Commissions of inquiry: Valuable first steps towards accountability or smokescreens for inaction?

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1 Introduction

This book began by describing the distinguishing feature of the modern human rights project as being the fact that responses to violations of these norms have become institutionalised: that there are legal consequences, formal measures, primarily aimed at restoring the infringed norm. The individuals responsible are held to account, and if not, the state can for its part be held to account domestically, or internationally. When that happens, we are dealing with rights in the strong sense of the word.

This does not mean that other, non-legal forms of accountability – including some which prevailed in earlier times – do not have a role to play in securing human rights. Rights in the weak sense of the word exist where the norm is recognised in ethical or religious terms but not protected in practical terms, or protected only through informal measures. Such informal measures against human rights abuses can have far-reaching consequences. Social pressure continues to find expression in personal interaction, but today can also find expression in media pressure, demonstrations, the increased popularity of the opposition or a loss of legitimacy of the ruling party.

While they are different in nature, the symbiotic relationship between legal and non-legal accountability in contemporary settings is evident from a consideration of the role of commissions of inquiry in the pursuit of human rights. Commissions of inquiry in some cases may lead to legal accountability, when prosecutions or civil claims are recommended and directly initiated as a result of their investigations. Even where such legal proceedings do not occur, however, it is not necessarily the end of the road for accountability. The findings of a commission of inquiry may contribute to public pressure and thus enhance informal accountability. This in turn may eventually lead to legal accountability, albeit in a belated or indirect way, when the pressure mounts and governments (or in exceptional cases

as happened in Chad, the international community) eventually institute prosecutions.

Commissions can thus lead to accountability in both the legal and non-legal senses, and these two elements can reinforce each other.

At the outset the book provided an exploration of the state's responsibilities to respect and to protect the right to life, and its concomitant duty to investigate all potentially unlawful deaths. It was underlined that a failure to investigate a potentially unlawful death, or to pursue accountability should a death be found to have been unlawful, in itself amounts to a violation of the right to life. Accountability in this sense was described as having three major components: an *investigation* that looks to attribute responsibility for the violation (either individually or systemically), a restitutive element that looks to provide a *remedy* to those who have suffered, and an attempt to ensure that the violation does not recur through the implementation of *reforms*.

Across six varied case studies, authors in this book have examined the extent to which different commissions of inquiry in Africa have contributed to processes aimed at achieving accountability for different types of right to life violations. In each of these cases, to varying degrees, the commissions have been viewed by various stakeholders as having played a defining role – either positive or negative – in shaping the pursuit of accountability. In some cases this role was that of catalyst, triggering social processes which indirectly helped to initiate legal accountability processes, as in Burkina Faso and, in a more protracted manner, in Chad. In Kenya some of the Waki Commission's proposed reforms have been implemented, but as yet no legal proceedings have been successfully concluded. In other cases, commissions have acted as rallying points for broader agendas of structural reform, for example in Malawi and in South Africa, and in that sense have had some legal consequences. Of the cases studied, the Zaria Commission represents the one that – at least from the perspective of one directly affected group – looks most like a failure leading to neither formal nor informal accountability. It should, of course, be recalled that our case studies were chosen as a discretionary rather than a formulaic sample, so no inference should be drawn from this as to the likelihood of success.

In this final chapter we briefly summarise some of the reasons why states may choose to establish a commission of inquiry rather than or in addition to some alternative measures, explore the extent to which commissions can be effective with respect to the three core components of

accountability identified above, and consider briefly the challenge posed by their recommendatory status.

2 Why do states establish commissions of inquiry?

The state can fulfil its duty to pursue accountability for human rights violations using a range of different mechanisms. As a general rule, commissions of inquiry are only appointed and used as fact-finding bodies when a situation is unusual and requires a special mechanism of accountability. This might be because of the scale of the incident, or the fact that there are credible allegations of political power being implicated in the event, or there may be particular reasons to engage in a very public inquiry – either to mark a clear break with the past (as in Chad) or to provide a forum for community-level engagement with what has happened (as in Kenya). In any case, it is important that they be envisioned only as part of a broader process and not as a stand-alone solution.

Our case studies have shown that one compelling measure of the need for alternatives to those mechanisms can be the level of public trust in them. Governments usually establish commissions of inquiry because there is a public demand for justice, expressed in the form of distrust at whatever state institution would normally be charged with investigating. This was for example the case in Burkina Faso where, much to the surprise of many in the political establishment, the murder of a well-known and highly-regarded journalist led to mass demonstrations calling for an end to impunity, and therefore for a different kind of investigation into what had happened.

