2 The concept of accountability and its importance for the protection of the right to life

Thomas Probert

The term 'accountability', its operational variations 'accountability mechanisms' or 'accountability processes', and some of its more rhetorical relatives such as 'the fight against impunity' have all become commonplace reference points in the day-to-day syntax of human rights arguments, policy debates and institutional dogma. Nonetheless, there often is a lack of agreement about what accountability means, or how far it extends. This may contribute to partial or limited versions of accountability that in fact may retard or impede the protection of rights.

As highlighted in the previous chapter, in order to secure the right to life, states must take both prospective steps to prevent arbitrary or unlawful deaths from occurring, and retrospective steps to pursue accountability for any potentially arbitrary deaths that have occurred. This chapter will briefly revisit this duality to demonstrate how a mutually-reinforcing set of parallel obligations combine to protect the right to life. It will then review how accountability and accountability-like processes (in which consideration of previous conduct guides future behaviour) frequently recur in many contexts, either individual behaviour, bureaucratic or other public administration, as well as, specifically, state conduct within a broader framework of international human rights norms. Focusing on this latter category, it will then discuss what amounts to the content of accountability for human rights violations and, finally, ask what types of mechanisms, either independently or in conjunction with one another, can ensure that all the necessary elements of accountability are achieved.

1 Guaranteeing the right to life: reinforcing consequences

The previous chapter introduced the source and basic content of the right to life – more accurately, the right not to be arbitrarily killed, either by the state or by another actor within its jurisdiction. In setting about

guaranteeing the right to life, as with any human right, state actions generally are thought of as falling into the categories of respecting and protecting (or otherwise ensuring) the right in question.[1] In the African context, the African Commission on Human and Peoples' Rights (African Commission) has recently reminded states that they have a responsibility under the African Charter on Human and Peoples' Rights (African Charter) 'to develop and implement a legal and practical framework to respect, protect, promote and fulfil the right to life'.[2]

Respecting the right to life requires that states have systems of law in place that do not violate it, and that its agents comply with these laws and do not engage in arbitrary killings. Protecting the right to life requires that the state and its agents also intervene to protect individuals from arbitrary killings at the hands of other individuals or groups. While the state is not expected to be able to do this perfectly, it is expected to be able demonstrate 'due diligence' in protecting life. Promoting and fulfilling the right to life requires the state to undertake a variety of measures ranging from conducting appropriate awareness raising to ensuring access to emergency healthcare or other vital services.

In addition to this categorisation of obligations, there is another distinction, introduced in the previous chapter, namely, that between *prospective* and *retrospective* actions. Most actions the state or its agent will take to guarantee the right to life, in the normal course of events, will be *prospective*: establishing law; undertaking training; planning or conducting routine policing operations; providing emergency care; even pre-emptive acts of crime prevention. All these actions are aimed at ensuring that arbitrary deprivations of life do not occur. However, it is important to acknowledge that, from time to time, mistakes will be made, accidents will happen, criminals will evade preventative acts, necessary precautions will be insufficient or ignored, and people will be killed arbitrarily. When this occurs – indeed even in a situation where this *might* have occurred – it is equally important that the state responds *retrospectively* to restore the norm.[3]

1 International Covenant on Civil and Political Rights, art. 2(1).

2 African Commission on Human and Peoples' Rights, General Comment 3 para.7. This formulation follows that of the Commission's influential ruling in *Social and Economic Rights Action Centre (SERAC) v Nigeria* (2001) AHRLR 60 (ACHPR 2001) paras.67, 44.

3 The two-part (prospective/retrospective) nature of the right to life is comparable to the scope of the state's obligation to 'to respect, ensure respect for and implement' international human rights law and international humanitarian law, as elaborated in the 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 [A/RES/60/147] para.3. Here it is emphasised that

Broadly speaking, it is these retrospective actions, often grouped together into an 'accountability process', to which this chapter and the remainder of this volume are dedicated. Different circumstances have different requirements, but generally it will be important to find out what happened, who was responsible (directly or indirectly), who was affected (as a victim), and whether there was any failing of a systemic (non-personal) character. This will be the core function of an *investigation*, usually a vital first step. Then, it will be necessary to *remedy* the suffering of the victims (or, more commonly in these cases, their beneficiaries and dependents) including by holding any responsible parties 'to account' (which may take various forms) but also by other means of reparation or restitution. Finally, some form of legislative, institutional or practical *reform* may need to be implemented to reduce the likelihood of such an event recurring.[4]

Properly applied, these prospective and retrospective actions play a mutually-reinforcing role (as will be discussed further in the next part on the concept of accountability). Setting out the norm defines the terms and conditions under which accountability for violations will take place but, conversely, effective accountability processes make future violations of the norm in question less likely to occur. Robust responses against those who violate the norm, coupled with support to those who suffer from a violation both sure up the content and validity of the norm in the minds of the general population (particularly important after a large-scale violation) and contribute to deterring future violations.

This mutually-reinforcing logic applies both to the obligation to *respect* and to *protect* the right to life (or any other right). The democratic state is largely premised on the notion that the state is entrusted with something approaching a monopoly on the legitimate use of force in return for securing the basic rights of the population. Given the importance of the right to life, it is central to the legitimacy of the state that this right be secured. Where agents of the state misuse such force but are held accountable for doing so, the norm against arbitrary killing is upheld and the premise for the

this obligation requires states to '(a) take appropriate legislative and administrative and other appropriate measures to prevent violations; (b) investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law'.

4 As one would expect from a document dedicated to this subject, the Basic Principles then elaborate the retrospective obligation, highlighting the state's obligation to '(c) provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and (d) provide effective remedies to victims, including reparation'.

legitimacy of the state's power can be retained. Conversely, where there is no accountability for state agents' failure to respect the right, not only the norm but the legitimacy of the state itself is undermined.

Likewise, when it comes to protecting the right to life, given how little control the state can exercise over the acts of individuals, the state cannot prevent every arbitrary killing perpetrated by a private individual. What the state *can* be held responsible for, however, in addition to the question of whether it has exercised due diligence to prevent the deprivation of life, is the way in which it responds to such an event, either through criminal or other investigation, or perhaps by way of emergency response, or over a longer term, reflecting on how it might better guard against such an event happening again by implementing legal or policy reforms. This has been referred to as the requirement of 'accounting for life' – whereby states have a responsibility to be aware of the incidence and causes of deaths in their jurisdiction, so that more detailed investigations can be initiated where necessary.[5]

Where this does not occur, in a situation where norms can be violated without consequence, one finds the onset of 'impunity', in which norms quickly begin to lose their value. 'Impunity', both commonly and strictly understood to mean exemption from punishment or penalty[6] (and hence strongly associated with a criminal justice setting, and with the concept of *de jure* or *de facto* immunity) can perhaps be better understood more broadly as 'the absence of accountability'. This can reflect a broad understanding of accountability: punishment usually being a consequence of an investigation, sometimes perceived as a form of remedy for the victims, and sometimes as a deterrent (to prevent the violation from recurring).

