Introduction: The role of national commissions of inquiry in securing the supreme human right

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This volume asks how and to what extent national commissions of inquiry can contribute towards accountability for potentially unlawful death, and thereby protect the right to life, specifically in the African context. After exploring the theoretical concepts of accountability and introducing the history of the use of this particular investigative mechanism, the core of the research presented are six detailed case studies of commissions that have been established across the length and breadth of the continent over the past 25 years.

This book builds upon an initial review of those national commissions of inquiry involving violations of the right to life that have taken place in Africa over the last 25 years. Of these – more than 60 – commissions, six case studies were selected by a collaborative team of researchers, who then traced the history of the selected commissions of inquiry, and the emergencies to which they were a response. Moreover, they visited the countries in question and interviewed direct participants, ranging from the commissioners themselves, their staff, lawyers that were involved, civil society activists who mobilised around the commission, journalists who covered the events at the time and in some cases representatives of the victims. In some instances these studies represent the first time the story of the commission is being told; in others the commissions have been studied before, but are approached here from a fresh perspective. In all cases the question asked is to what extent the creation of the commission, and the way in which it went about its business, has contributed to or impeded the pursuit of accountability for violations of the right to life? The result is the first comparative study of national commissions of inquiry as accountability mechanisms in Africa, their origins, their conduct, and their impact.

The modern human rights project, as it has emerged since World War II, has come to be centred around the idea that people do not only have rights in the weak sense of the word, but also in the strong sense. Following certain norms is more than just 'the right thing to do'; people also 'have a right' that these norms will be followed and, if not, that

there will be consequences, which will restore the norms. The concept of 'accountability' captures the essence of this process to ensure that there are consequences that restore the norms where they have been breached. In addition a system where there is accountability serves to restore human relationships. People may thus be victims, but they are victims with agency, with recourse, and need not simply accept their situation.

This study particularly focuses on violations of the right to life, and will build upon international standards that have been developed surrounding the investigation of potentially unlawful death. It will focus on how one particular investigative mechanism, the national commission of inquiry, contributes towards securing accountability, in the African context.

Commissions of inquiry do not always or even mostly deal with right to life violations. For our purposes commissions of inquiry may be seen as extraordinary, *ad hoc* and quasi-judicial fact-finding bodies, established by domestic authorities. They may be tasked to inquire into a wide range of issues, including, for example, treatment of minorities, labour disputes, or corruption. Their findings are not binding, but they can have considerable authority. Our interest is confined to where such bodies are established to investigate cases in which lives have been lost. This typically occurs in the wake of major incidents that allegedly involve the state or its agents, by acts or omissions, and are either large-scale in impact, systemically violent, or of particular political significance, and for which routine mechanisms of justice – on their own – are viewed for some reason as inadequate or impracticable.[1]

There is much scepticism about the use of commissions of inquiry, and rightfully so. They often serve as convenient instruments used by states and their officials as a means of escaping accountability, rather than achieving it. They can be used to create the impression that something is being done, and 'buy time' but the result (if not the intention) is to let the real culprits 'off the hook'. Unlike more formal judicial mechanisms, such as courts, they have no real teeth. This is a problem whenever it occurs, irrespective of the subject matter investigated by the commission; it is even more problematic when violations of the right to life are at stake.

However, as will be discussed further throughout the book, a commission of inquiry should not necessarily be contrasted with a court or with a criminal trial, since their proper place is at a different stage of the

1 See Thomas Probert 'Vehicles for Accountability or Cloaks of Impunity? How can National Commissions of Inquiry Achieve Accountability for Violations of the Right to Life?' Institute for Justice and Reconciliation Policy Brief 25 (May 2017).

investigative process. Commissions will not necessarily replace a criminal process, but they may guide how it should take place and complement its role. Commissions of inquiry may be used to pursue accountability in the full sense of the word as well as other social objectives. They can be broader than a narrow trial determining the guilt or innocence of particular defendants; they can be cathartic events for victims or families by aiming to address *their* issues; they can promote justice by imposing moral condemnation; they can demonstrate that human rights are a priority for the state and thus lay the foundations for the rule of law; and they can make broader recommendations about next steps.[2] In some cases commissions of inquiry may help to facilitate normative clarification, for example where traditional and contemporary value systems clash.