However, it is important to underline that commissions should be used sparingly. Commissions (which are costly and disruptive) should respond to unusual and extreme concerns that cannot be adequately addressed using existing mechanisms because of scale or gravity. If this bar is set too low, then the mechanisms for 'routine' oversight or accountability are made redundant or, where such mechanisms do not yet exist, possible impetus for their creation can be lost (though often, if that is the case, the creation of such a mechanism may well be one of the recommendations of the commission). Moreover, if commissions are created as routine, kneejerk reactions to pressure being exerted on the government to respond to allegations of a violation, then it is likely that states will find themselves flooded with separate, potentially conflicting and competing recommendations that it must try to implement. Moreover, too frequent a resort to exceptional measures could undermine the legitimacy of the regular system, and impede longer term initiatives to improve it. In certain countries – for example as our research suggested was the case in

Nigeria and Kenya – commissions of inquiry are created so frequently that many potential parties, including individuals who are asked to become commissioners, have lost confidence in their potential to achieve anything.

If events are regularly occurring that appear to require investigation by commissions of inquiry on account of the scale of the event or the lack of trust in other mechanisms, then it is quite likely that previous commissions' recommendations (probably around strengthening those mechanisms) will not have been implemented or properly implemented. The proper implementation of the recommendations of a previous commission on a similar or related issue should usually precede the establishment of a new commission.

A further advantage of commissions of inquiry over other mechanisms can be that of accessibility. As public fora in which the truth can be told, commissions of inquiry will likely be more participatory than an investigative mechanism with a narrower mandate. It is more likely that an affected community will be able to engage with a specially-designed commission than, say, with a highly-technical coroner's investigation or a highly-legalised court proceeding.

The examples of Burkina Faso and South Africa demonstrate how public pressure can play a constructive role at various stages of an inquiry process, for example with respect to the framing of the mandate and the appointment of commissioners. From the perspective of accountability, once the commission has been set up, public pressure can perhaps most usefully be mobilised around the implementation of its recommendations. The suspicion that commissions of inquiry are established merely to 'buy time' for the government while the public pressure dissipates can be actively mitigated both by the commission and by the public, through sensitive and continued communication or engagement between the two.

However, even when done effectively, a commission of inquiry may not necessarily quench a 'thirst for justice' among the people broadly or, if applicable, among the victim group. They are often set up because of a lack of confidence in other mechanisms (their trustworthiness can more readily be achieved than wholesale root and branch reform of the judiciary) but the problem is that, with respect to right to life violations, these commissions are likely to result in recommendations that rely upon exactly the same (now unreformed) justice mechanisms. This was perhaps particularly clear in the cases studied here in Kenya and in Burkina Faso, which should be cautionary examples for those looking to use commissions of inquiry as a means of puncturing a pervasive culture of impunity: a small hole may well be made, but it will not necessarily lead to a wider

rupture. In circumstances where States choose to establish a commission of inquiry, we have contended throughout that it is helpful to think of its effectiveness with reference to three core elements of accountability: investigations, remedy and reforms. In the next three sections we consider each in turn.

3 What happened? Commissions of inquiry as *investigative* mechanisms

Within any accountability process, a focus on personal responsibility can obscure important questions of systemic responsibility or culpability: at certain vital junctures it can be as important if not more important to ask not only *who* was responsible (the direct perpetrator), but also *what* was responsible (the enabling environment).[1] Commissions of inquiry can be particularly well suited to this latter kind of investigation.

At various points throughout this study authors have examined the 'effectiveness' of a commission of inquiry as an investigative mechanism. Various sources exist in international law for what amount to the qualities of an effective investigation, by which is meant not only one that stands a good chance of discovering the truth about what happened but also one that is capable of doing so in a credible (and fair) manner.[2]

3.1 The independence and impartiality of a commission

Probably the foremost criterion for the credibility of a commission of inquiry as an investigative body is that it be independent and impartial. Independence, in this sense, is a largely relational quality, concerning the extent to which there is a formal or informal relationship between a member of the commission and the subject of investigation or interested party, or a power dynamic between the commission as a whole and an interested party (for example a funding/budgetary dynamic). Impartiality, by contrast, is largely a question of predictability of outcome – whether

1 As highlighted by Sidney Dekker *Just Culture: Balancing Safety and Accountability* 2nd ed. (Aldershot: Ashgate, 2012) p.12f. Dekker illustrates his point with reference to Martin Luther King, who in the aftermath of the murder of three civil rights workers in June 1964 asked people to focus not on who had committed the murders, but rather what mix of hatred, discrimination, bigotry and intolerance had driven whoever the culprits were to see their acts as legitimate.

2 The most authoritative recent statement of these standards – as has been discussed at various points throughout this collection – is the Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016). See also 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).

or not the conclusion reached by the member of a commission or a commission as a whole will be based on a fair balancing of the available evidence, or whether instead there is a strong likelihood of bias.

Our case studies have highlighted that one potential reason for establishing a commission may be that it is likely to be or, perhaps more importantly, is likely to be perceived as being more independent and impartial than whatever the alternate investigative mechanism would have been. However, questions of independence and impartiality will always be asked more closely of an *ad hoc* mechanism than of a pre-existing routine body since, being established to investigate only a particular incident it would be quite easy to 'pick and choose' to achieve the outcome the state wants. Therefore, regardless of the question before the commission, investigators and investigative mechanisms must be, and must be seen to be, independent of undue influence (such as the interests of political parties or social or ethnic groups). They must be independent of any suspected perpetrators and the units, institutions, or agencies to which they belong.