The understanding that retrospective investigations play an important role in preventing future violations has been embedded in the language of relevant United Nations (UN) resolutions, such as that mandating the Special Rapporteur on Summary Executions, which highlights that the state has the obligation to conduct investigations 'to identify and to bring to justice those responsible, … to grant adequate compensation within a reasonable time to the victims or their families and to adopt all necessary measures, including legal and judicial measures, in order to bring an end to impunity and to prevent the recurrence of such executions'.[7] Similarly,

5 See Christof Heyns *Report of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions* (6 August 2014) [A/69/265] para.115.

6 See *Oxford English Dictionary* 2nd ed. (Oxford: OUP, 1989) vol.VII p.756f.

7 Human Rights Council Resolution 26/12 [A/HRC/RES/26/12] (11 July 2014) para.4.

the African Commission has underlined the idea of accountability being a self-reinforcing concept, noting that a failure to pursue accountability for a violation of the right to life (including a failure to investigate a potential violation) in itself amounts to a violation of the right.[8]

2 Concept of accountability

The previous part introduced the idea that the international human rights system is premised on the use of accountability as a means by which norms self-reinforce. Accountability in this sense has a virtuous-cycle logic: by responding to a mistake or an infraction one highlights that a mistake or infraction has occurred, or that the conduct that has occurred amounts to a mistake or an infraction (strengthening the norm if necessary) making a future mistake or infraction less likely and thus reducing the need for future responses.[9] This part examines how similar logics of accountability exist within different circumstances (and different bodies of scholarship) ranging from individual behaviour to public administration and governance, and then goes into greater detail on its place within that which is the interest of this study – human rights practice.

2.1 Accountability and individual behaviour

The conditioning of individual behaviour is replete with examples of accountability logics – incidents where a consequence results in us re-evaluating our own behaviour. In terms of our interaction with our physical surroundings this generally takes place during infanthood – children learn not to touch hot pans either by getting burnt or by a guardian imposing an equally memorable sanction. Thus a norm of sorts – 'don't touch hot pans' – is established. Should the child ever forget or transgress the 'norm', he or she will quickly be reminded of the consequences.

With respect to our interaction within a social group, the process is somewhat more complicated, but probably more recognisable as something that relates to accountability. Why do individuals within groups not relentlessly pursue their personal self-interest? At its most basic level the logic of accountability will centre around some variant of revenge. Revenge, in this sense, has a rationale, and one that can facilitate a (probably

8 African Commission, General Comment 3 para.15.

9 Some have gone as far as conceptualising the history of the international human rights project as a whole as the result of a gradual attempt over time to respond to injustices – of attaching consequences aimed at restoring the norm when it is breached. See Christof Heyns 'A "Struggle Approach" to Human Rights' in Christof Heyns & Karen Stefiszyn (eds) *Human Rights, Peace and Justice in Africa: A Reader* (Pretoria: PULP, 2005) pp.15–34.

uneasy) cohabitation of purely self-interested actors. As Daly and Wilson have pointed out (with respect to interpersonal violence, but it could also apply to less bodily protection of interests) 'effective deterrence is a matter of convincing our rivals that any attempt to advance their interests at our expense will lead to such severe penalties that the competitive gambit will end up a net loss which should never have been undertaken'.[10]

In a more advanced social setting, the way in which this expectation of revenge can evolve into a grounds for cooperation can be demonstrated with reference to the Prisoner's Dilemma. The Prisoner's Dilemma is a hypothetical illustration of the ways in which independent entities can choose to either cooperate for mutual gain, or defect from each other for personal advantage. Two individuals are placed in separate rooms unable to communicate with each other. Each faces the choice of giving evidence that incriminates the other for the sake of a reduced sentence, or relying on the other's fidelity and escape with no sentence at all.[11] In its classic, singular form the Prisoner's Dilemma is tragic (because, absent some reliable guarantee from the other beforehand, each prisoner's best odds are to turn 'snitch). However, in exploring how effective deterrence as described above does not become socially or economically stultifying, during the 1980s political scientist Robert Axelrod explored the conception of an *iterated* Prisoner's Dilemma, where the choice is repeated and each prisoner has the opportunity to modulate his decision based on the other's conduct.[12] The three possible outcomes – long sentence, reduced sentence, no sentence at all – are replaced with a score in each iterative round of the 'game'. What strategy maximises results for an individual in such a context? In one of the simplest strategies (known as 'tit for tat') players cooperate until they are defected against, in which case in the next round they themselves defect, holding the other party in some way accountable. As Pinker has subsequently observed, in this conception it becomes clear that 'vengeance is no disease: it is necessary for cooperation, preventing the nice guy from being exploited'.[13]

There are certain key features of a 'tit for tat' strategy that are worth reflecting on as one considers the extent to which it contains an accountability logic: (i) it is *nice* – it means one cooperates on first move,

10 Martin Daly & Margo Wilson *Homicide* (New York: Aldine de Gruyter, 1988) ch.10.

11 For an accessible introduction to the Prisoner's Dilemma, see W. Poundstone *Prisoner's Dilemma: Paradox, Puzzles, and the Frailty of Knowledge* (New York: Anchor, 1992). Poundstone describes it as 'one of the great ideas of the twentieth century, simple enough for anyone to grasp and of fundamental importance'.