Moreover, they can be established in circumstances where more routine mechanisms of investigation, such as police oversight bodies, investigative magistrates, coroners or other bodies, are unavailable or compromised, and they are particularly useful in circumstances where the public has lost faith in such investigative mechanisms. In some cases a commission of inquiry may be the only accountability mechanism that a government (or other hegemonic political interest) is willing to accept. As we will see, even if the government in question is unwilling to take further measures at the time, the fact that evidence is gathered and a particular version of the truth is established may in the long run become a building block for later accountability, including prosecution.

The challenge lies in establishing under what circumstances a commission of inquiry can be expected to yield these results. This seems to be a particularly urgent question in Africa, where (as will be seen in chapter 3) commissions of inquiry are frequently used to address a wide range of issues. Moreover, the problem of violence and of violations of the right to life on the continent are pressing: all indications from the literature and reporting that exists are that Africa is one of the most violent regions in the world, probably second only to Latin America.[3] Importantly, with respect to the protection of human rights, much of this violence, while a clear violation of a number of norms, is not being met with an adequate response: States are failing to 'account for life' and hence people do not enjoy the right to life in the strong sense of the word.[4] Africa, then, is

2 See Steven R. Ratner, Jason S. Abrams & James L. Bischoff *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* 3rd ed. (Oxford: OUP, 2009) pp.259–272.

3 Christof Heyns *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions* (6 August 2014) [A/69/265] para.125.

4 *Ibid.*, para.115.

a region in which there is a great need for accountability, but in which at present it is being only imperfectly provided. Meanwhile the relations between African states and international accountability mechanisms are often fractious, including most saliently the International Criminal Court (ICC), but also other more regional initiatives and mechanisms, such as the Southern African Development Community (SADC) Court.

Accountability requires the asking and answering of a number of vital questions in the aftermath of a violation: What happened? Who suffered and how? Who was responsible? How can the suffering or loss and the disruption to the norm be repaired or compensated (including, potentially, through prosecutions)? How can the same situation be prevented in the future? As will be made clear in the next chapter, these three core elements – investigation, remedy, and reform – are deeply interlinked. The central question of this study concerns the role that domestic commissions of inquiry in Africa can play in all of this.

1 The right to life: its status and content

The UN Human Rights Committee has described the right to life as 'the supreme right'.[5] A UN Special Rapporteur once noted that the right to life 'is the most important and basic of human rights. It is the fountain from which all human rights spring. If it is infringed the effects are irreversible.'[6] The African Commission on Human and Peoples' Rights (African Commission) has described it as the 'fulcrum of all other rights'.[7]

The right to life has a substantive and a procedural component. In order to secure the right to life states must take steps both to ensure that unlawful or arbitrary deaths do not occur (the substantive guarantee), and pursue accountability for any potentially unlawful deaths that have occurred (the procedural guarantee). There thus is a prospective duty on the state to ensure that it is not, through the actions or inactions of its agents, responsible for unlawful death, and a retrospective duty to ensure accountability where that has occurred. Accountability has a number of

5 UN Human Rights Committee (HRCtte) General Comment 36: The Right to Life (Article 6) (3 September 2019) [CCPR/C/GC/36] para.2.

6 S. Amos Wako *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions* (31 January 1983) [E/CN.4/1983/16] para.22. One of the authors, during his term as one of Wako's successors in the mandate, labelled the right to life 'the ultimate meta-right, since no other right can be enjoyed without it'; see Christof Heyns *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions* (9 August 2012) [A/67/275] para.12.

7 African Commission on Human and Peoples' Rights (African Commission) *Forum of Conscience v Sierra Leone* (2000) AHRLR 293 (ACHPR 2000), para.19.

objectives, one of which is to prevent recurrences of similar violations, and in that sense it also has a prospective role.