In some cases the public will expect some form of representation on the commission that is independent of the government. This may entail independent lawyers, scholars or members of prominent civil society groups, including perhaps religious figures, or a representative of the affected community. The absence of representatives of non-governmental organisations on the commission of inquiry in Malawi was highlighted by many interviewed after the fact as a limitation, while the demand for greater non-governmental participation was so strong in Burkina Faso that it forced the government to change its approach. However, the same Burkina case demonstrates that it is also important that commissions cannot later be portrayed as a civil society investigation – the official status of the Commission's members and its report often is its most valuable asset in terms of likely impact, as was evidenced in the case of the Zongo Inquiry by the fact that the government tried to pressure the representatives of official ministries to distance themselves from the report at the last minute.

Judges or magistrates, who play an official role but are at least supposed to be independent of the executive, can play an important role in this regard. Independence may also entail the involvement of international members, at least in a certain number of roles. International participation in the inquiry in Burkina Faso was proclaimed at the time to be an unprecedented step, and while it is unclear exactly how great an impact that international member had, it certainly was a far more accepted attribute of a commission by the time two out of three commissioners on the Waki Commission were non-Kenyan.

It is important that commissioners are viewed as 'credible' as well as independent. This can mean that they are well-qualified in some relevant technical capacity (for example, it might be appropriate that at least one member of a commission has a background in either international human rights law or international humanitarian law, as appropriate), but it could also encompass more social or cultural determinants of their standing within the nation or the community. The direction given to the Khayelitsha Inquiry by Justice O'Regan was highlighted as having given a human rights lens to a commission which otherwise may have taken on an overly partisan tone. By contrast, the absence of a human rights lawyer's perspective from the Malawian Commission of Inquiry resulted in an analysis of the Police Act which did not go as far as perhaps it should have.

In addition to any particular technical capabilities that may be required of an investigator, members of a commission of inquiry (and other associated individuals, including lawyers or investigators) need to be able to perform all of their professional functions without intimidation, hindrance, harassment, or improper interference, and must be able to operate free from the threat of prosecution or other sanctions for any action taken in accordance with the investigation.

It is also important that both a commission's terms of reference and its members be impartial, in that the outcome of the inquiry must not appear to have been pre-determined. This can impact the appointment of commissioners as well as the framing and announcement of the mandate or terms of reference of the commission. The way in which the mandate and terms of reference are framed should not pre-judge the outcome, nor pre-emptively apportion blame. For example, the inclusion of terms such as 'riot' or 'massacre' in an official mandate could potentially skew an investigation. Commissions should not be proscribed from pursuing certain lines of inquiry, but at the same time the questions posed to a commission should be narrow enough so as to be realistically answerable.

Allegations raised regarding the partiality of members of the commission, or its terms of reference, especially if raised near the beginning of the commission's work, ought to be taken very seriously by the governing authority. Although it delayed the work of the commission, the Burkinabe government's constructive response to concerns raised about the proposed design of the Zongo Commission doubtlessly increased the credibility of its final report. Conversely, the Kaduna State government's refusal to address the concerns raised about the impartiality of the Zaria Commission's terms of reference and its members led to a vital party to

the investigation – the Islamic Movement of Nigeria – walking away from the accountability process, and ultimately stymied the Commission.

3.2 Financing

In addition to what might be described as the 'orientation' of the commission, the independence and impartiality of which, to a large extent, is within the control of the commissioners, there can also be what may be termed 'functional' limitations to the extent a commission can perform its duties without becoming subject to undue or inappropriate influence. One of the most common limits to the functional independence of a commission of inquiry is control of its financing.

Inquiries cost money, and where – for whatever reason – it has been decided that the established mechanisms of investigation or inquiry are inappropriate, and that a specialist, usually one-off mechanism needs to be established, these costs are likely to be greater. By limiting the available funds of an inquiry, the state can easily exert an influence to prevent it from undertaking certain investigative activities or from doing so in a sufficiently rigorous way – especially where the life of the commission is constantly expanded, and its funding over the long term is not secure. A commission that is established without funding that is adequate to complete the inquiry in the manner it determines to be necessary cannot be capable of fulfilling the state's duty to investigate.[3]

Where possible, commissions should quickly be given authority and practical control over their own expenditure as reliance on another government department can limit both their independence and their practical efficiency. The Zongo Inquiry was given authority to create its own budget, was given a large sum of money to control/disperse as it saw fit, and thus was completely self-sufficient with respect to financing. Linking the budget to a more bureaucratic department may be expedient in terms of human resources, and in some cases may be unproblematic (as in Khayelitsha), but in other cases, particularly those whose investigative process is going to be more complex, this can cause significant delays (as was the case in Chad).

Nonetheless, commissioners also have a duty to conduct the inquiry in a cost-effective manner, and to avoid unnecessarily duplicating work, or take on functions that properly belong to other parallel mechanisms where they exist. This might particularly be the case with respect to forensic testing, or other forms of expert investigation or evaluation. It

3 Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016) para.27.

may also be the case that, as in Burkina Faso, a commission can draw upon intergovernmental or international non-governmental organisations to provide technical assistance to an investigation.

