduced the space allowed for consideration of the role of the military in the period’s abuses.

The Habré-centricism is particularly pointed in light of the fact that commissions, unlike many prosecutorial processes, have the latitude to consider broader prospects for justice. There are two features of this Commission specifically, in contrast to other commissions discussed in this book, and other truth commissions more generally that render this focus fairly stark. First, in contrast, for example, to the commissions in Burkina Faso or in Malawi,<sup>137</sup> which had limited temporal and subject matter mandates to look at specific incidents of violence, the Habré Commission was mandated to examine a period of eight years. Of course, two caveats are worth noting here: that the Commission’s focus was tethered to the presidency of Habré; and that individual instances of violence may have complex causalities and complicities. However, the fact that the Habré Commission had such broad temporal scope at least could have resulted in a far broader attribution of responsibility at complex and intertwined levels than was provided by the Commission. Second, in contrast to many transitional justice-oriented processes, or truth commissions, with which this Commission finds much alignment, it did, as detailed above, dedicate significant attention to economic crimes. In this regard, there was scope for broader consideration of structural issues than the Commission ultimately documented. However, while the discussion of dispossessions is a deeply-important (and indeed, in many respects pioneering) contribution to an understanding of which conflicts and oppression themselves are considered acts of violence, the narration thereof still seems to situate individual acts of dispossession and confiscation as systemic, but individual acts, as opposed to as features in complex intersection with the violations and atrocity of the period. In a

135 *Ibid.*, p.84 (emphasis added).

136 Debos, *Living by the Gun in Chad*, p.60.

137 See ch. 6 and ch. 8 respectively.

similar vein, the implication of international actors, while present, and similarly pioneering, was not as comprehensive as regards the extent, and enabling effect of international complicity in its ultimate return to a focus on Habré.

While none of the analysis above seeks to diminish the extent of Habré's responsibility for the horrific violations committed, the Commission in effect produced an official narrative of the period which risks providing as much impunity for many actors involved as it did accountability for Habré and a few DDS agents. This has come to influence subsequent processes, and has played out in approaches to justice and the interplay of the Commission and subsequent mechanisms. This is discussed in the part below, where the chapter turns to a discussion of the legacy of the Commission.

## 5 The impact or legacy of the Commission

Legacy is a liquid concept. As it relates to accountability mechanisms, it demands tangible answers to questions of impact while assessing that impact in the context of multiple variables. For international justice scholar Frédéric Mégret '[a] legacy is not something cast in stone for all times; rather it is an evolving intellectual relationship that we construct with an object receding in the past'.<sup>138</sup> It is also a concept that has gained increasing traction in the context of accountability mechanisms, particularly of an international legal nature, which Viviane Diettrich has described as the 'legacy turn' in international law.<sup>139</sup> Across transitional justice contexts, questions of legacy have become popular, filling journals, newspapers and hotel conference rooms with contestation and debate on questions of legacy, which range from 'lessons learned' and best practice approaches to occasionally hubristic memorialisation of processes or mechanisms.<sup>140</sup> A legacy is always political, and its deployment cannot be detached from the objectives of its construction and its role as lesson or spectre. As such, projects of constructing legacy tend to frequently paper over the liquidness, to represent processes in binary terms – failures for cautionary tales or sanitised success stories.<sup>141</sup> On the International

138 Frédéric Mégret 'The Legacy of the ICTY as Seen Through Some of its Actors and Observers' *Goettingen Journal of International Law* 3 (2011) p.1014.

139 Viviane E. Diettrich 'Legacies of the International Criminal Court under Construction' *Sicherheit und Frieden* 31 (2013) pp.197–204.

140 See, for example, *The ICTY Legacy Dialogues*, available at: <http://www.icty.org/en/in-focus/icty-legacy-dialogues> (accessed 7 October 2017), or the AJIL Special Issue on the Legacies of the International Criminal Tribunals *American Journal of International Law* 110 (April 2016).

141 Sara Kendall & Sarah MH Nouwen 'Speaking of Legacy: Toward an Ethos of Modesty

Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR), Kendall and Nouwen make the call for an ethos of modesty about legacy.<sup>142</sup> Below we try to think through the Commission's legacy in refusal of this binary and with a tethering to such an ethos of modesty, with an embrace of the liquidness.

With this commitment, we ask to what extent the Commission itself, and its legacy, contributed to accountability for the violations of the Habré era. To what extent did it provide justice for the victims of the violations? There are at least three components that need to be considered to address this question. The remainder of this chapter begins by considering the extent to which the Commission itself and its legacy in terms of its recommendations provided for accountability. Thereafter, it turns to the Commission's interplay with other mechanisms to consider its role in other and, in this case, specifically prosecutorial mechanisms. Particularly in light of its relationship with the Habré case at the EAC as well as the prosecution of DDS agents in Chad in 2015, it considers the role the Commission might have played in contributing to broader accountabilities, through its intersections with universal jurisdiction processes. Finally, it looks at broader notions of accountability than the individualised precepts embedded in both the Commission itself and the subsequent prosecutorial processes to turn to a question of how the culmination of these factors resulted in notions of accountability, and wider possibilities for justice in Chad.

## 5.1 The Commission of Inquiry

There was widespread agreement among research participants that the Commission of Inquiry was a highly-important mechanism. In particular, many participants felt that the role of the Commission in providing an account of violations, as well as its fairly ground-breaking direct attribution of responsibility to individual perpetrators, was a significant process for Chad.<sup>143</sup> For some who had lost loved ones it functioned as a means of knowing the details of the egregious crimes, and for many the fact that the government established the Commission functioned as a public national acknowledgment of the abuses of the era.<sup>144</sup> One respondent who worked

at the International Criminal Tribunal for Rwanda' *American Journal of International Law* 110:2 (2016) pp.212–32.