The focus in this book is specifically on the procedural component of the right to life – the element of accountability. It is widely accepted today that a failure in terms of securing accountability, for example by not conducting proper investigations into a suspicious death, in itself can constitute a violation of the right to life.[8] Moreover, the question of whether there has been a violation of the right to life often turns on the question of proper investigations, which are a foundational element of accountability. While there is agreement on many of the substantive rules concerning the right to life – for example that those who do not pose a threat may not be targeted with lethal force – there often is a dispute about the facts. The protection of the right to life then depends upon whether it is possible to establish what happened in the particular case, on the basis of which responsibility can be assigned and further steps can be taken. What is at stake in most cases is not the norm itself, but the application of the norm. We are interested in one aspect of the latter question, namely, the role of commissions of inquiry in applying the norm against unlawful killing.

The central position accorded to the right to life, in its substantive as well as procedural sense, is evident from its recognition in the formal sources of international law. Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR) reads as follows: 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.'[9]

Article 4 of the African Charter on Human and Peoples' Rights (African Charter) provides that '[h]uman beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.'[10] The other regional human rights mechanisms, the European and American Conventions on Human Rights and the Arab Charter of Human Rights, similarly recognise the right to life.[11]

8 Christof Heyns *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions* (30 August 2011) [A/66/330] para.44; African Commission General Comment 3 on the Right to Life (Article 4) (2015) para.15; HRCtte General Comment 36, para.27.

9 International Covenant on Civil and Political Rights (ICCPR) art. 6(1). As has been noted elsewhere, no other right in ICCPR is described as being 'inherent'.

10 African Charter on Human and Peoples' Rights, art. 4.

11 European Convention on Human Rights, art. 2; American Convention on Human Rights, art. 4; Arab Charter of Human Rights, art. 5.

The right to life is also protected as part of customary international law. The Human Rights Committee has affirmed that the prohibitions on arbitrary deprivation of life is a peremptory norm.[12] The African Commission has recently observed that '[t]he right not to be arbitrarily deprived of one's life is recognised as part of customary international law and the general principles of law, and is also recognised as a *jus cogens* norm, universally binding at all times'.[13]

In the context of the status of the right to life as a general principle of law, it is worth noticing that all national legal systems criminalise murder. There is a customary norm prohibiting murder in both international and non-international armed conflict,[14] and certain violations of the right to life are considered to be war crimes, crimes against humanity, or genocide.[15]

The recognition of the right to life in formal sources of international law listed above is supported by so-called 'soft' law and other standards that do not qualify as law in the strict sense of the word, but which in practice often carry similar weight, and elaborate in more detail the general provisions of the formal document.

The UN Human Rights Committee has adopted a number of General Comments on the right to life.[16] The most recent of these overviews of the full implications of the right to life by the main UN treaty body tasked with its protection was General Comment 36, finalised in 2018. A number of other specialised instruments dealing with aspects of the right to life have been adopted under the auspices of the UN, on such matters as the

12 HRCtte General Comment 24: Reservations to the Covenant (4 November 1994) [CCPR/C/21/Rev.1/Add.6] para.10.

13 African Commission General Comment 3 para.5. With respect to the question of *jus cogens* (peremptory norms of international law), Rodley has highlighted that most of the arguments underlying the classification of the prohibition of torture as *jus cogens* apply equally, if not more so, to the prohibition of 'extra-legal' killing, see Nigel Rodley *The Treatment of Prisoners Under International Law* (Oxford: OUP, 2009) p.250. It can therefore be said that the prohibition forming the core element of the right to life (arbitrary killing) meets the threshold of *jus cogens*, if not the broader dimensions of protecting and fulfilling the right. It is often said that the right to life is not an absolute right (in that, in certain circumstances, killing can be justified) but the prohibition on *arbitrary* killings may be considered peremptory.

14 See the ICRC's Study on Customary IHL (Rule 89), available at: https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule89.

15 See generally International Criminal Tribunal for the Former Yugoslavia *Prosecutor v Mile Mrkšić and Veselin Šljivančanin*, Case IT-95-13/1-A.