The creation of a professional secretariat for the commission is an important contributor to both investigative and budgetary efficiency, as was amply demonstrated, for example, in the case of the Khayelitsha Commission. It moreover is a useful safeguard for institutions that are and should by design be *ad hoc*, to have some form of institutional memory so as to avoid the repetition of past mistakes and to learn lessons from good investigative practice.

Of the commissions studied here, it was probably the Chadian Commission into the crimes of Hissène Habré that most suffered from insufficient resources. For example, for a long time it did not have access to vehicles that could allow it to conduct investigations in more remote parts of the country. This was a reflection of the economic plight of Chad at the time, but it had an impact on the effectiveness of the Commission's investigation.

3.3 Investigatory powers

Along with adequate financing, the proper provision of investigatory powers is an essential component of a robust commission of inquiry. Commissioners need the capability to subpoena any relevant evidence, compel the appearance of witnesses, and have them testify under oath, and at risk of perjury (or similar offence).

As in the case in any investigation, commissions need to be strategic about using these powers: compelling vast amounts of unnecessary evidence will flood an investigative staff and dilute their study of the probative material; likewise omitting to subpoena vital physical evidence (especially if that entails leaving it in the custody of the body being investigated) allows ample opportunity for perpetrators to spin out fabrications that likewise delay or impede the commission's work.

It will almost always be the case that the aims of a right to life investigation will be materially assisted by the performance of an autopsy.[4] However, a commission of inquiry may not be the most appropriate mechanism to undertake it. This principally is a consequence of timing (given that by the time the commission has been established, the most appropriate time to conduct an autopsy has passed). A decision not to

4 Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016) para.25.

undertake an autopsy, by whatever body was better placed at the time, should certainly be a decision within the scope of the commission's investigation.

In certain circumstances – for example should a mass grave be discovered as part of the commission's investigation – a need may arise for a commission to undertake a forensic investigation. Forensic inquiries must always be conducted by appropriately-qualified experts, whose contributions to the commission's work should be treated as expert testimony. Where this is not done, a commission can ultimately impede a subsequent investigation by having contaminated evidence. Most of the commissions studied here had some kind of interaction with forensic evidence: the Zaria Commission, though empowered to conduct forensic investigations, turned down the opportunity to examine a mass grave and to identify the bodies; the Commission in Chad chose to conduct exhumations but did so in such a way that subsequent investigations were unable to use the same sites or any of the evidence gathered. The Malawian Commission was able to draw upon medical autopsy records in terms of those victims who had died, and further medical evidence of those injured, but did not publish other important information, for example the number of rounds that had been fired, to substantiate their findings.

In several of the cases studied the relationship between a commission of inquiry and another investigative mechanism working alongside it was a significant factor. Likewise, commissions, such as the one in Burkina Faso, needed to pay attention to the standards of investigation that would be required by subsequent proceedings. Forensic investigations should ideally be conducted to the standard necessary for a subsequent criminal investigation. Where possible witness testimonies should be collected rigorously enough so that a prosecutor can avoid the possibility of re-traumatising witnesses and duplicating work. However, it is also important to bear in mind that witnesses may choose to give evidentiary testimony to an investigator for a commission of inquiry only with the assurance that they can do so anonymously.

In larger commissions, or where there are a significant number of victims or witnesses, maybe distributed across a large geographic area, or where there is a vast amount of source material to comb through, it may be important to appoint a staff that is larger than just the official members of the commission. Across the cases studied here, such expert external

staff members included specialist investigators and forensic experts, as well as psychiatrists, trauma counsellors, archivists and translators.

3.4 Security (including witness protection)

Protecting the safety of individuals involved in the commission's work is a self-evident guarantee of their independence. However, it is also important that security concerns are not used as a means of unduly limiting the commission's scope of work. Those involved in providing security should understand the purpose of the investigation and endeavour to provide the necessary support. Moreover, those providing security (and advice about security) should be functionally independent of any agency under investigation by the commission.

With respect to security and protection, it should be noted that successfully achieving accountability for unlawful killings, by whatever mechanism, is extremely difficult in the absence of effective witness protection programmes. Former Special Rapporteur on Summary Executions, Philip Alston, has noted:

> If witnesses can be easily intimidated, if they and their families remain vulnerable, or if they sense that the protections offered to them cannot be relied upon, they are unlikely to testify. As a result, it is often the case that the only people willing to take the risk of testifying are the victims' family members. Usually, however, they are poorly placed to provide the most compelling evidence against the perpetrators. Ending impunity for killings thus requires institutionalizing measures to reduce the risks faced by witnesses who testify.[5]

The absence of witness protection programmes was an issue in several of the cases examined here, and was often highlighted by former commissioners as one of the most significant limitations on their investigation.