12 Robert Axelrod *The Evolution of Cooperation* (New York: Basic Books, 1984).

13 Steven Pinker *The Better Angels of Our Nature: The Decline of Violence in History and its Causes* (London: Allen Lane, 2011) p.534.

and on subsequent moves until one is defected against; (ii) it is *transparent* – if strategy or rules of engagement are too complicated, other players cannot discern how it is operating, meaning its moves appear arbitrary (and, strategically, the best response to an opponent who is acting arbitrarily is 'Always Defect'); (iii) it is *retaliatory* – it responds to defection with defection, which is the simplest form of revenge; (iv) it is *forgiving* – it allows its opponent to return to cooperation and will not retributively punish, instead reverting to cooperation as soon as its opponent does.[14]

Criminological literature is replete with studies of the impact of individual criminal accountability (prosecutions, custodial sentences or other sanctions) as a deterrent – exploring under what circumstances it may function and under what circumstances not.[15] Certain key features, including, for example, transparency, predictability and fairness, stand out in this regard. Meanwhile it is also important to highlight the role that forgiveness plays in the 'tit for tat' strategy. In follow-up research to Axelrod's contentions it became clear that both generously forgiving and contrite strategies led to even better performance.[16] Both Pinker and McCullough have drawn attention to the extent to which these insights can be drawn into thinking about the emergence of campaigns for restorative justice within a criminal law setting.[17]

Critiques of certain approaches to the pursuit of 'law and order', for example those that allege too heavy a focus on retributive sanction by the state against the perpetrator, and not enough on rehabilitation or community engagement, or even not enough on addressing the structural causes of crime in the first place, all strike a familiar note in debates about a full interpretation of human rights accountability. Just as such heavy-handed criminal justice approaches are accused of ignoring the needs of the victims and failing to address the structural causes of crime, so an overly criminal responsibility-focused approach to human rights accountability can miss key components that allow accountability to be a constructive process.

The general point about accountability and individual behaviour is that individuals are 'held to account' by other individuals directly or, in

14 *Ibid*. See also Michael McCullough *Beyond Revenge: The Evolution of the Forgiveness Instinct* (San Francisco: Jossey Bass, 2008) p.98.

15 For a review of this scholarship, see Valerie Wright 'Deterrence in Criminal Justice: Evaluating Certainty vs Severity of Punishment' (Washington DC: Sentencing Project, 2010).

16 See McCullough, *Beyond Revenge* p.99f.

17 See Pinker, *Better Angels of Our Nature* p.541f; McCullough, *Beyond Revenge* p.175f.

a more developed social setting, criminal accountability allows private individuals to be 'held to account' by the state itself. This is different to the examples that follow.

2.2 Accountable public administration and policy learning

In addition to addressing the conduct of its citizens or subjects through a criminal law accountability system, as states historically have grown increasingly complex, they have also come to need internal mechanisms of accountability and control to regulate the conduct of their own agents.

Traditional understandings of the concept of 'accountability' stressed 'giving an account' – not only in English but also in French (*rendre compte*) and in German (*Rechenschaft abgeben*). The *Oxford English Dictionary* defines accountability as 'liability to give an account of, and answer for, discharge of duties or conduct'.[18] In public administration this has generally meant giving an account to some form of public body, charged with either executive or legislative power. As Mansbridge has argued, over the last several decades the term has slowly begun to connote the application of sanctions after a process of monitoring.[19]

As public administration began to be prominently theorised (especially in the US during the mid-twentieth century) two distinct points of view emerged about the best way to guarantee accountable public servants: on the one hand it was argued that government departments should be staffed by first selecting self-motivated persons who sincerely wanted to work for the public interest and then reinforcing those internal commitments (a position identified with Friedrich) while, on the other hand, it was contended (for example by Finer) that the only way to achieve accountability was through a system of external sanctions and controls.[20] Of course, ultimately a mixture of the two is probably optimal: with no disciplinary sanctions at all, a system based on selection and trust will eventually unravel like a prisoner's dilemma game in which co-operators gradually decide not to remain suckers as they see others benefiting from defecting but, on the other hand, when internal motivation is doing most of the work, sanction-based accountability must discipline only lightly and

18 *Oxford English Dictionary* 2nd ed. (Oxford: OUP, 1989) Vol.I p.87.

19 See Jane Mansbridge 'A Contingency Theory of Accountability' in Mark Bovens, Robert Goodin & Thomas Schillemans *The Oxford Handbook of Public Accountability* (Oxford: OUP, 2014) p.55f.

20 Carl Friedrich 'Public Policy and the Nature of Administrative Responsibility' in *Public Policy: A Yearbook of the Graduate School of Public Administration* (Cambridge, MA: Harvard UP, 1940); Herman Finer 'Administrative Responsibility in Democratic Government' *Public Administration Review* 1 (1941) pp.335–50.

in the most important places in order not to disrupt the delicate balance of the selection-trust system. Nonetheless, as Mansbridge has identified, in more recent years the perceived need for accountability and oversight has led to an 'audit explosion' in which quantitative metrics of performance have come to mean more than trust in the expertise or competence of appointed individuals.

In a more explicitly political setting, our understanding of democratic accountability, at both national and international level, includes the implication that 'some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of those standards, and to impose sanctions if they determine that those responsibilities have not been met'.[21] However, there is also the important question of how the political authority to which these actors may be giving their account is itself accountable. 'Democratic accountability' in this sense generally means the right of citizens to hold their rulers to account. They can do this through a number of political mechanisms (such as the secret ballot, regular voting and competition between potential representatives) – which provide with means for 'choosing, authorizing and controlling political decisions.'[22]

So both civil servants and elected officials should ideally be accountable in the sense that their behaviour can, on a continuing basis, be subject to oversight and review. In the field of public administration, Bovens and others have established an important distinction between 'accountability as a virtue' and 'accountability as a mechanism'.[23] As a virtue, accountability is a desirable quality of government organisation, or officials. It does not necessarily require a specific mechanism, but its logic still defines and prevents undesirable behaviour. In this usage, 'accountability' is close to 'responsiveness', answerability, or a willingness to act in a transparent, fair compliant and equitable way. It is thus an evaluation of the conduct of actors. Conversely, in what Bovens and others suggest as maybe the dominant usage, accountability as a social, political or administrative

21 Ruth W. Grant & Robert O. Keohane 'Accountability and Abuses of Power in World Politics' *American Political Science Review* 99 (2005) p.29. More broadly, see Michael Goodhart 'Democratic Accountability in Global Politics: Norms, Not Agents' *Journal of Politics* 73 (2011) p.46 and Mark Philip 'Delimiting Democratic Accountability' *Political Studies* 57 (2009) pp.28–53.

22 David Held *Models of Democracy* 3rd ed. (Stanford, CA: Stanford UP, 2006) p.70f. These mechanisms form part of a 'protective theory of democracy' which Held identifies both with James Maddison and with members of the nineteenth-century 'English liberalism', such as Jeremy Bentham and James Mill.

23 See Mark Bovens 'Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism' *West European Politics* 33 (2010) pp.946–67.

mechanism describes an institutional relation or arrangement in which an agent can be held to account by another agent or institution.[24] The two are clearly linked, in that actors working within systems where mechanisms exist readily to hold them to account are far more likely to behave in a way that is consistent with the established norms, thereby demonstrating many of the virtues of accountability while, over time, no doubt also internalising the norms.