16 HRCtte General Comment 6. In 1984 the Committee adopted General Comment 14 which also addressed art. 6, considering the impact of nuclear weapons on the right to life.

use of force by law enforcement officials, the death penalty and medical autopsies.[17]

From the perspective of accountability in general, a number of international standards are of interest (and will be discussed in chapter 2), including the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.[18] An updated set of principles for the protection and promotion of human rights through action to combat impunity were adopted in 2005.[19] The UN Working Group on Enforced or Involuntary Disappearances has adopted a General Comment on the Right to Truth which reinforces many of the same standards.[20]

As far as the specific issue of investigations is concerned, the UN Principles on the Prevention and Investigation of Extra-Legal Arbitrary and Summary Executions of 1989 and the updated Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016) are of particular importance.[21] The Minnesota Protocol is often described as the "gold standard" on the procedural or accountability element of the right to life.

Of special interest in the African context is General Comment 3 on the Right to Life, adopted by the African Commission in November 2015. Several of the provisions in this instrument are relevant to the questions at hand. Broadly speaking, the Commission began from the premise that

17 UN Code of Conduct for Law Enforcement Officials (1979), UN Safeguards guaranteeing protection of the rights of those facing the death (1984); UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (1989); Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990).

18 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2006) [A/RES/60/147].

19 UN Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity (2005) [E/CN.4/2005/102/Add.1].

20 UN Working Group on Enforced or Involuntary Disappearances 'General Comment [10] on the Right to Truth in Relation to Enforced Disappearances' (2011) [A/HRC/16/48] para.16.

21 The original 'Minnesota Protocol' was finalised in 1990 and published to accompany the Principles as the UN Manual on the Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (1991). In 2014, in his capacity as UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns initiated a process to update the manual, a process involving two international working groups of experts, and an advisory panel, which finalised the Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016), which was published by the Office of the High Commissioner for Human Rights in 2017.

states must take steps both to prevent arbitrary deprivations of life and to conduct prompt, impartial, thorough and transparent investigations into any such deprivations that may have occurred'.[22]

The African Commission underlined what, as noted above, is taken now to be an established standard, that

> [t]he failure of the state transparently to take all necessary measures to investigate suspicious deaths and all killings by state agents and to identify and hold accountable individuals or groups responsible for violations of the right to life constitutes in itself a violation by the state of that right. This is even more the case where there is tolerance of a culture of impunity.[23]

In addition to highlighting that all investigations must be prompt, impartial, thorough and transparent, the General Comment also noted that effective systems and legal processes of police investigation (including capacity to collect and analyse forensic evidence) and accountability (including independent oversight mechanisms) should be established where they are not in place'.[24]

As is clear from the international instruments quoted above, the right to life provides protection against 'arbitrary' deprivations of life. The right to life thus is not absolute, and life may be lawfully deprived under certain narrow circumstances, for example, when there is no other way for a police officer to protect life against an imminent threat. Arbitrariness should not be conflated with intentionality: there can be intentional deprivations of life that are not arbitrary, and – more importantly – unintentional ones that are. Instead, arbitrariness has been taken to include elements of unlawfulness, injustice, capriciousness and unreasonableness.[25] As the Human Rights Committee has reaffirmed, "arbitrariness" should not be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law.[26] In its General Comment on the right to life, the African Commission also enumerates these basic elements, and adds that

22 African Commission, General Comment 3, para.7.

23 *Ibid*., para.15.

24 *Ibid*., para.16.

25 See Manfred Nowak *UN Covenant on Civil and Political Rights: CCPR Commentary* 2nd ed. (Khel am Rhein: Engel, 2005), pp.127–8.

26 The HRCtte set this out with respect to a different article of the ICCPR in *Albert Mukong v Cameroon* Communication 458/1991 (10 August 1994) [CCPR/C/51/D/458/1991] para.9.8. The African Commission would later use the same language in *Article 19 v Eritrea* (2007) AHRLR 73 (ACHPR 2007) para.93. More recently see HRCtte, General Comment 36, para.12.