3.5 Transparency

Aside from the need of confidentiality for the protection of victims or witnesses, investigations should be as transparent as possible. This means that it should be open to general public scrutiny, and to that of the families of victims. Transparency promotes the rule of law and public accountability,

5 Philip Alston, *'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions'* (20 August 2008) [A/63/313] para.12.

and enables external monitoring of the efficacy of investigations. It also enables the participation of the victims and others in the investigation.[6]

Commissions of inquiry, through their public hearings, tend to be an inherently more transparent means of investigation than many others. This said, particularly given their responsibility to ensure witness protection, and their objective to investigate potentially publicly sensitive questions, a commission may find it helpful or necessary to conduct certain parts of its investigation in confidential session, or to keep parts of its report restricted. One notable example of such a decision was that made by the Waki Commission into post-election violence in Kenya, which alongside public hearings held a number of informal *in camera* sessions with key witnesses, and famously presented a confidential 'envelope' alongside its report.

Commissions should also guard against 'playing to the gallery' and prevent interested parties from using the official transparency of a commission of inquiry as a means of popularising a particular narrative of events before it is able to publish its report. It is partly for this reason that commissions must have carefully and impartially designed terms of reference, as discussed above.

All the commissions studied were relatively transparent, although some were more proactive than others. The time in which the commission took place plays a role here: for example, the Khayelitsha Commission used its dedicated website to publish a great deal of information during the process, as well as afterwards. Of course, the communications power of the internet was not a resource available at the time of all of the commissions studied here, but it seems likely to be a key part of future investigations.

3.6 Publication of a commission's report

One of the most tangible indicators of the success of a commission of inquiry as an accountability mechanism is the rather binary one of whether its report is published. In some cases reports are unpublished because they are unwritten – for some reason the commission never finished its

6 Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016) para.34. Any limitations on transparency must be strictly necessary for a legitimate purpose, such as protecting the privacy and safety of affected individuals, ensuring the integrity of ongoing investigations, or securing sensitive information about intelligence sources or military or police operations. However, transparency must not be restricted in a way that would conceal the fate or whereabouts of any victim of an enforced disappearance or unlawful killing, or result in impunity for those responsible.

work; in other cases, a report has been submitted by the commission to the government but the government has not made it public.

Commissions are established by governments, either the executive or the legislature, and often are mandated to report directly to the entity establishing them, rather than to the public. This is not necessarily problematic, since the primary purpose of an *ad hoc* institution such as a commission of inquiry is to advise the government on how to proceed with respect an unusual challenge of accountability – either determining who was responsible or advising how to proceed to remedy. However, as noted above with respect to transparency, accountability, of which a commission represents at least an initial step, must be *seen* to be done.

In most cases where a commission of inquiry is set up there is a public interest in a report of some kind. It is, after all, one advantage of a commission over certain other investigative mechanisms, that it can sometimes produce a better account of the 'bigger picture'. This function is rendered less significant if it is not allowed to publish its findings, or if there is an extended delay during which one party is allowed to control the narrative.

There can sometimes be good reasons for certain parts of a report to remain confidential – for example those parts that might prejudice the fairness of a subsequent prosecution, those parts that might identify particular witnesses or other individuals who might subsequently be targeted. Commissions should bear this tension – between the public right to information and the necessities of confidentiality – in mind while drafting, and maybe consider a confidential annex to a broader public report. Of course this was most deliberately done in the case of the Waki Commission, but a similar point could be made about the *procès-verbaux* collected during the Chad Commission.

4 Contributing to reconciliation or restitution: Commissions effecting *remedy*

Under certain circumstances, then, a commission of inquiry can be as effective or sometimes even more effective than other forms of investigation into a potentially unlawful death. A significant question, however, can be the extent to which they can provide for the second dimension of accountability: that of remedy. In some ways, on account of their more participatory process and more open-ended mandate, they can provide important public spaces for debates over restitution, and can make more tailored or sensitive recommendation about rehabilitation or memorialisation than perhaps some other mechanisms. However, given

that their recommendations regarding subsequent prosecutions invariably rely upon an external authority, their ability to provide a sometimes essential part of satisfaction can be found wanting.

4.1 Participation

One feature of commissions of inquiry that is frequently discussed, perhaps most persuasively around their incarnation as truth commissions, is the extent to which they can be more participatory than judicial proceedings with strict standards of proof, practices of cross-examination, and considerations of relevance. Of course, it is important to point out that, in any type of investigation, victims or their family members have a right to participate in the investigation (provided that their involvement does not compromise its integrity).[7]

Commissions of inquiry, though, can allow for participation to extend well beyond the direct family of the victim(s). They can provide institutionalised pauses for review, or forums of potential change, or indeed of resistance to change. They can be places for contestation and debate over meaning, but they are sometimes able to break down partisan divides that prevent progress in conventional sites for political debate. For whatever reason they may have been set up, and whatever flaws there may be in their processes, commissions have a potential to enrich as well as to moderate public dialogue.

Many commissions, perhaps in addition to taking expert evidence, hold public hearings in which people are invited to participate in a very open way. It should of course be borne in mind that such sessions are never as genuinely democratic as they may appear or try to appear – certain 'gatekeepers' will almost always retain some kind of influence – but the broadened participation can have an evidentiary benefit, as well as a powerful reconciliatory potential.