142 *Ibid.*

143 Interviews with research team, May and June 2016.

144 *Ibid.*

closely with recognised victims noted that the Commission ‘was small, but its impact was enormous’.<sup>145</sup>

On the question of whether the Commission itself functioned as a form of accountability or justice, there was less certainty. There is much discussion in transitional justice literature of the role of truth telling, and the production of a record of abuses as a sufficient form of justice in dealing with the past. Some of the more theological approaches towards justice and reconciliation emphasise inherent healing properties of truth telling. In the heyday of the South African Truth and Reconciliation Commission (TRC), there was much enthusiasm in some quarters for the implicit value of truth telling as the South African process became a poster child for such processes internationally.<sup>146</sup> Within South Africa itself at the time, and since – as the failures to deliver any form of justice have revealed themselves in a vastly unequal, violent, and racist society – the idea of truth without justice and the demands of forgiveness without accountability have shown the poverty of such approaches.<sup>147</sup> Others have questioned this inherent value as well as highlighted the political implications of contested truths, while others still have presented more nuanced approaches that locate truth and reliable records within a broader spectrum of transitional justice measures.<sup>148</sup> In the Chadian context, it is clear that while the Commission and its report played a role in the drive for justice and accountability, it was not perceived as a sufficient mechanism for accountability. Indeed, while many acknowledged the importance of the Commission, there was very little suggestion that, in isolation, it could have functioned as a form of justice.<sup>149</sup> It was variously described as the ‘first step’ or ‘where it all began’ but little sense that the Commission or its report itself functioned as a mechanism for accountability.<sup>150</sup>

Many of the discussions concerning the shortcomings of the Commission in terms of its possibilities for accountability revolve around the failure to implement its recommendations. Of course, this is not

145 *Ibid.*

146 Fanie du Toit *When Political Transitions Work: Reconciliation as Interdependence* (Oxford: Oxford University Press, 2018).

147 Sisonke Msimang ‘You Can Free Apartheid Killers But You Can’t Force Their Victims to Forgive’ *Guardian* (11 March 2016) available at: <https://www.theguardian.com/world/2016/mar/11/chris-hani-apartheid-killers-cant-force-victims-to-forgive> (accessed 18 November 2019).

148 For a useful overview discussion, see David Mendeloff ‘Truth-Seeking, Truth-Telling, and Post-Conflict Peacebuilding: Curb the Enthusiasm?’ *International Studies Review* 6 (September 2004) pp.355–380.

149 Interviews with research team, May and June 2016.

150 Interviews with research team, May and June 2016.

the fault of the Commission itself, but rather a lack of political will. To date, few of the recommendations of the Commission's report have been implemented, and substantial obstacles have been placed in the paths of those who have sought their implementation, with victims' groups having come under threat at various junctures.<sup>151</sup> The government did establish a National Human Rights Commission, which was one of the few tangible recommendations implemented. On the basis of the Commission's report, a 2015 case in Chad against DDS officials saw the judge ordering that reparations be paid to victims and the establishment of a monument of remembrance for Habré's abuses, neither of which has been implemented at the time of writing.

## 5.2 Subsequent prosecutions

The aspect of the recommendations most significantly addressed, and indeed the aspect of the Commission that perhaps has been its most substantial impact, has been the prosecution of Habré and Habré-era officials, which has taken place in various jurisdictions both within and outside Chad. In 2000 three sets of prosecutorial processes were initiated, in Chad, Senegal and Belgium respectively. In Chad, in October and November, several victims together with the AVCRP filed 40 individual and two group complaints for torture, murder, and 'disappearance' with the registrar of the investigating judge at the court of first instance in N'Djamena against all the directors, heads of service and named members of the DDS and members of its subsidiary, the *Brigade Spéciale d'Intervention Rapide* (BSIR).<sup>152</sup> In 2001 the Court held that it was not competent to hear the matter on account of a 1993 ordinance which provided for the establishment of a special criminal court to try Habré and his accomplices<sup>153</sup> which, it held, removed common law courts' jurisdiction.<sup>154</sup> The plaintiffs appealed the decision at the Constitutional Court, which held that the court of first instance in fact did have jurisdiction over the case and that the ordinance was unconstitutional as it purported to create a parallel judicial order.<sup>155</sup> Thus, in 2001 a new set of investigations began and many

151 Human Rights Watch, *Victims of Hissène Habré Still Awaiting Justice*.

152 *Ibid.*

153 Ordonnance N° 004/PR/MJ/93 du 27/02/1993.

154 Cour d'appel de N'Djamena, *Ordonnance aux fins d'incompétence* (2000) available at: [http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Chad/Habr%C3%A9\\_Cour\\_Appel\\_23-11-2000.pdf](http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Chad/Habr%C3%A9_Cour_Appel_23-11-2000.pdf) (accessed 7 September 2017).