'any deprivation of life resulting from a violation of the procedural or substantive safeguards in the African Charter, including on the basis of discriminatory grounds or practices, is arbitrary and as a result unlawful'.[27]

It is axiomatic that questions of life and death are some of the most important questions that, as a society, we ask. Where someone dies because such questions are not asked, then several of the core elements of arbitrariness – capriciousness and unreasonableness, to name but two – are immediately at issue. However, of course it is not practicable that such questions can be asked and answered, in a perfectly accurate way, in every circumstance when life is at risk. It is for this reason that accountability processes are so important. States must take all reasonable steps to ensure that lives are not lost arbitrarily, but where there is a risk that they have been, an accountability process that evaluates the facts of what happened and effectively conducts the 'questions of life and death' in retrospect, can be a powerful safeguard of the norm. Not only does an accountability process ensure that, even if after the fact, close attention is paid to the reason why someone died, but it can also exercise an influence on the way in which the questions are asked in the present.

Knowing that an accountability process will follow their decision makes decision makers more likely to make good decisions.

2 Commissions of inquiry

The African Commission's General Comment 3 highlights that, from a procedural perspective, accountability regarding the right to life 'requires investigation and, where appropriate criminal prosecution. In certain circumstances, independent, impartial and properly constituted commissions of inquiry or truth commissions can play a role, as long as they do not grant or result in impunity for international crimes.'[28]

Commissions of inquiry typically perform an investigatory and advisory function, are mandated by the state with a specific object of inquiry, delegated certain investigatory powers, and are established for the purpose of providing an account of a single event or events over certain periods. Commissions of inquiry usually provide a report with recommendations to state authorities, although the implementation of those recommendations may be a matter of political discretion. Domestic commissions of inquiry often include international components, including staff and a reliance on international norms.

27 African Commission, General Comment 3, para.12.

28 *Ibid.*, para.17.

The original version of the UN Minnesota Protocol (from 1991) paid particular attention to the possible role of commissions of inquiry, noting that '[i]n cases where government involvement is suspected, an objective and impartial investigation may not be possible unless a special commission of inquiry is established. A commission of inquiry may also be necessary where the expertise of the investigators is called into question.'[29]

The revised version of the Minnesota Protocol is less prescriptive, noting that '[t]he duty to investigate does not necessarily call for one particular investigative mechanism in preference to another'.[30] It highlights that in certain circumstances a special mechanism, such as a commission of inquiry, can play a valuable role. However, it notes that

> [s]tates must ensure that special mechanisms do not undermine accountability by, for example, unduly delaying or avoiding criminal prosecutions. The effective conduct of a special investigative mechanism – designed, for example, to investigate the systemic causes of rights violations or to secure historical memory – does not in itself satisfy a state's obligation to prosecute and punish, through judicial processes, those responsible for an unlawful death. Accordingly, while special mechanisms may play a valuable role in conducting investigations in certain circumstances, they are unlikely on their own to fulfil the state's duty to investigate.[31]

As official forums for establishing the truth, or fact-finding, commissions of inquiry can have a broader capacity than courts. Criminal courts may not be able to document the full spectrum of crimes that have taken place during a prolonged period of abuses, partly because they may convict only on proof beyond reasonable doubt, and only consider evidence relevant to the alleged perpetrator standing accused. Moreover, investigators in a criminal prosecution have a series of obligations toward the defence in order to ensure a fair trial (for example, disclosure of evidence), which do not apply to a commission. On the other hand, commissions can investigate and document a broader range of information that might be

29 *UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* (1991) §D. In this regard the Protocol was building upon what had been established two years earlier in the Principles on the same subject as circumstances in which 'an independent commission of inquiry or similar procedure' should be used to pursue the investigation, namely, cases where there was a lack of expertise or impartiality in routine mechanisms, where the matter was particularly important, or where there was an apparent pattern to the abuse. See UN Principles on the Prevention and Investigation of Extra-Legal Arbitrary and Summary Executions (1989) Principle 11.