It is worth noting that in certain countries, for example South Africa and Nigeria, commissions of inquiry tend to have a highly juridified procedure, which requires parties to the issue at hand to be represented by professional counsel in order properly to participate. In the case of the Zaria Commission, for example, parties had to submit a formal memorandum to be invited to participate. Likewise, some participants complained about the overly judicial atmosphere of the Khayelitsha Inquiry. It is important that states guard against procedures such as this amounting to a barrier

7 Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016) paras.35–7.

threshold to participation, for example by providing legal aid or other support.

Where the event that has taken place has had a widespread impact, or emanates from an underlying cause with broad roots, effective commissions will seek testimony or other evidence from as diverse a range of communities as possible. In many cases this requires the commission to take the initiative in terms of making itself and its processes known to the wider public, through newspaper, radio or television advertisements, as well as relying, where appropriate, on a network of local investigators.

4.2 Providing space for non-legal moral resources

While commissions of inquiry are quintessentially state mechanisms, and in ways represent the intrusion of the state into problems which may or may not have been of the state's making, because of their flexible and participatory format, they can sometimes act as fertile theatres for non-state discourses to emerge.

Even if this drama does not take the form of a coherently articulated parallel philosophy of justice (which would, after all, be rather surprising), at the very least such a forum provides an opportunity for popular priorities to emerge. This is why we mention it in this part, under remedies, because on the whole it is in this dimension of accountability that state-driven processes are often found wanting. The desire to know who was responsible for some kind of crisis comes naturally to most executives, along with a desire to be seen to be pursuing justice. Likewise, the interest in reforming what is found to be broken is oft-articulated, if rarely followed through. The supply of a remedy, repairing what was broken or compensating what was lost sometimes is only a secondary concern. By contrast, this element of making good often is the priority of the affected community, and a commission of inquiry can be a valuable forum in which they can express their preferences.

Values of social solidarity seem to play a strong role on many fronts in Africa, as in other parts of the world. This impacts perceptions of and approaches to accountability as much as it does any other public function, and in some instances may suggest a stronger emphasis on restoration than on prosecution. This moreover may have an impact on the kind of mechanism that is used to pursue accountability. Commissions of inquiry are often staffed not only by lawyers but also by people representing the broader community, including sections of the community that may find themselves at odds about the issue being investigated. They typically are in a position to hear evidence on a broader scale than other investigative

mechanisms, and to look deeper at the underlying structural causes of a conflict, and to make recommendations that address those causes in the long run. As such, involving a commission of inquiry as part of an investigative process may have the advantage of ensuring that the accountability process as a whole has greater resonance with relevant social values (including those about the resolution of disputes) within the community in question.

4.3 Reparations

Based upon what they often hear during public hearings or other consultations, most commissions of inquiry will make recommendations about some form of remedy. Since they are not imbued with executive power, they cannot directly grant reparations or order works to be started on commemoration, but since they are asked to make recommendations on what the next steps should be (or, when they are not directly asked, they often arrogate themselves this responsibility), the inclusion of reasoned recommendations about remedy ought to carry weight. None of the recommendations about reparation to victims made by the commissions of inquiry studied here have come to fruition although, as has been noted throughout, several of the accountability processes are still ongoing, including in very attenuated ways.

4.4 Timing

The timing of a commission of inquiry can be a delicate balancing act. An effective commission will likely have been set up quite soon after the events in question, although it is possible for commissions to be valuable investigative mechanisms regarding historical events as well (as demonstrated in the case of Chad).

However, the duty of promptness does not justify a rushed or unduly hurried investigation. Once established, it is important that a commission be given sufficient time to complete its work. Since the full extent of the necessary work may not be apparent at the time a commission is established, it is important that reasonable extensions to the initial timeframe be allowed. This said, it should also be borne in mind that one of the advantages of a commission can be to conduct an initial investigation, quickly, to determine the best course of action.

While unnecessary delays in their work should be avoided, commissions should also avoid rushing into high-profile or public work, and instead give time for the commissioners and their staff to familiarise themselves with the available evidence and to formulate a suitable strategy.

It is interesting to note that the public contestation over the mandate of the Commission established in Burkina Faso resulted in the time period allotted to the Commission being *shortened* – it was felt that giving a commission too much time (or rather, delaying the point at which it would publish its report) would be a means of limiting its impact. This point was partly proven in Malawi, where a lengthy delay before the President announced the Commission, combined with a long process of evidence-gathering meant that civil society interest in the findings of the Commission had diluted by the time it came to publish its report.

4.5 Prosecutions

As noted above, one part of remedy – indeed often the part that receives the greatest attention – is the prosecution and punishment of those identified as the perpetrators. This is one part of remedy on which commissions of inquiry have a very mixed record. Clearly they cannot themselves directly prosecute individuals (by doing so their character would change into some kind of *ad hoc* tribunal). Consequently, they are often left appearing rather impotent, in that even where they may identify a perpetrator they can do no more that make a recommendation to another branch of government that a prosecution should be pursued.