It is worth noting that public or democratic accountability can overlap with the logics and mechanisms of human rights accountability – most pertinently in the case of response to a crisis (and, of course, allegations of serious human rights violations often amount to a crisis).[25] Governmental response to crisis will often take place across a variety of forums, ranging from regulatory or oversight bodies, which will adopt a *technical*, or *professional* paradigm of accountability, to more judicial authorities (such as coroners, police, public prosecutors or courts) which – in different ways – will operate with a *forensic* paradigm of accountability where the main aim is not only to establish causality but to ascertain responsibility and indeed culpability. There may also be *ad hoc* public investigations or inquiries of a more explicitly political character, in which legislatures (especially opposition members within them) are keen to show their involvement and robustness in holding executive power to account.[26]

It is in this context (as will be more fully discussed in the next chapter) that commissions of inquiry, originally a mechanism of bureaucratic

24 See Mark Bovens, Thomas Schillemans & Robert Goodin 'Public Accountability' in Bovens, Goodin & Schillemans *Oxford Handbook of Public Accountability* p.7f.

25 See Sanneke Kuipers & Paul 't Hart 'Accounting for Crises' in Bovens, Goodin & Schillemans, *Oxford Handbook of Public Accountability* p.589f.

26 *Ibid.*, p.592. With respect to these specific inquiries (similar in many ways to those studied throughout this volume) it is worth noting the authors' observation that 'authorities that commission such inquiries walk a fine line in designing their briefs. In order to properly fulfil its symbolic, cathartic function, the investigation needs to be bestowed with public authority. This presupposes that people of impeccable, non-partisan credentials are selected to head it, that they be given a wide brief, unlimited access to information and actors, ample resources to conduct their business and freedom to organise their work as they see fit. But by granting all of that, governments may also be setting up a body that can prove to be a major thorn in their own side, which will end up finding fault not just 'out there' and 'down the line', but tracing responsibilities back to 'in here' and 'up at the top', or proposing policy changes that are politically controversial and financially unpalatable. So, in practice, the relationships between governments and official investigations are full of ambiguity and latent tensions that need to be carefully managed in order for both to come out the other end unscathed.' Also see S. Dekker *Just Culture: Balancing Safety and Accountability* (London: Ashgate, 2007) and A. Boin, A. McConnell & P. 't Hart *Governing After Crisis: The Politics of Investigation, Accountability and Learning* (Cambridge: CUP, 2008).

review of public administration, have also come to play a role in human rights accountability. It also becomes clear that often there will not be an individual accountability mechanism that can suffice to answer all of the necessary questions or to administer all of the necessary responses; instead, often multiple interacting mechanisms will combine in a *process* of accountability.

Nonetheless, in any individual mechanism one will normally find three defining attributes: an *actor* that is accounting; a *forum* to which he or she is accounting and which can interrogate that about which he or she is accounting; and *consequences* that can follow from the account that is given. The actor needs to be obliged to inform the forum about his or her conduct (often, particularly with failure, this involves the provision of explanations and justifications); the forum needs to be able to interrogate the actor and to question the adequacy of the explanation, in all likelihood with reference to other evidence or testimony it has received from elsewhere, and to be able to pass judgment on the conduct; then, in terms of consequences, when passing a negative judgement the forum may impose sanctions or, conversely, in the case of a positive judgment it may commend or even reward the actor.[27]

While accountability in this sense of public administration can appear quite formal, and can lead to a great deal of bureaucracy, the important kernel is that state institutions are capable of being (or indeed are required to be) 'held to account' by the people, either directly through the ballot box or other political mechanisms (democratic accountability), or indirectly though the people's elected representatives (administrative accountability), often empowered by other actors such as civil society organisations and a free press. Similar logics and mechanisms can also be observed in the corporate realm, where the role of the 'people' is played by a narrower category of shareholders.

2.3 Human rights and accountability

The notion that something should happen if or when a human right is violated, either by deliberate criminal act or through legislative or practical oversight, is an idea that is logically necessary for human rights to be something more than a list of aspirations.

At the national level, if nothing happens when a law is broken, it becomes questionable whether the law in fact is a law at all. At the

27 See Bovens, 'Two Concepts of Accountability' and also Bovens et al, 'Public Accountability' p.9.

international level, governmental *response* to a human rights violation (rather than a violation itself) becomes a very important measure of the value accorded to, and the protection of, human rights. Were the international human rights system to become engaged every time an individual right was violated, the system itself would become impossibly overloaded. Indeed, it is premised on the idea of subsidiarity – the primary responsibility for rectifying wrongs should remain with states.

Since the 1960s it has been an agreed principle of the international system that states have responsibilities, under articles 55 and 56 of the UN Charter, 'to take joint and separate action' in cooperation with the UN to achieve, *inter alia*, 'universal respect for, and observance of, human rights and fundamental freedoms for all'.[28] According to this logic, it was general governmental policy, rather than individual actions, that engaged the international system.[29]

A general governmental policy of indifference to violations of human rights represents a challenge to the sustainability of the norms. As has been noted above, the African Commission has recently highlighted that such indifference – the failure of the state to investigate a potentially unlawful death and pursue accountability – itself amounts to a violation of the right to life. This is particularly the case, the Commission suggests, 'where there is tolerance of a culture of impunity'.[30] In the UN's Updated Set of Principles on the Combating of Impunity (Impunity Principles) the term is defined as meaning

> the impossibility, *de jure* or *de facto*, of bringing the perpetrators of violations to account – whether in criminal, civil, administrative or disciplinary proceedings – since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.[31]

Impunity and accountability therefore are opposite ends of a spectrum of possible state responses to the violation of its norms or laws: a particular

28 UN Charter, arts 55 and 56.

29 On the emergence of consensus about this interpretation of Charter obligations, and the way in which it became politically significant during the 1960s, see Thomas Probert 'The Politics of Human Rights in the United States of America and in the United Kingdom, 1963-76' PhD thesis, University of Cambridge, 2013 ch.1. It is noteworthy that these same Charter obligations are adverted to in the preamble of the UN's more recent (2005) Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity [E/CN.4/2005/102/Add.1] p.6.

30 African Commission, General Comment 3, para.15.

31 UN, Updated Set of Principles to Combat Impunity p.6. These Principles are applied

set of responses to a violation will in practice end up being nearer one end of the spectrum than the other. Importantly, the mere presence of a mechanism purporting to be an 'accountability mechanism' does not necessarily negate the persistence of impunity.