155 Décision du Conseil Constitutionnel, République du Tchad, Decision N°002/PCC/SG/001 (2001) available at: [http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Chad/Habr%C3%A9\\_Conseil\\_Constit\\_6-4-2001.pdf](http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Chad/Habr%C3%A9_Conseil_Constit_6-4-2001.pdf) (accessed 3 May 2015).

additional victims came forward to testify.<sup>156</sup> However, the investigations were repeatedly stalled and faced significant financial challenges, in addition to security challenges attached to the investigation of many of those who still retained positions of power in the new administration.<sup>157</sup>

In Senegal, also in 2000, in what transpired to be the start of a protracted intellectual and judicial engagement with the prospects of universal jurisdiction in the prosecution of Habré, a group of Chadian victims and the AVCRP filed a criminal complaint against Habré in the Dakar regional court (where he was then living in exile) accusing him of crimes against humanity, torture and 'barbarous acts'.<sup>158</sup> The plaintiffs cited Senegal's obligations under customary international law with regard to the prosecution of those accused of crimes against humanity, while the barbarity and the torture charges were both based on Senegalese statutes, with the later affirmed by Senegal's 1986 ratification of the 1984 United Nations Convention against Torture.<sup>159</sup> Judge Demba Kandji indicted Habré on charges of *complicité d'actes de torture* (complicity in acts of torture) and placed him under house arrest. He further opened an investigation into individuals to be named for crimes against humanity, disappearances and barbarous acts, which left open the possibility of subsequent indictments of Habré and others.<sup>160</sup>

The case was appealed by Habré's lawyers and the indictment was dismissed, with the Appeals Court holding that there was no jurisdiction for crimes committed outside of Senegal regardless of the nationality of the victims and that the UN Convention Against Torture was not applicable on account of the absence of implementing legislation in Senegal.<sup>161</sup> The Court further held that Senegal's positive law contained no rulings over crimes of humanity and thus could not rule on such charges. The Appeals Court consequently lifted the restrictions on Habré's movement. The victims and the AVCRP then appealed the decision to the *Cour de Cassation*, Senegal's highest court, which upheld the Appeals Court's judgment.<sup>162</sup>

156 Human Rights Watch, *Victims of Hissène Habré Still Awaiting Justice*, p.28.

157 *Ibid.*

158 Reed Brody 'The Prosecution of Hissène Habré – An "African Pinochet"' *New England Law Review* 35:2 (2000) p.324.

159 *Ibid.*, p.325.

160 Cour d'appel de Dakar, (ch. acc.), Hissène Habré, Arrêt No 135, 4 Juillet 2000, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/0/4872D1E231539097C125708A002AF709> (accessed 15 September 2017).

161 *Ibid.*

162 *Association des Victimes des Crimes et Répressions Politiques au Tchad (AVCRP) et al v Hissène Habré.*

It is worth noting that prior to the Appeals Court's decision, in April 2000 Abdoulaye Wade was elected President of Senegal. Wade's electoral victory over incumbent President Abdou Diouf marked the end of the *Parti Socialiste's* tenure in government, which had lasted for more than 40 years.<sup>163</sup> The Habré case thus came at a moment in Senegal's history in which the new government was in the process of being established and was assessing the former government. Many involved in the case alleged political interference as the reason behind the Court's decision,<sup>164</sup> a view they evidence by pointing out that several members of Habré's defence team were appointed to various positions within Wade's administration<sup>165</sup> and by the decision by the Council of Magistrates, over which President Wade presided, to transfer Judge Kandji from his position as chief investigating judge of the Dakar regional court to become assistant state prosecutor at the Dakar Court of Appeals, thus removing him from the Habré investigation altogether.<sup>166</sup> In the aftermath of the dismissal of the case, a group of Chadian victims lodged a communication against Senegal with the UN Committee Against Torture (UNCAT).<sup>167</sup>

Also in 2000, Chadian victims who had become Belgian nationals filed a criminal complaint at the Brussels District Court under Belgium's universal jurisdiction law for crimes against humanity, torture, arbitrary arrests and abduction.<sup>168</sup> The International Court of Justice's ruling against Belgium in the *Arrest Warrant* case<sup>169</sup> and revisions to Belgian law on universal jurisdiction suggested immunity from prosecution for leaders such as Habré. However, continued campaigning, particularly by Chadian groups in Belgium, as well as legislative processes, kept alive the possibility of the prosecution of Habré.<sup>170</sup> These factors culminated in Habré's indictment by Belgian authorities in 2005 who sought his extradition from Senegal.

163 Human Rights Watch, *Victims of Hissène Habré Still Awaiting Justice*.

164 See, for example, Brody, 'An "African Pinochet"'

165 Ba, *International Criminal Justice and State Sovereignty* p.50.

166 Brody, 'An "African Pinochet"' p.329.

167 Souleymane Guengueng et Autres C/ Sénégal, *Communication Présenté au Comité Contre la Torture (Article 22 de la Convention), pour violation des Articles 5 et 7 de la Convention* (18 April 2001), available at: [www.hrw.org/en/news/2010/10/14/legal-documents](http://www.hrw.org/en/news/2010/10/14/legal-documents) (accessed 4 June 2016).

168 Reed Brody *Victims Bring a Dictator to Justice: The Case of Hissène Habré* (updated edition after the April 2017 verdict) (Berlin: Bread for the World, 2017).

169 Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v Belgium*), 14 February 2002, p.3, available at: <http://www.icj-cij.org/files/case-related/121/121-20020214-JUD-01-00-EN.pdf> (accessed 13 September 2017).