Of course, they often do so in the public eye, which is not without its power, but often victims or other participants would complain of a lack of further pursuit. This said, the examples of Chad, and now it seems also Burkina Faso, Commissions of Inquiry have played a role at the basis of prosecutions. In these cases, the commission plays the role of something of an accountability archive, in which whatever mobilisation was possible at the time is fully utilised, and the evidence remains stored in a usable, and official, record for future further mobilisation.

It is also worth noting, by way of contrast, that there are plenty of fully established investigative mechanisms (such as police oversight authorities) which will not be authorised directly to prosecute those they find culpable of a violation. Many oversight mechanisms will only make recommendations of prosecution to the office of a prosecutor. Because they are established mechanisms and the process is more routine, such recommendations, if ignored or supressed, may not receive the same press coverage as those of a high-profile commission of inquiry, which again contributes to the (perhaps misleading) impression that the recommendations of commissions of inquiry are less impactful than those of other available alternatives.

5 Looking forward: Commissions as instigators of *reform*

Some scholars distinguish two separate processes of politicisation in the aftermath of crisis – accountability (by which they mean backward-looking, retributive blaming) and learning (meaning evaluation and redesign of institutions, policies and practices).[8] We have contended that in fact both fall within the human rights conception of accountability – with the backward-looking part being comprised within the *investigative* component, and the forward-looking part, or the learning being the effort at *reform* (or non-recurrence). Human rights accountability also insists (in addition to the interests of systems-based accountability logics) on a component that provides remedies for those who have suffered.

Other scholars have distinguished between forward and backward-looking accountability. They note that if we see something as a crime, and accountability as meaning blaming and punishing, then accountability will be backward-looking or retributive; if instead we see the act or event as indicative of an organisational or technical issue, then accountability can be forward-looking – asking what should be done about the problem and who bears responsibility for implementing those changes.[9] Many of the examples studied in this volume suggest that accountability mechanisms such as commissions of inquiry can pursue both backward-looking and forward-looking accountability at the same time.

As a consequence of being mandated to look beyond a narrow or particular instance of personal responsibility for a particular case, or to look at longer-term causes of a crisis, commissions can be better placed than some other mechanism to make recommendations about forward-looking reforms. In right to life cases, such recommendations often concern the structure, personnel, training, organisation or control of law enforcement or security agencies. They may recommend reforms to particular operational procedures or to broader legislations concerning the use of force (as was the case in Malawi), or they may relate to who ultimately is responsible for control of a particular unit (as in Burkina Faso).

8 See for example A. Boin, A. McConnell & A. 't Hart *Governing After Crisis: The Politics of Investigation, Accountability and Learning* (Cambridge: CUP, 2008) p.9 (and generally)

9 See for example Sidney Dekker *Just Culture: Balancing Safety and Accountability* 2nd ed. (Aldershot: Ashgate, 2012) p.9, 83f.

In some cases, such as in Kenya, the recommendation of a commission of inquiry can precipitate the creation of a new permanent entity of accountability, such as the Independent Police Oversight Authority.

In her wide-ranging study of truth commissions, Priscilla Hayner highlights that specificity of recommendations would be helpful – in that broad sweeping recommendations are sometimes difficult to implement; she also highlights the important role that outside actors such as the United Nations can play in pressuring the implementation of recommendations.[10] However, if well-framed, even non-binding recommendations can act as a vitally important road map for domestic and international advocacy organisations and donor agencies.

6 Recommendatory bodies: The limits of commissions of inquiry

Commissions are, of necessity, recommendatory bodies: if these cases were sufficiently straightforward, or prosecutors were sufficiently reliable that the case could proceed directly to review by a body with prosecutorial powers, or if the next steps were clear enough and there was sufficient political will for a parliamentary legislative or executive body immediately to begin drafting legal reform, then that is what would happen. Instead, where that is not the case, a commission of inquiry is established to weigh the various options.[11]

Importantly, where a commission recommends further investigation or prosecution, the state's duty to investigate has not been fulfilled unless these steps are taken.[12] Again, this is also true of the recommendation to prosecute or to investigate further made by an alternative mechanism, such as a coroner or an oversight authority. The steps taken may involve the establishment a second special mechanism or may involve passing cases to established mechanisms (in all likelihood a national prosecutor).

10 Priscilla Hayner *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* 2nd ed. (Routledge, 2010) p.192f. Hayner also highlights as one counter-example the Liberian truth commission, the Act of which stated that '[a]ll recommendations shall be implemented' and that the national human rights commission would be responsible for ensuring that they were. It was also provided that '[w]here the implementation of any recommendation has not been complied with, the legislature shall require the head of state to show cause for such non-compliance'. This would appear to overcome concerns about investigative commissions having mandatory powers of recommendation, and thus forcing actions on independent entities such as the judiciary, legislature or executive.

11 Hayner, *Unspeakable Truths* p.192f.

12 Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016) para.8(c).