Many core human rights documents elaborate the important elements of accountability, the full content of which will be elaborated in the next part.[32] Broadly speaking, it centres on establishing what happened (indeed, whether a human rights violation occurred at all), to whom it happened and who was responsible, repairing damage done, prosecuting those responsible, providing rehabilitation to victims, potentially attempting reconciliation while at the same time undertaking steps to prevent a similar event from occurring in the future.

It is taken to be a customary principle that any and all such investigations must be prompt, impartial, thorough and transparent.[33] Significantly, the African Commission has also drawn attention to the fact that '[a]ppeals to national security or state secrecy can never be a valid basis for failing to meet the obligation to hold those responsible for arbitrary deprivations of life to account, including during armed conflict or counter-terrorism operations'.[34]

Where individual (criminal justice) accountability involves the state holding the individual to account, and democratic accountability involves the people (or their representatives) holding the state to account, human rights accountability, while it can include either of the preceding two, at its core involves the state holding *itself* to account (or – in certain quite limited circumstances – being held to account by other states or international bodies).

to serious crimes under international law, defined as including the violation of 'internationally protected human rights that are crimes under international law and/or which international law requires states to penalise', including extrajudicial executions.

32 In addition to the Impunity Principles and the Basic Principles on the Right to Remedy and Reparation, perhaps the most directly relevant normative instrument aimed at ensuring accountability for violations of the right to life in particular are the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (1989), especially Principle 9.

33 See, for example, African Commission, General Comment 3, para.15.

34 *Ibid*., para.20.

3 Content of accountability

The first general principle in the UN's Impunity Principles provides an extensive list of some of its different causes and, by implication, the necessary elements of the effective pursuit of accountability:[35]

> Impunity arises from a failure by states to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations.

Likewise, in their General Comment the African Commission has elaborated accountability as having many components:[36]

> Accountability, in this sense, 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. Accountability also encompasses measures such as reparation, ensuring non-repetition, disciplinary action, making the truth known, institutional review and, where applicable, reform. States must ensure that victims have access to effective remedies for such violations. States should cooperate with international mechanisms so as to ensure accountability.

A broad understanding of human rights accountability, therefore, can be thought of as having three interlinked components: the identification and pursuit of those responsible through an *investigation*; the provision of a *remedy*; and the implementation of *reform*. There can be a degree of overlap, and in certain cases not all three elements will be appropriate, but the burden should rest on the state to demonstrate that it is not.

An investigation is aimed at determining whether or not a violation of a human rights norm has occurred, whom it affected, and who was directly or indirectly responsible. The provision of remedy to the victim or victims of the violation or to their beneficiaries (or in certain circumstances to some form of social group with which the victim was identified) requires an assessment of the harm inflicted and some form of restitution, whether

35 UN Updated Set of Principles to Combat Impunity, Principle 1.

36 African Commission, General Comment 3, para.17.

directly or indirectly. The implementation of reform is aimed at ensuring non-recurrence, and requires an assessment of the likely *causes* of the violation.

This part will explore these three elements of accountability in more detail.

3.1 Investigation

The Impunity Principles reaffirm that 'states shall undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished'.[37] As noted above, a multitude of international human rights instruments underline the importance of investigations as part of securing fundamental human rights. More recently, the international legal standards surrounding the duty to investigate suspicious deaths, and the practical requirements of an effective investigation, have been condensed in the Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016).[38]

The duty of the state to investigate is triggered where the state knows or should have known of any potentially unlawful death within its jurisdiction,[39] including (but not only) where reasonable allegations of a potentially unlawful death are made.[40] It includes all cases where the state has caused a death or where it is alleged or suspected that the state caused a death (for example, where law enforcement officers used force that may

37 UN, Updated Set of Principles to Combat Impunity, Principle 19.

38 From 2014 to 2016 the author supported the process of updating the UN's Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (the original of which dated back to 1991). More information on the process is available at: http://www.ohchr.org/EN/Issues/Executions/Pages/RevisionoftheUNManualPreventionExtraLegalArbitrary.aspx.

39 The duty to investigate applies wherever the state has a duty to respect, protect, and/or fulfil the right to life, and in relation to any alleged victims or perpetrators within the territory of a state or otherwise subject to a state's jurisdiction (see, for example, Human Rights Committee, General Comment 31, para.10; African Commission, General Comment 3, para.18. See also ECtHR, *Hassan v UK*, Judgment (Grand Chamber), 16 September 2014, para.78.) Where the duty to investigate applies, it applies to all states that may have contributed to the death or that have failed to protect the right to life.

40 ECtHR, *Ergi v Turkey*, Judgment, 28 July 1998, para.82; *Isayeva, Yusopva and Bazayeva v Russia*, Judgment, 24 February 2005, paras.208–209; IACtHR, *Montero-Aranguren & Others*et *v Venezuela*, Judgment, 5 July 2006, para.79.

have contributed to the death). This duty exists regardless of whether it is suspected or alleged that the death was unlawful. In other words, whenever a state agent uses force that results in death, whether or not, on the face of it, the force was justified or appropriate, there must be an independent investigation. This usually requires some kind of mechanism of mandatory reporting, often to an external, independent oversight body (as will be discussed below).

Where a state agent has caused the death of a detainee or where a person has died in custody, this must be reported, without delay, to a judicial or other competent authority that is independent of the detaining authority and mandated to conduct prompt, impartial, and effective investigations into the circumstances and causes of such a case.[41] Owing to the control exercised by the state over those it holds in custody, there is a general presumption of state responsibility in such cases.[42]

The state also has a duty to investigate all potentially unlawful deaths caused by individuals, even if the state cannot be held responsible for failing to prevent such deaths.[43] For the state to be able effectively to enforce a criminal norm against arbitrary killing, it must be able to investigate murders, identify perpetrators and prosecute them. This means that the criminal justice response to violent crime, including forensic investigation and police detectives, are an important part of the state's apparatus to protect the right to life. The African Commission has underlined that states should put in place effective systems both for police investigation (such as forensic investigation) and for accountability and oversight (such as an independent police oversight mechanism).[44]

The duty to investigate continues to apply at all times. It applies generally during peace time, situations of internal disturbances and tensions, and armed conflicts.[45] Certain situations, such as armed conflict,

41 See the UN Standard Minimum Rules for the Treatment of Prisoners (revised in 2015 as the Nelson Mandela Rules), Rule 71(1).

42 See Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, [A/61/311], (5 September 2006), paras.49–54. The African Commission has made this point even more clearly in its Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (Luanda Guidelines) (2014) §20, and in its General Comment 3, para.37.