170 Reed Brody, *Victims Bring a Dictator to Justice*.

This extradition request offset a series of political processes around where Habré should be tried, that were to culminate in the prosecution of Habré at the African Union-mandated EAC in 2015. In 2001 President Wade had given Habré a month to leave Senegal. After the Chadian groups had lodged a complaint with the UNCAT, it had called on Senegal to prevent Habré from leaving the country unless pursuant to an extradition request.<sup>171</sup> In 2005, in response to Belgium's extradition request, Habré was arrested, but the Dakar Court of Appeal held that it was not competent to grant the extradition request on account of Habré's immunity as a former head of state.<sup>172</sup> At this point, the Senegalese government placed the matter in the hands of the African Union. Assuredly, the prospect of a former colonial power that had played such a brutal role in the region, extraditing and trying Habré, played a role in the decision to push for the African Union's addressing of the issue.<sup>173</sup> In 2006, thus, after the establishment and report back of a committee of eminent African jurists tasked with finding a solution to the matter, the African Union called on Senegal to prosecute Habré 'on behalf of Africa',<sup>174</sup> a call which Senegal duly accepted. Concomitantly, efforts to prosecute Habré in Chad had continued, and in 2008 a Chadian court sentenced Habré to death *in absentia*. At one point, President Wade threatened to expel him to Chad but concerns were raised about the possible imposition of the death penalty.

The years following saw significant obstacles and machinations surrounding the establishment of what would eventually become the EAC. Initially there were successive issues surrounding the funding for the EAC, which was ultimately provided by the African Union, Chad, the European Union, the US and France. At the same time, concerns about how the trial would be located in terms of the Senegalese judicial system stalled the process.<sup>175</sup> A 2010 decision by the Economic Community of West African States (ECOWAS) stipulated that the trial ought to take

171 Human Rights Watch, *Victims of Hissène Habré Still Awaiting Justice*.

172 Opinion of the Court of Appeal of Dakar on the Extradition Request for Hissène Habré, 25 November 2005, available at: [http://www.asser.nl/upload/documents/20120419T034141-Habr%C3%A9\\_Cour\\_Appel\\_Avis\\_Extradition\\_25-11-2005\(Extraits\).pdf](http://www.asser.nl/upload/documents/20120419T034141-Habr%C3%A9_Cour_Appel_Avis_Extradition_25-11-2005(Extraits).pdf) (accessed 25 September 2017).

173 Oumar Ba, 'In the Name of Africa: Former President of Chad Hissène Habré Will Stand Trial in Senegal' *Africa is a Country* (3 March 2015) available at: <http://africasacountry.com/2015/03/in-the-name-of-africa-former-president-of-chad-hissene-habre-will-stand-trial-in-senegal/> (accessed 7 My 2016).

174 African Union *Decision on the Hissène Habré Case* Doc.Assembly/AU/9(XVI) (2006) available at: [http://archive.au.int/collect/auassemb/import/English/Assembly%20AU%20Dec%20340%20\(XVI\)%20\\_E.pdf](http://archive.au.int/collect/auassemb/import/English/Assembly%20AU%20Dec%20340%20(XVI)%20_E.pdf) (accessed 17 September 2017).

175 Reed Brody 'Bringing a Dictator to Justice: The Case of Hissène Habré' *Journal of International Criminal Justice* 13:2 (2015), pp.209–17.



place before a ‘special *ad hoc* procedure of an international character’,<sup>176</sup> which set in motion the establishment of the EAC. The series of delays and the continued campaigning by activists and lawyers had led to several additional extradition requests and, notably, to an International Court of Justice (ICJ) decision in 2012 which held that Senegal must either prosecute Habré or allow for his extradition to be prosecuted elsewhere.<sup>177</sup>

Thus, in 2013 the EAC was inaugurated and in 2013 charged Habré for war crimes, crimes against humanity and torture. Habré’s counsel had viewed the Chambers as illegitimate, and sought to suspend the process, including by filing a motion to that effect with ECOWAS, but a 2013 ECOWAS decision held that the process should go ahead.<sup>178</sup> It was perhaps the culmination of the ECOWAS decision, the ICJ decision – which again raised the spectre of Habré’s prosecution by Belgium – and the election in 2012 of Macky Sall who succeeded Wade as President of Senegal that the final push for the operation of the EAC came to the fore. Sall had entered office and soon promised to prosecute Habré in contraposition to his predecessor’s resistance.<sup>179</sup> In 2015 the EAC began the trial of Habré for war crimes, crimes against humanity and torture, for which he was convicted in 2016 in what was widely lauded as a victory for justice, both in Chad and internationally.<sup>180</sup> The decision was upheld on appeal in 2017, at which point Habré was also ordered to pay €123 million in victim compensation. A trust was mandated to seize Habré’s assets in fulfilment of this order.

The EAC required the signing of a judicial cooperation agreement between Senegal and Chad for matters related to the work of the EAC, which also saw parallel judicial processes in Chad. Some respondents suggested that the judicial cooperation agreement to shadow the EAC officials, purportedly to keep themselves abreast with the EAC investigations, but possibly also to dissuade them from looking too deeply

176 *Hissène Habré v Republic of Senegal*, ECOWAS Judgment of 18 November 2010, available at: <https://www.hrw.org/fr/news/2010/11/18/arret-cedeao/ecowas-ruling-hissein-habre-c-republique-du-senegal>.

177 *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* ICJ Judgment of 20 July 2012.

178 *The arrest of Hissène Habré* ECOWAS Judgment of 5 November 2013, available at: [http://www.courtecowas.org/site2012/pdf\\_files/decisions/judgements/2013/HISSEIN%20HABRE\\_c\\_REPUBLIC\\_OF\\_SENEGAL2013.pdf](http://www.courtecowas.org/site2012/pdf_files/decisions/judgements/2013/HISSEIN%20HABRE_c_REPUBLIC_OF_SENEGAL2013.pdf).