30 Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016) para.38.

31 *Ibid*., para.40.

revealed about the perpetration of human rights violations. While courts are not well designed to determine the underlying causes of an event (beyond, in some cases, the individual motives of the perpetrators) or to explore complex institutional relationships, commissions of inquiry can explore historical, systemic, institutional and personal drivers of events, without having to focus on a strict proof of culpability.

Stephen Sedley once observed that the major function of inquiries was 'the organising of controversy into a form more catholic than litigation but less anarchic than street fighting'.[32] Inquiries clearly nominally serve the public interest, reviewing what has happened and making amendatory action; however – and perhaps without contradiction – they also serve government interests, providing a number of benefits. As scholar of ministerial accountability Diana Woodhouse has noted, the instigation of a commission of inquiry can remove an issue from the political arena, depoliticising it and deflecting criticism; it gives the impression that the government shares the public's concern about what happened and is as anxious to find out what went wrong; it buys time, allowing public anger to dissipate and interest to wane; and while such an inquiry should be independent from government, many of its core dimensions – its personnel and its terms of reference, most importantly – are under the government's control.[33]

As will be discussed in greater detail later in the volume, during our research it quickly became apparent that commissions of inquiry are widely-used mechanisms on the African continent. In surveying only the last 25 years, and looking specifically for consideration of right to life violations, researchers found more than 60 commissions that had addressed those issues, taking place in more than 30 countries.[34]

The detailed case studies in this collection reveal that – at least in those instances studied – there are grounds for scepticism about commissions. In many cases they can involve compromises. The asymmetric power of the state allows it to preclude or override the independence of the commission of inquiry or to skew the compromises that are made in its favour. They thus often serve as a *de facto* form of immunity from prosecution for wrongdoers, at least in the short term.

32 Stephen Sedley QC 'Public Inquiries: A Cure or a Disease' *Modern Law Review* 52 (1989) p.472.

33 Diana Woodhouse 'Matrix Churchill: A Case Study in Judicial Inquiries' *Parliamentary Affairs* 48 (1995) p.25f.

34 For a list of the commissions of inquiry found during this period, see Annex I.

At the same time, the evidence also shows concrete examples of cases where commissions have helped to restore the violated norm, by ensuring or at least contributing towards the elements of accountability listed above. What is often under-appreciated is the extent to which commissions of inquiry can also convey the message that, where life has been treated cheaply, there are consequences that restore the norm that fall outside the scope of the elements of accountability identified above. This is partly because commissions of inquiry are well-equipped to serve as what may be termed *political theatre*: to convey to the public that what has happened did not go unseen, and to provide the opportunity for them to participate in the process of addressing it. A commission is not a court which pronounces an outcome from above: if done well it can reflect the best compromise that the parties on the ground could find. Commissions thus can play an important role by making a society stop and pause at the passing of life, but thereafter allowing society to go on. In some cases a government may also not be willing to allow prosecutions to take place, but may be willing to appoint a commission of inquiry.

Commissions generally have a wide mandate, encompassing different aspects of accountability and restoration of the norm, and tend, deliberately, to be open to witnesses who can, hence, address that broader picture, who give testimony that may not be allowed in court; they can be mobile; and can be staffed by people who come from different parts of the community, which may include non-lawyers but also in some cases people who are associated with different constituencies, and as such become microcosms of the community.

It is also important to note that while commissions may be susceptible to being instrumentalised by those who appoint them, they can also in some cases have their own dynamics. Once appointed, commissioners can sometimes recognise the importance of independence and the gravity of the moment, and commissions can acquire a 'life of their own', going beyond what was envisaged. As such, they offer at least the possibility that the state or state officials may be called upon to justify themselves.

The theatrical role of commissions of inquiry is of special importance in societies where the norms about the value of life may be weakly established among the population or may indeed be open to serious question because many atrocities have occurred in the past that did not elicit any response. This fact has significant implications for the way in which mechanisms to restore or establish the norm of the value of life are to be approached.