43 ECtHR, *Opuz* v. *Turkey*, Judgment, 9 June 2009, para.150.

44 African Commission, General Comment 3, para.16.

45 However, in the context of armed conflict the general principles must be considered in light of the surrounding circumstances, as well as the underlying principles governing international humanitarian law. Moreover, as the Minnesota Protocol makes clear, there are certain specificities about the duty to investigate during the conduct of

may pose practical challenges to the conduct of an investigation. This would particularly be the case with the regard to the obligation of a state (as opposed to another actor) to investigate deaths linked to armed conflict when they occur on territory the state does not control.

In addition to reinforcing the protection of the right to life, a proper investigation of violations also contributes immeasurably to other rights, such as the 'right to truth' or 'right to know'. In the language of the Impunity Principles, '[e]very people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations.'[46]

At various points in debates about accountability, particularly in debates about transitional justice, questions are raised about the duty to investigate combined with the state's duty to prosecute violations of human rights. The two are clearly instrumentally linked, in that the latter cannot (justly) be achieved without the former, but as will be discussed below, the failure to prosecute an individual against whom an investigation has provided credible evidence of a violation may amount to a failure to provide satisfaction to the victims rather than a failure to investigate the events that took place. This brings us on to the next, critical, component of accountability in human rights terms, namely, remedy for the victims.

3.2 Remedy

States must ensure that victims have access to effective remedies for violations. As the African Commission has noted, victims should have a role both during an investigation and afterwards, highlighting that they 'should be treated with respect and appropriate measures should be taken to ensure their safety. Those who have suffered violence or trauma should benefit from consideration to avoid re-traumatisation.'[47] In a more detailed document, their General Comment on the Right to Redress for Victims of Torture, the Commission describes a right to redress that 'encompasses the right to an effective remedy and to adequate, effective and comprehensive reparation'.[48]

hostilities; see Minnesota Protocol on the Investigation of Potentially Unlawful Death para.21

46 UN Updated Set of Principles to Combat Impunity Principle 2.

47 African Commission, General Comment 3, para.19.

48 African Commission, General Comment 4 on the African Charter on Human and

The UN's Impunity Principles make it clear that '[a]ny human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries, implying a duty on the part of the state to make reparation and the possibility for the victim to seek redress from the perpetrator'.[49] Moreover, the Basic Principles on the Right to Remedy and Reparation elaborate that '[a]dequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered.'[50] They stipulate that states should 'provide reparation to victims for acts or omissions which can be attributed to the state and constitute gross violations of international human rights law or serious violations of international humanitarian law'.[51]

The Impunity Principles establish that '[t]he right to reparation shall cover all injuries suffered by victims; it shall include measures of restitution, compensation, rehabilitation, and satisfaction as provided by international law'.[52] The same core content is provided for in the African Commission's General Comment on Redress.[53] The Basic Principles on Remedy and Reparation elaborate in more detail on each of these elements: *Restitution* should, whenever possible, restore the victim to the original situation before the violation occurred.[54] In the case of victims of most violations of the right to life this is clearly impossible; most forms of individualised remedy will, if applicable, be directed at the relatives or dependants of the deceased. This is also true of *Rehabilitation*, which should include medical and psychological care as well as legal and social services.[55] Meanwhile, *Compensation* should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case.[56]

Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5) (2017) para.8.

49 UN, Updated Set of Principles to Combat Impunity, Principle 31.

50 UN, Basic Principles on the Right to Remedy and Reparation, para.15.

51 *Ibid*. They further note that '[i]n cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the state if the state has already provided reparation to the victim'.

52 UN, Updated Set of Principles to Combat Impunity, Principle 34.

53 African Commission General Comment 4, para.10.

54 UN, Basic Principles on the Right to Remedy and Reparation, para.19.

55 *Ibid*., para.21.

56 *Ibid*., para.20.

Probably most relevant to accountability for right to life violations is what the Basic Principles refer to as *satisfaction*, which can include measures aimed at the cessation of continuing violations, where applicable; and verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives or witnesses. In cases where victims have been 'disappeared' the search for their whereabouts can form part of satisfaction, including assistance in the recovery, identification and reburial of the bodies.

In circumstances where there have been a large number of victims, or the violation has represented a fundamental rupture, satisfaction can also include more broadly-focused steps, such as an official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim; a public and official apology, including acknowledgment of the facts and acceptance of responsibility; public commemorations and tributes to the victims; the inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.[57]

The Basic Principles also include judicial and administrative sanctions against persons liable for the violations as part of 'satisfaction'. We have established 'responsibility' as a separate category of accountability, but a circumstance where those responsible were identified by a thorough investigation but a decision was taken to grant some kind of pardon or immunity, this could represent a failure to pursue a remedy rather than a failure to investigate *per se*.

In various of the case studies that are examined in this volume there will also be a discussion of *reconciliation*. This could conceivably also be a vehicle for reform, but probably should most commonly be understood as a broader purpose of remedy.

3.3 Reform

In certain systematic categorisations of accountability (including the African Commission's in its General Comment on the Right to Life) guarantees of non-recurrence are wrapped up in conceptions of reparations. However, the contention here is that given the role that reforms implemented for the purpose of such non-repetition can play in

57 *Ibid*., para.22.

the self-reinforcing nature of an accountability process, reform deserves consideration on its own merits.

As with any mutually-reinforcing 'virtuous circle' it is difficult to draw a sharp distinction between when reform as part of accountability ends and legislative or policy provisions for the prevention of violations (the prospective obligations discussed above) begin. Nonetheless, it is important that at least the beginnings of such a process of reform be part of an accountability process, otherwise there is a risk that the virtuous circle will not be a circle at all. If accountability is allowed to become only a process of establishing who was responsible and compensating the victims without having to consider the question of 'how or why did this happen and how can we prevent it from happening again', then the fundamental logic of accountability – a consequence to condition future behaviour – will be lost.