179 Reed Brody, *Victims Bring a Dictator to Justice*.

180 See, for example, Pierre Hazan, ‘The Trial of Hissène Habré: A Pivotal Case for International Justice in Africa’ *The Conversation* (16 June 2016) available at: <https://theconversation.com/the-trial-of-hisse-ne-habre-a-pivotal-case-for-international-justice-in-africa-61052>.

into aspects that might implicate Déby.<sup>181</sup> In 2015 a Chadian criminal court convicted 20 Habré-era security agents on charges of murder, torture, kidnapping and arbitrary detention, based on complaints filed by the same group of victims from the 2000 case in Senegal. The court sentenced seven men to life in prison, including Saleh Younous, a former director of the DDS, and Mahamat Djibrine, described by the Commission as one of the ‘most feared torturers in Chad’.<sup>182</sup> Both men were also originally wanted for possible indictment by the EAC, but Chad declined to transfer them. Most of the defendants had given testimony to the EAC when they visited Chad, but the Chadian government also refused to allow them to travel to Senegal to testify at trial. The Chadian court acquitted four others.

### **5.3 Relationship between the Commission and other mechanisms**

The role of the Commission, and its report, in the prosecutorial processes are complex. At the EAC and in the Chadian 2015 cases as well as those predating them, the Commission’s report was among various sources of evidence used in the trials, including reporting by international non-governmental organisations such as Amnesty International and Human Rights Watch, the dossier of DDS documents, as well as investigations by the respective prosecutions.<sup>183</sup> For the cases in the early 2000s, the Commission’s report was perhaps more central; in the Dakar case, the Commission’s report accompanied AVPRC files, a 1992 report by a French medical team on torture under Habré as well as some additional documents on Habré’s control over the DDS as the key documents provided to Judge Kandji of the Dakar regional court.<sup>184</sup>

The findings of the Commission have been used in ways that were initially unanticipated in pursuing prosecutions. The recommendations of the Commission have been used in advocating measures to be taken by the Chadian government in pursuit of accountability as outlined by the Commission. During the 2015 Chadian case, for example, counsel for the victims made extensive use of the Commission’s report, and centred many of its arguments on the unimplemented recommendations of the Commission.<sup>185</sup> The Court’s verdict reiterates and juridifies the

181 Interviews with research team, May and June 2016.

182 Human Rights Watch ‘Chad: Habré-Era Agents Convicted of Torture’ (25 March 2015) available at: <https://www.hrw.org/news/2015/03/25/chad-habre-era-agents-convicted-torture>.

183 Human Rights Watch, *Victims of Hissène Habré Still Awaiting Justice*.

184 Brody, ‘An “African Pinochet”’ p.325.

185 Interviews with research team, May and June 2016.

recommendations of the Commission. In addition to the conviction of 20 Habré-era officials, it ordered the Chadian government to pay half of the \$125 million in reparations to 7 000 victims and those convicted to pay the other half. The Court also ordered the government to within a year erect the monument to those who were killed under Habré and to turn the former DDS headquarters into a museum. Neither of these has been implemented.<sup>186</sup>

According to almost everyone to whom we spoke who was involved in the various cases, the Commission's report was a critical source in being able to provide leads for investigations.<sup>187</sup> Many involved noted that the report served as a useful starting point from which to pursue further testimony at both the EAC and the 2015 Chadian case.<sup>188</sup> In particular, it provided testimony from government insiders that many victims' groups and international human rights groups would not have been able to attain.<sup>189</sup> One respondent described the Commission's report as the 'heart' of the EAC case.<sup>190</sup> Others found it a useful background document and it was one of the sources upon which the prosecution relied.<sup>191</sup> Several involved in the case described it as useful in forming a basis on which to evaluate the patterns into which individual testimonies could be read,<sup>192</sup> while those involved in the judgment at the EAC noted that the report's findings were used to provide a narrative overview but were not regarded for judgment unless corroborated by witnesses.<sup>193</sup>

In the Chadian case in particular, the report's status as an official narrative lent a degree of gravitas to its content which distinguished it from reporting by human rights organisations which could be more easily dismissed.<sup>194</sup> Specifically in advocating action within Chad, the fact that the report itself was wholeheartedly supported by the same government being asked to comply with its recommendations is significant. Even if the effects have not been substantially forthcoming, it is a stronger advocacy tool in this regard than reporting by international human rights organisations.

186 Human Rights Watch, 'Q&A: The Case of Hissène Habré'.

187 Interviews with research team, May and June 2016.

188 *Ibid.*

189 *Ibid.*

190 *Ibid.*

191 *Ibid.*

192 *Ibid.*

193 *Ibid.*

194 *Ibid.*

At the same time, the ostensible role of the Commission as a government-endorsed anti-Habré mechanism, was to play a different role narratively in the EAC trials. Indeed, its Habré-centric one-sidedness detracted from its reliability as a source in the case.<sup>195</sup> All of those involved in the case critiqued its absence of neutrality.<sup>196</sup> When Commission president Abakar was called to testify at the Chambers, his testimony was so critical of Habré that Judge Kam had to intervene. Habré's defence counsel built his case on the basis of the notion that the subjective anti-Habré sentiment of the Commission was the flawed kernel or heart upon which the prosecution and victims built their cases. The Commission was framed by the defence as an initial lie upon which the other lies were built and the obvious subjectivity of the Commission's report was used to undermine the prosecution's arguments. Moreover, the Commission was framed by the defence, as a mechanism through which to inoculate Déby of accountability while maligning Habré as part of a conspiracy involving Amnesty International and Human Rights Watch.<sup>197</sup> While the defence's proclamations of Habré's innocence are without basis, their broader arguments around the approach to accountability embodied by the Commission and subsequent processes accurately reflect the singularity with which accountability has been pursued in Chad and particularly the question of whose complicity has been obscured by this focus.