As we have seen, accountability is central to the human rights project. However, the principle that violations must have consequences can have both narrow and broad meaning. In the narrow sense, the consequences and thus the accountability is primarily legal – there are investigations, remedies (including, where appropriate, prosecutions) and reforms. In the broader sense, the consequences and the accountability can entail additional elements such as social and political sanction. In some cases accountability can occur shortly after the violation of the norm, but in other cases it may take place after a delay, or take a long time. Ideally accountability is comprehensive, but even partial accountability can help to restore the norm.

Commissions of inquiry cannot themselves deliver most of the elements of legal accountability, although they may be a stepping stone towards that goal. But moreover, even if that does not happen, they often are well placed to muster the additional elements that are associated with accountability in the broader sense of the word, including meaningful restoration.

Viewed from the perspective of a system where every suspicious death is investigated in great detail, and violent death is not an everyday reality, the commissions of inquiry covered in the book may in some respects seem inadequate. However, where there is no such general tradition of accountability, a commission that attracts the public's attention and stirs a national debate about suspicious death and potential accountability may indeed help restore the value of life as a public norm. Even a weak commission can have the advantage that it represents an admission on the part of the state of the need to justify its position, and of eliciting concrete and focused outrage, and a search for alternatives. Of course, where a commission does not properly manage its public profile, it forfeits this very important opportunity.

The main point of the book is that there is evidence from the Commissions studied that these bodies have and can play an important role in ensuring accountability for right to life violation in Africa. This can take the form of contributing towards (eventual) criminal accountability, though not in all cases. It can also take the form of contributing towards accountability in a broader sense of the term, where the community as a whole is engaged in the restoration of the norm against the arbitrary deprivation of life in a less formal way. Commissions of inquiry often play the role of what has been called political theatre, by publicly demonstrating that life is valuable and that taking life has consequences, and by making society pause and reflect before allowing it to move on after a serious rupture. The emphasis on traditional approaches to resolving disputes in

Africa supports a role for commissions that complements that of courts. However, in many cases the potentially positive role that commissions can play is undermined because they are not well structured or executed. We suggest ways in which better use can be made of such inquiries in Africa to ensure greater protection for the right to life. Thus, we make the case not necessarily for more commissions, but for better ones.

3 The nature of this study

This book explores the actions African states can take to better fulfil their duties to pursue accountability, including by investigating potentially unlawful deaths. After establishing the importance of accountability processes for the protection of the right to life and the standards according to which they may be evaluated, it focuses on a particular mechanism, the national commission of inquiry. As will become clear, this is a widely and regularly used mechanism on the African continent, but one that has received surprisingly scant academic attention.

A preliminary desktop review found that commissions of inquiry had been used to investigate right to life violations in at least 70 case during the period from 1990-2015. This preliminary research is presented briefly in chapter 3 and further details are provided in an Annex. On the basis of this survey, we selected six case studies for detailed examination. This selection was made with a view to illustrating the diverse uses and abuses of commissions of inquiry--the different types of violation they might investigate and the strengths and weaknesses of different approaches. It was not designed to be a representative sample.

In several instances the research will introduce commissions that have not before received focused academic attention. Six case studies will be considered – with respect to a core set of research questions around the extent to which a commission is an effective response to whatever crisis it is established to investigate – on the basis of detailed interviews with direct participants, as well as those who now live and work with the legacy of the commissions in question.

The collection continues after this chapter with three further introductory chapters, providing background both to the 'logic' of accountability as a priority in the human rights space and elsewhere, and on the historical use of commissions of inquiry in Africa. In chapter 2, Thomas Probert looks at how the mutually-reinforcing character of human rights accountability is fundamental to its definition, and the consequence that human rights accountability must contain three key elements: finding out what happened and who was responsible (investigations); finding ways

of remedying the situation (remedies); and finding ways of preventing it from happening again (reforms).

In chapter 3 Meetali Jain demonstrates that commissions of inquiry have a long pedigree in the legal and bureaucratic architecture of several of the colonial powers in Africa, and have been adopted by many African governments during the post-colonial period. She explores how the commission of inquiry, as an instrument of governmentality, can be and has been imposed for the purpose of legalistic domination, but how it has sometimes acquired a life of its own and also catalysed reform.