The Impunity Principles remind states that they must ensure that victims do not again have to endure violations of their rights, and that '[t]o this end, states must undertake institutional reforms and other measures necessary to ensure respect for the rule of law, foster and sustain a culture of respect for human rights, and restore or establish public trust in government institutions'.[58] States must take all necessary measures, including legislative and administrative reforms, 'to ensure that public institutions are organised in a manner that ensures respect for the rule of law and protection of human rights'.[59]

Taking a fairly broad stance on the range of potential steps, the Impunity Principles provide that '[l]egislation and administrative regulations and institutions that contribute to or legitimise human rights violations must be repealed or abolished' while, conversely, '[l]egislative measures necessary to ensure protection of human rights and to safeguard democratic institutions and processes must be enacted'.[60] Meanwhile, the Basic Principles elaborate on the possible content of '*guarantees of non-repetition*', which they contend 'will also contribute to prevention', and could include ensuring civilian control of military or security apparatus, ensuring international standards of due process fairness and impartiality in legal proceedings, strengthening the independence of the judiciary; providing human rights and international humanitarian law education

58 UN, Updated Set of Principles to Combat Impunity, Principle 35.

59 *Ibid.*, Principle 36.

60 *Ibid.*, Principle 38.

to all sectors of society and training for law enforcement officials; and reviewing and reforming relevant laws.[61]

International guidance on the content of this third component of accountability, of necessity, is rather generalised, but as several of the case studies included in this volume will make clear, recommendations for or implementation of reforms can be one of the most lasting impacts of an accountability mechanism. Moreover, it is with respect to this component of accountability that commissions of inquiry can most clearly provide something that is more difficult for routine court proceedings to accomplish.

4 Mechanisms of accountability

In most cases, processes of human rights accountability aimed at securing the right to life will involve one or more state organs that should simultaneously be accountable in the public administration sense discussed above. In that sense, recall, one can speak of accountability as a 'virtue' as well as a 'mechanism'. Many state organs, including the police or other security forces, may well be encouraged to have a 'culture of accountability' (accountability as a virtue) in which their actions are reviewed on an ongoing basis by an independent entity, regardless of whether anything has gone wrong. In such a culture it is likely that such an entity, be it a specialised civilian oversight body or a national human rights institution, will be the first port of call in the event that something does go wrong.

This part will draw two cross-cutting distinctions between accountability mechanisms: first between routine and extraordinary mechanisms and, second, between national and international or hybrid mechanisms. It is worth underlining that in all cases, the mechanisms are the *tools* that are being used, or that might be considered, for the end of achieving the *outcome* of accountability. This is significant, as will become clear throughout this book, because simply having the tool does not necessarily mean that it will be well-used, or that the user will be successful in achieving the outcome (or even that the user in fact is trying to use the tool for that purpose).

4.1 Routine accountability

In an ordinary criminal context (in a scenario, for example, where a body is found in the street with a knife in its back) a police investigation will be the

61 UN, Basic Principles on the Right to Remedy and Reparation, para.23.

first form of accountability. Even where the police were not called to the scene immediately, it may be that a coroner's finding of 'suspicious death' (or similar) would trigger a police investigation. Such an investigation should remain open until a satisfactory explanation of the death has been determined and, where appropriate, until the responsible party has been identified and, likely, apprehended.

In a circumstance in which a person has been killed as a result of action (or obvious inaction) on the part of a state agent, or where a person has died in state custody, the investigation of the death should most likely – in order to be separate from the chain of command of the responsible party – be conducted by an independent investigative department or oversight body. In certain jurisdictions an 'internal affairs' department of the police might handle the investigation (which is possible provided that certain safeguards are observed). In custodial settings, national preventative mechanisms, designed as a guard against torture and ill-treatment, would quite possibly be involved.

Whatever the institutional character of the body doing the investigating, it would need access to the same investigative tools (such as facilities for forensic tests) as the police and would need to have the necessary security clearance to access the higher authorities of the police or other security apparatus, if appropriate. Again, the investigation would remain open until a satisfactory explanation has been found and, if appropriate, the responsible party has been identified. The oversight mechanism may also make recommendations to the original authority or to the prosecutor's office.

At this point, whether an ordinary police investigation or some form of oversight body investigation has taken place, the case will ordinarily be passed on to a prosecutor (or, in the *droit civil* system, to a *juge d'instruction*). As noted above, deliberate murder is universally criminalised, and in most jurisdictions other forms of killing (including culpable homicide, negligence or manslaughter) are also prosecutable.

4.2 Extraordinary accountability

The most straightforward indicator that the routine mechanisms may be insufficient to address a particular incident or issue will be lack of public faith. If people do not believe that the ordinary mechanisms for accountability will function, that they will lead to a cover-up or will simply ignore the issue altogether, then they will call for an extraordinary mechanism (including, as we shall see throughout this collection, a commission of inquiry). These opinions might be expressed through

the media, by opposition figures in the legislature or outside it, or even through public demonstrations in the street.

This prompts a potentially important observation, from an advocacy perspective, that the response to human rights violations in contexts where a culture of accountability is weak, will often require mobilisation before accountability can be achieved. One shared feature of the situations described in the subsequent chapters is the amount of public pressure under which the states in question decided to establish commissions of inquiry.

Such pressure for accountability can also be applied at the international level. International civil society, broadcast through an internationalised media or social media, combined with intergovernmental bodies such as the Human Rights Council, can create powerful pressures on states. The practice of 'naming and shaming' is one that advocates use with caution; but in certain circumstances it can have dramatic effects.

As noted above, the longstanding position within intergovernmental human rights bodies has been that commenting on individual acts into which a state is conducting a proper investigation would be an intrusion into the domestic jurisdiction. However, where the state is not conducting a meaningful investigation, or where the act is the result of a deliberate government policy, the event becomes a legitimate topic of international debate.[62]

Occasionally, this public pressure (both domestic and international) may amount to a political force that is able to achieve what might be thought of as 'political accountability' – whereby a government which (in the public mind) is responsible for a violation, or is responsible for impeding a full investigation, is deliberately voted out of office, or a minister likewise viewed as responsible is placed under sufficient pressure that he or she is compelled to resign. One way in which the government may respond to the pressure is by establishing an *ad hoc* inquiry or parliamentary panel to conduct a preliminary investigation and to make recommendations for further action. Such inquiries may have an international component (one or several members of the inquiry may be invited from overseas) as

62 Even the more legalistic of the international community's human rights tools (recommendations of treaty bodies, or the UPR, or the findings of regional or treaty-body cases) fit within this accumulation of international political pressure calling for a respondent state to act, namely, to begin an investigation, or prosecute those that an investigation has determined are responsible, or to provide adequate remedies to the injured parties.

a measure of independence, but they remain fundamentally national in scope and powers.