#### 5.4 Broader questions of accountability

It now is perhaps useful to turn to the question of broader notions of accountability, and how the Commission might or might not have fostered these through its work. There is growing literature that has come to critique an overreliance on prosecutorial processes, and the ways in which these provide for singular approaches to accountability, both in the narrowness of their purview, and in their attribution of responsibility, premised on the idea of individualised accountability.<sup>198</sup> For some, the possibilities presented by a commission, with its non-judicial or less judicial character, theoretically may serve to provide a more comprehensive overview of structural features of violence.<sup>199</sup>

195 *Ibid.*

196 *Ibid.*

197 Celeste Hicks *The Trial of Hissène Habré: How the People of Chad Brought a Tyrant to Justice* (Zed Books Ltd., 2018).

198 Ainley, 'Individual Agency and Responsibility for Atrocities'; Drumbi, 'Collective Violence'; Mamdani, *Saviours and Survivors*; Clarke, 'Refiguring the Perpetrator'.

199 Sharp, *Justice and Economic Violence in Transition*.

Writing about international commissions of inquiry, Christine Schwöbel-Patel has warned against the potential for commissions to become overly judicialised, thus eroding their potential to allow for broader possibilities for accountability, in that they in effect become preliminary inquiries for prosecutorial processes.<sup>200</sup> In Schwöbel-Patel's assessment this feature may erode possibilities for more comprehensive approaches to justice, mirroring the limitations – in terms of overly-individualised accountability at the expense of broader remedy or reform – that are endemic to international criminal processes.<sup>201</sup> The Chadian Commission departs from Schwöbel-Patel's analysis in its status as a domestic as opposed to international commission, as well as the absence of intentionality towards a focus only on prosecution. However, two interrelated features of the Chadian Commission are such that Schwöbel-Patel's cautioning against the possibilities for displacement of broader notions of justice hold true in the Chadian context. First, while it is true that the Commission provided some overview of structural and internationalised features of the violence, as indicated above, the singularity with which it focused on Habré, and several of his DDS agents, in many ways reflects the precepts of the individualised responsibility that shapes international criminal justice. Second, the way in which the Commission and its report have been used since its completion has been firmly tethered to prosecution, primarily that of Habré, as well as several DDS agents. Although the 2015 Chadian case did see a push for other forms of justice, including memorialisation, for the most part the linking of the Commission to prosecutorial processes in effect has equated justice with punishment. This focus on the punishment of a limited (and not representative) group of defendants has come to define what constitutes accountability in Chad, in turn crowding out other questions of justice.

The Habré case at the EAC perhaps stands as the pinnacle of this trend. The case and the Chambers themselves – established solely for this purpose – mirror the restricted focus of the Commission on Habré. This of course is not exclusively attributable to the EAC, but it is certain that the EAC initially had hoped to look beyond Habré and had requested the extradition of three other defendants, whom the Chadian government refused to extradite.<sup>202</sup> The resulting process was one that focused singly on Habré. The failure to prosecute Déby, in particular, is an issue that remains significant in the Chadian socio-political climate. Indicative of this is the

200 Christine Schwöbel-Patel, 'Commissions of Inquiry: Courting International Criminal Courts and Tribunals' in Christian Henderson (ed.) *Commissions of Inquiry: Problems and Prospects* (Oxford: Hart, 2017).

201 *Ibid.*

202 Human Rights Watch, 'Q&A: The Case of Hissène Habré'.

fact that at almost all the regular outreach sessions organised by the EAC throughout Chad, one of the first issues to be raised by participants in the sessions, albeit frequently obliquely, was the failure to prosecute Déby.<sup>203</sup> It was indicated to us by several participants close to the trial that Déby was subpoenaed to appear at the EAC but threatened to withdraw funding from the EAC should the subpoena have been carried out.<sup>204</sup> Significantly, then, the Chambers in effect functioned as a second, judicialised process through which Déby could skirt accountability.

Similarly, of course, there has been no accountability for international actors who are well-documented to have supported, and been essential to the capacities of Habré's government to carry out the abuses. Ironically, perhaps, in addition to the Chadian government, the French and the US governments were among the EAC's most significant donors. Even beyond this, however, there has been little impetus for accountability or reparation for these actors. Several respondents indicated that one of the reasons the EAC is experiencing such substantial difficulties in garnering funds for the reparations effort is related to the reluctance by the French and US governments to donate towards it (in contraposition to their substantial donations towards the trial itself) lest this be construed as a form of acknowledgment of guilt.<sup>205</sup>

It would be fallacious to attribute all of this to the Commission. The individualisation of accountability has become a totalising part of the lexicon of transitional justice. Advocates of the displacement thesis often note the ways in which the international justice project has displaced other forms of justice. In this regard Mégrét remarks that '[o]ne cannot be oblivious to the fact that international criminal justice, with its somewhat limited ambitions but considerable hold on imaginations, is in fact powerfully displacing other thinking about justice'.<sup>206</sup> Nouwen and Werner similarly show how international criminal law's focus on prosecution of individuals erodes space for other approaches to justice, silences contestation, and 'monopolise[s] global justice'.<sup>207</sup> In situating the *locus* of responsibility with one person, international complexities,

203 Interviews with research team, May and June 2016.

204 *Ibid.*

205 *Ibid.*

206 Frédéric Mégrét 'International Criminal Justice: A Critical Research Agenda' in Christine Schwöbel (ed.) *Critical Approaches to International Criminal Law: An Introduction* (New York: Routledge, 2014) p.43.