In chapter 4 Christof Heyns discusses the extent to which it is possible to draw lessons from an historical emphasis on social solidarity to inform our understanding of the role of commissions in Africa. In particular, the chapter explores the extent to which South African jurisprudence has been informed by or has deployed the concept of *ubuntu* and its impact on accountability, also for right to life violations.

The six case studies are then examined in chronological order, beginning, in chapter 5, with the *Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habré, his Accomplices and/or Accessories*, which took place in Chad in 1990 to 1991. Established by new President Idriss Déby after Habré had fled the country, it provided a rather one-sided account of the abuses that had occurred during the latter's rule. Nonetheless, its role in documenting violations, and its status as an official record adopted by the government of Chad, would go on to play a central role in the long story of the pursuit of justice for Habré's victims, culminating in the Extraordinary African Chambers verdict and his conviction in 2016.

Whereas that Chadian Commission reviewed evidence of violations that took place over eight years, and reported on thousands of deaths, the next case study, that of the *Independent Commission of Inquiry into the Death of Norbert Zongo and His Four Companions* in Burkina Faso in 1999, investigated the events of a single afternoon. In chapter 6 Thomas Probert shows how, while the Commission focused on the murder of a journalist, the mobilisation for its establishment, and the challenges it faced reflected a complete lack of faith of the official judicial machinery of Blaise Compaoré's regime.

Anyango Yvonne Oyieke examines a third case study, the well-known *Commission of Inquiry into Post-Election Violence in Kenya* (sometimes called the Waki Commission) in chapter 7. This Commission played a central role at the beginning of a long process of the pursuit of accountability

for the abuses at the hands of both non-state and state actors in the aftermath of the 2007 election in Kenya. The Commission formed part of an internationally-mediated peace agreement, involved two international commissioners, and would ultimately end up implicated in a far more international process of indictments before the ICC that would lead to a sitting President appearing (briefly) in the dock at The Hague.

The conduct of the police was also examined by the *Commission of Inquiry into the Death and Destruction of Property during the events of July 2011* in Malawi. In chapter 8, John Kotsopoulos demonstrates how this case was an interesting example of a commission of inquiry investigating a single set of events (the state's response to a coordinated set of public protests across several cities) from multiple social perspectives, while also drawing important lessons for how the police ought to conduct public order operations.

Whereas the case studies mentioned thus far examine commissions concerning events that had occurred in the past (indeed in one case events of several years before), the *Commission of Inquiry into Police Inefficiency in Khayleitsha* was tasked with investigating an ongoing situation, in one of South Africa's larger townships. Rather than inquiring into a specific police action, it was in many ways tasked with examining the causes of police *inaction*. Meetali Jain in chapter 9 shows how a commission established by the provincial government of the Western Cape was able to cast a spotlight on a series of social injustices that contributed to substantially weaker protections of the right to life.

The final case study is the most recent. The Kaduna State *Commission of Inquiry into the Clashes Between the Islamic Movement of Nigeria and the Nigerian Army in Zaria Between 12th & 14th December 2015* provides an interesting example in many respects of how *not* to conduct a commission of inquiry. In chapter 10 Anyango Yvonne Oyieke demonstrates how, provided with a less than impartial mandate, a commission can ostensibly neglect the opportunity to conduct detailed investigations into credible evidence of serious violations.

All the chosen case studies could benefit from further, deeper analytical research, which could cast valuable light on the way in which they interacted with broader accountability processes that in certain cases are still ongoing. While not based on a representative sample of current usage or "success", the findings of this study can lend themselves to certain generalised observations about the effectiveness of commissions of inquiry as accountability mechanisms, and the circumstances under which they can play a role in the broader process that fulfils the state's

procedural obligations with regard to violations of the right to life. In a concluding chapter the editors pull together some of these general characteristics, while also drawing upon international human rights law standards for the conduct of investigations.