In the case of the opening of investigations into alleged violations that took place over an extended period of time, often in a reasonably open-ended fashion, this *ad hoc* inquiry may take the form of a 'truth commission' in which the bigger picture may be privileged over precise details of each individual act of criminality. In the Impunity Principles, a truth commission is defined as an 'official, temporary, non-judicial fact-finding bodies that investigate a pattern of abuses of human rights or humanitarian law, usually committed over a number of years'.[63]

As will become apparent across the case studies, extraordinary mechanisms are fraught with risks. The Minnesota Protocol makes it clear that special mechanisms must not be allowed to undermine accountability by, for example, unduly delaying or avoiding criminal prosecutions. It notes that '[t]he effective conduct of a special investigative mechanism designed to, for example, investigate systemic causes of rights violations or to secure historical memory, does not in itself satisfy a state's obligation to prosecute and punish those responsible for an unlawful death through judicial processes'.[64]

Nonetheless, extraordinary mechanisms such as commissions of inquiry can have certain advantages: 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 solve *their* issues; they can promote justice by imposing moral condemnation; they can demonstrate that human rights are priority for the successor government (in a transitional context) and can thus lay the foundations for the rule of law as successfully as can trials; and they can make broader recommendations about what should be done.[65]

63 UN, Updated Set of Principles to Combat Impunity, p.6. The set of principles relating to such entities are, however, grouped under a more general heading on 'Commissions of Inquiry' (Principles 6-13) confirming the position taken in this volume that a truth commission is a sub-species of commissions of inquiry. Commissions of inquiry are also afforded a particular section within the UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions.

64 Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016), para.41.

65 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.

On balance, while special mechanisms may play a valuable role in conducting investigations, they are unlikely on their own to fulfil the state's duty to investigate.[66] Fulfilment of that duty will likely require a combination of mechanisms, with different ones best suited to undertaking an investigation as to responsibility, another assessing harm suffered and supplying remedy, and yet another making recommendations as to the best next steps in terms of reform.

4.3 External or hybrid accountability processes

As noted above, another helpful distinction between accountability mechanisms is that between national and international mechanisms. Having hitherto in this part discussed national mechanisms, it is worth dwelling for a moment on their international counterparts, recalling that the two can sometimes interact with each other. As with the national mechanisms there can be routine examples, international mechanisms which review state conduct in an ongoing fashion, regardless of whether anything has 'gone wrong'. These would include the UN treaty bodies, the Human Rights Council's Universal Periodic Review mechanism, and to a certain extent its Special Procedures. Likewise, the regional human rights mechanisms often have a rolling system of state review.

In addition to these, there are also a number of investigative accountability-like mechanisms that are more analogous to extraordinary mechanisms, which the international community may choose to put in place in the event that the state in question appears unwilling or unable to pursue accountability on its own. International inquiry missions, where a small group of internationally-recognisable authorities (law professors, experts or seasoned diplomats) were sent on short investigative missions so as to report to a larger intergovernmental body, used to be common method of the international community becoming seized of a human

66 Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016), para.41.

rights situation.[67] They are now less common, although they do still occur, as evidenced recently in Burundi.[68]

More recently, international commissions of inquiry have emerged as a common response to ongoing or unresolved human rights crises. Although these share the same name as the object of study of this book, and share certain common features – they are non-judicial, non-binding, report and recommendation-generating bodies – international commissions of inquiry are a rather different beast in terms of the relationship they normally enjoy (or rather do not enjoy) with the state in whose jurisdiction they are investigating.[69]

At the extreme end of the spectrum of accountability mechanisms, in extraordinary circumstances, would be international criminal tribunals, or (where allowed by the ratification of the Rome Statute or by Security Council referral) prosecutions at the International Criminal Court (ICC). Such mechanisms are always designed to be a last resort, becoming applicable only where all of the alternate mechanisms described above have either been ignored or failed for some other reason.

The national and international system of accountability mechanisms can be thought of as a pyramid – with a large number of cases of routine investigations and prosecutions for individual acts of criminality forming the broad based foundation, with more high-profile investigations, far fewer in number, tapering away towards the top, in highly-individualised cases of perhaps international criminal prosecution. Another metaphor

67 Philip Alston 'Introduction: Third Generation Human Rights Fact-Finding', Proceedings of the Annual Meeting (American Society of International Law) (2013) p.61. Alston's argument is that this mode of human rights fact-finding was largely supplanted by large international NGOs reporting, and now by a third generation of digitally-empowered civilian witnesses. For an interesting review of other forms of international commissions (tracing a genealogy of the modern international commission of inquiry all the way back to the early twentieth century) see Jan M. Lemnitzer 'International Commissions of Inquiry and the North Sea Incident: A Model for a MH17 Tribunal?' *European Journal of International Law* 27 (2016) pp.923–44.

68 One of the editors of this volume, Prof Christof Heyns, from January to September 2016 was the Chairperson of the UN Independent Investigation into Burundi.

69 It should be noted that the Office of the High Commissioner for Human Rights has recently issued guidance on international commissions of inquiry. See OHCHR *Commissions of Inquiry and Fact Finding Missions on International Human Rights and Humanitarian Law* (2015). Also see M. Cherif Bassiouni & Christina Abraham (eds) *Siracusa Guidelines for International, Regional and National Fact-Finding Bodies* (Cambridge: Intersentia, 2013). For a recent academic exploration of international commissions of inquiry, see Christian Henderson (ed.) *Commissions of Inquiry: Problems and Prospects* (Oxford: Hart Publishing, 2017).

could aptly be an iceberg, in which the vast majority of cases are beneath surface, with only the most public ones visible above the waves of international consciousness. Fixating on the criminal trials of a handful of perpetrators at the ICC may sometimes miss the far larger picture of accountability.

As has been observed elsewhere, an approach to accountability that is overly focused on international criminal law has been stultifying for a number of reasons: first, a number of academic observers have become preoccupied with the decisions or structures of a handful of international courts, and neglected the role of domestic mechanisms; second, even if it includes reference to domestic processes, international criminal law typically fails to analyse crimes defined without reference to international sources but which address equally egregious abuses, such as mass murder; and, third, even in its broadest incarnation, international criminal law excludes those processes of accountability that are not criminal in nature.[70]

Moreover, except where they enjoy full and open cooperation from the state in question (in which case they may become genuinely 'hybrid' mechanisms) external mechanisms cannot fulfil the state's ongoing duty to pursue accountability (in its broadest sense) for the violations that have taken place. Even if a high-profile international process has taken place, publicly convicting a senior official (or even a former head of state), for as long as there are lower-level perpetrators enjoying *de jure* or *de facto* immunity for serious human rights violations, or victims whose grievances remain unaddressed, or institutions left unreformed, then accountability has not occurred.

70 Ratner, Abrams & Bischoff, *Accountability for Human Rights Atrocities in International Law*, p.18f.