207 Sarah Nouwen & Wouter Werner, 'Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity' *Journal of International Criminal Justice* 13 (2015) p.157.

structural conditions, less immediately ‘solveable’ features of violence are effaced. Justice becomes a fairly digestible story, and there is an envisaged end which purports to remedy wrongs.

On the day of the judgment, Reed Brody from Human Rights Watch remarked that ‘[t]oday will be carved into history as the day that a band of unrelenting survivors brought their dictator to justice’.<sup>208</sup> In a similar vein, consider, for example, the introduction to Celeste Hicks’s *The Trial of Hissène Habré: How the People of Chad Brought a Tyrant to Justice*. Despite engaging at some length in the book with the role of US and French actors in the atrocities committed in Chad, in describing the book she notes:

What follows is simply a remarkable tale of one man’s brutal attempts to hang on to power in a period of intense political turmoil set against the backdrop of the 1980s and the Cold War. This is followed by the incredible story of how the victims of this shocking cruelty carried on in the face of almost universal pessimism, and at times ridicule, to ensure that a tyrant was eventually brought to justice.<sup>209</sup>

In this narration, which echoes much of the scholarly and advocacy discourse around the case, there is a villain and there are victims, and there is a solution. The Cold War is a ‘backdrop’ rather than an essential instrument. In contraposition to her extensive detailing of Cold War complicities, her detailing of accountability is rather cursory, noting that the Court chose not to examine the role of international support without much engagement.

In critical respects the Habré trial at the EAC, in addition to speaking to a privileging of individualised accountability, was a theatre for two co-constitutive narratives, with significant political investments. On the one hand, the EAC trial is situated as an embodiment of the promise of universal jurisdiction. Indeed, much of the framing, especially by Human Rights Watch, has focused on the idea of Habré as ‘Africa’s Pinochet’.<sup>210</sup> For Scheele, rather than incidental, the prospect of a universal jurisdiction prosecution was the central driving feature of HRW’s support for the case, without which, Scheele argues, ‘the trial never would have happened’. In this regard, for Scheele, ‘[HRW was] largely motivated by reasons external to Chad: HRW, briefly put, needed “another Pinochet” to create

208 Ephrem Rugiririza ‘Habré Gets Life Sentence in Historic Judgment’ Justiceinfo.net, 30 May 2015, available at: [www.justiceinfo.net/en/component/k2/27541.html](http://www.justiceinfo.net/en/component/k2/27541.html) (accessed 4 November 2019).

209 Hicks, *Trial of Hissène Habré*.

210 Brody, ‘An “African Pinochet”’ p.321.

a precedent for universal competence.<sup>211</sup> This seems to be supported by a similar shift to focus on the prosecution of Yahya Jammeh in the aftermath of the Habré trial.<sup>212</sup>

At the same time the promise of the Habré trial is frequently framed as a panacea for the troubled ICC-Africa relationship, as a step towards an African Court, or as a deviation in the interregnum which attends to some of the concerns related to immunity voiced about the Malabo Protocol. The idea that justice is brought closer to Africa, and executed by African nationals, is frequently positioned as a means of dispensing justice that obviates the complex politics of the ICC. For Høgestøl, 'internationalised courts modelled after the EAC could still be an important mechanism to prosecute pending, as well as older cases of atrocity crimes in Africa, while the region waits for the international criminal chamber of the African Court of Justice to be created'.<sup>213</sup> In Hicks's monograph, an entire chapter is devoted to the international justice context, and the ICC is discussed at length. For Hicks, the EAC adopted a 'politically acceptable formula'.<sup>214</sup> In her view, a court set up by Africans 'could hardly be criticised for targeting Africa'.<sup>215</sup> This coupled with the fact that the judges were all from Africa was 'a symbolic, political victory, a court which could defend itself against charges of being imperialist'.<sup>216</sup>

Effectively, this narrative functions on two flawed and violent axes. On the one hand, rather than taking seriously the concerns with the ICC or of international justice more broadly, they frame the EAC as a means not to eschew imperialism, but to eschew perceptions of imperialism. The idea of the use of such mechanisms as a means to deflect critique allows for a deflection of the critique itself. Framing the presence of African judges as a solution obviates the very real concerns about the structures of justice, and reduces racism and imperialism to individuals and interpersonal factors rather than structures. Equally, while it is true that a central line of critique is oriented around the fact that justice is dispensed in Europe rather than close to the sites of violence, this a symptom of

211 Judith Scheele, 'Celeste Hicks. The Trial of Hissène Habré: How the People of Chad Brought a Tyrant to Justice' *African Studies Review* 62:1 (2019) p.27.

212 See, for example, HRW fact sheet on Yahya Jammeh, available at: <https://www.hrw.org/tag/yahya-jammeh> (accessed 17 November 2019).

213 Sofie A. E. Høgestøl 'The Habré Judgment at the Extraordinary African Chambers: A Singular Victory in the Fight Against Impunity' *Nordic Journal of Human Rights* 34:3 (July 2016) p.155.