In some cases, states may introduce additional *ad hoc* mechanisms to implement recommendations of a commission of inquiry (as happened in Burkina Faso, with the creation of the *Collège de Sages*, and has happened, maybe slightly more organically, in Khayelitsha).

The duty to investigate gives practical effect to the duties to respect and protect the right to life, and promotes accountability and remedy where the substantive right may have been violated. Where an investigation reveals evidence that a death was caused unlawfully, the state must ensure that identified perpetrators are prosecuted and, where appropriate, punished through a judicial process.[13] Investigations and prosecutions are essential to deter future violations, and to promote accountability, justice, the rights to remedy and to the truth, and the rule of law.[14]

States must ensure that recommendatory special mechanisms do not undermine accountability by unduly delaying or avoiding other accountability mechanisms.[15] 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. Fulfilment of that duty may require a combination of mechanisms.

7 Conclusion

Throughout this book, it has been emphasised that the failure of the state to pursue accountability for violations of the right to life, including through the effective investigation of suspicious deaths, is itself a violation of that fundamental human right. As part of a state's response to an alleged or suspected violation, in certain complex and challenging situations a properly-constituted national commission of inquiry can potentially play a helpful role in fulfilling the state's duty to investigate. As in the case with any other investigative mechanism, such a commission needs to meet various standards, including those of promptness, effectiveness, thoroughness, independence, impartiality and transparency, but as most of the examples in this collection have demonstrated, that is perfectly possible.

13 Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity Principle 1.

14 Christof Heyns *'Report of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions'* [A/70/304]; Preamble to the UN Basic Principles and Guidelines on the Right to Remedy and Reparation.

15 Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016) para.40.

The eventual impact of a commission of inquiry (beyond the participatory event and/or the reception of the report) will often ultimately depend on the implementation of its recommendations by the body that established it. In some jurisdictions, where a commission of inquiry has been established pursuant to a formal Act, there may be a statutory requirement (such as that in Nigeria) for the government to put forward a White Paper or equivalent legislative instrument relating to the commission's findings.

As the example of Burkina Faso illustrated, the impact of a commission of inquiry can be greatly heighted by the longevity of public interest in its outcome. After a certain point this interest can only be maintained by continued engagement on the part of civil society, including the press. Awareness raising about the role of commissions of inquiry, their needs and their limitations, could help civil society engage better with commissions and to amplify their impact. Moreover, after a commission has been completed, they may well leave behind them a trove of recommendations that can (as the example of Khayelitsha has demonstrated) prove valuable entry-points for activism and advocacy.

However, it is important to distinguish commissions of inquiry as a potential tool (or mechanism) of accountability from the entity that ultimately has the responsibility to drive the process of accountability, namely, the state. Commissions are sometimes established as a response to unusually strong pressure for accountability, stemming from public outrage or from international condemnation. Establishing such bodies may play into the hands of those in power if the latter want to avoid accountability, for example by stalling the process, or if there is reason to be confident that they will conclude that there was no official involvement even where the facts point in the other direction. At their most effective, commissions can sustain the momentum of the pressure on the responsible party – the State – and at times even add to it with an official and reliable record of facts. However, they cannot implement their own findings.

In the majority of cases a commission of inquiry should be only the beginning of an accountability process: as a body that is usually only empowered to establish a record and to make recommendations, the pursuit of meaningful accountability must then be taken up by others. Caution should be exercised before speaking of commissions as 'successes' or 'failures' of accountability: commissions can be part of successful or unsuccessful processes of accountability; they can helpfully advance or unhelpfully impede those processes, but they cannot ultimately be responsible for the eventual outcome.

Commissions of inquiry are state institutions, and thus are subject to questions concerning their independence, especially where the potential complicity of those who act on behalf of the government is concerned. The members of a commission of inquiry are appointed for a specific purpose. They may thus be appointed specifically to produce 'a whitewash'. However, the fact that this can be done should not serve to discount the potential of the mechanism *per se*. They can equally be staffed with people who carry much more trust with the community than the other state structures. Their potential contribution to accountability has to be compared not to the ideal, but to the alternatives that are available. As one former commissioner pointed out to us during the research, sometimes 'asking questions in an even-handed manner is a process of accountability itself'.

This study has reviewed a number of cases where commissions of inquiry into loss of life in different countries in Africa have made a significant contribution to accountability. In many cases this did not come about as planned by those who set them up, nor in one fell swoop. In some cases it might be said that the commissions turned out to have lives of their own.

One way in which this occurred was where they were perhaps more independent than expected, not least because of public pressure, and at the end of their mandate they implicated government involvement, leading to prosecutions. In other cases, where such findings did not lead to prosecutions rightaway, informal accountability measures over the years eventually lead – indirectly – to formal accountability.

Although usually highly-formalised mechanisms, commissions of inquiry often stand at the crossroads where legal and non-legal accountability intersect. They are powerful tools which may fail or succeed on either or both fronts. There is ample evidence to believe that, if well-managed, they can play an important role to ensure accountability for right to life violations in Africa.