214 Hicks, *Trial of Hissène Habré*.

215 *Ibid.*

216 *Ibid.*



a broader structural problem rather than the totality of the problem.<sup>217</sup> Indeed, much of the concern voiced by the AU and many critics with the ICC is anchored in the power politics and materialities that drive justice rather than the individuals operating the Court.<sup>218</sup> Closer proximity and better representation do not efface the political economies of justice and donor-driven justice which plague both the ICC and other mechanisms.<sup>219</sup> Equally, where Høgestøl declared the Habré case as a ‘singular victory against impunity’,<sup>220</sup> Kamari Maxine Clarke reminds us that the narrow historical frames of culpability in international criminal law’s focus on individual perpetrators, obviating accountability for many perpetrators, and for the ways in which colonial power relations inform contemporary violence. For Clarke, this creates an ‘impunity gap’ which represents ‘an abyss between legal presumptions of temporally relevant responsibility, and the growing grass-roots conception of who is actually criminally responsible for acts of violence – including historically relevant institutions such as colonial agents and discriminatory segregation politics’.<sup>221</sup>

In this way, the Commission’s individualisation is inextricably linked to a broader *zeitgeist* of a certain notion of justice premised on such values. In critical respects, much of the focus on the EAC as a ‘lesson’ or promissory tale or guarantor of a certain vision of justice has taken up much more space than the specificities of justice in Chad, and the people whose experiences of injustice should be centred. The politics of justice at play in these narratives have a disquieting resemblance to the politics of violence that is the object of justice.

## 6 Conclusion

The African Commission’s General Comment on the right to life delineates accountability for right to life violations as potentially encompassing many different possible processes, including criminal sanctions, reparation and restoration, disciplinary action, making the truth known, institutional

217 For an appraisal of the problematics of judgment from afar, see Phil Clark *Distant Justice: The Impact of the International Criminal Court on African Politics* (Cambridge University Press, 2018).

218 African Union, Draft Decision on the International Criminal Court, Doc. EX.CL/1006(XXX), 2017, available at: [https://www.hrw.org/sites/default/files/supporting\\_resources/assembly\\_au\\_draft\\_dec\\_1\\_-19\\_xxviii\\_e.pdf](https://www.hrw.org/sites/default/files/supporting_resources/assembly_au_draft_dec_1_-19_xxviii_e.pdf) (accessed 4 November 2019).

219 Sara Kendall ‘Donors’ Justice: Recasting International Criminal Accountability’ *Leiden Journal of International Law* 24:3 (2011) pp.585–606.

220 Høgestøl, ‘The Habré Judgment’.

221 Kamari Maxine Clarke ‘Refiguring the Perpetrator: Culpability, History and International Criminal Law’s Impunity Gap’ *International Journal of Human Rights* 19: 5 (July 2015) p.609.

review and, where applicable, reform.<sup>222</sup> These processes are intended to provide accountability, which includes a form of punishment for the perpetrators, the protection of the right to life, as well as the promotion of non-repetition of the violations.<sup>223</sup>

‘Truth’ is always contested,; it is always subjective; its contestation underlies conflict, and equally underlies its resolution. It is difficult then to purport to conduct an objective appraisal of the extent to which the commission ‘made truth known’. As in the case of legacies, truths are political. The Commission indeed documented some of the violations of the period, which served as a basis for subsequent mechanisms. At the same time, its narrow focus, documenting only a small proportion of the expansive range of violations, and its overemphasis on Habré without recourse to the structural and international contributors, including its failure to examine Déby’s role points to its particular politics of truth. Perhaps this has broader ramifications for the pursuit of ‘truth’ in transitional justice processes, when truths are always multiple and contested.

For the other components of accountability, it is necessary to look to the impact of the Commission. As part 4 has illustrated, the pursuit of criminal sanction has been the most rigorously-instituted component of accountability for right to life violations, through the Chadian cases, cases in foreign jurisdictions, and the EAC. Considering the immensely protracted road to criminal justice, it is fairly disconcerting that this is the most significant possibility for justice. Nevertheless, evaluated on this feature alone, the Commission has, in tandem with other processes, played a role in the pursuit of criminal justice for the violations under Habré. It is hoped, but far from conclusive, that while the Commission’s recommendations around reparations were not implemented, the EAC’s reparations orders to the same effect might be. This would provide for some degree of compliance with the African Commission’s discussion of reparative elements. It is worth noting that the EAC included in its reparations order victims who were not part of the group of victims before the EAC. This is a notable inclusion in broadening access to justice and reparation beyond the judicial process.

In some respects the criminal processes have become pivots upon which to orient notions of justice. There has been very little implementation of other recommendations. As the Chadian process may relate to the

222 African Commission on Human and Peoples’ Rights, General Comment 3 on the African Charter: The Right to Life (2015) para.17.

223 This has been elaborated further in ch 2 of this volume.

institutional reform and review possibilities envisaged by the General Comment, efforts at reform, the institutionalisation of human rights processes, and the removal of Habré-era security agents from policing structures have not been implemented, despite explicit recommendations around these factors.

Thus, the Commission may well have laid the foundations upon which – with substantial efforts by victims’ groups – it has been possible to garner criminal accountability, but it also came to narrate a narrow basis of what constitutes accountability, and linked, in some respects, the punishment of Habré with the notion of justice, which in turn has contributed to impunity for others, including the President of the country. When justice is so narrowly defined, injustice can be equally narrowly defined. The promises of broader accountability are potentially undermined by the singular focus on Habré and several DDS agents. In this regard, ultimately, while the Commission was able to produce some form of record of abuses, both the Commission itself and its subsequent instrumentalisation have potentiated impunity for right to life violations in the resounding power of its omissions.

Accountability as a process was thus, through various tributaries, garnered by the Commission. Accountability as a defining political climate, however, was, in some ways, limited by the Commission’s narration and its relationship with other processes. Perhaps then, what the Chadian Commission can elucidate for thinking about commissions of inquiry in general is the danger of overly narrow conceptions of accountability. For genuine accountability to be sought, it needs to be considered beyond the precepts of individual criminal sanction, for in the broad swathes of space outside of this, climates of impunity can be not only permitted but encouraged.