4 Commissions of inquiry and social solidarity in the African context

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1 Introduction

One often hears generalisations about issues of relevance to international human rights pertaining to local characteristics, relating to particular regions and cultural groupings or countries of the world. For example, it is often noted that there is widespread resistance to abortion in countries in Latin America on religious grounds, compared to say the Nordic countries. The same applies to the statement that expressions of dissent are under particular pressure in countries with a long history of authoritarian rule, such as the former Soviet republics.

What to make of the contention that the concept of human rights on the African continent should be understood against the background of relatively widely held regional emphasis on social solidarity, or cohesion? Similar sentiments are expressed about other parts of the world, especially of the global South, and much of what is said below might also be applicable there, but our focus is on Africa.[1] As noted elsewhere in the book, one often encounters scepticism about the use of commissions of inquiry, because they are seen as facilitating impunity. The question arises whether a special emphasis on social solidarity in the African context, if it exists, might exacerbate this danger and put their role as tools of accountability in this context in question.

But before addressing this question, it is worth asking whether such generalisations have any role to play in the human rights context. Are

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1 On 'solidarity' as the subjective element of community life, see Lawrence Wilde 'The Concept of Solidarity: Emerging from the Theoretical Shadows?' (2007) available at: https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1467-856X.2007.00275.x

they not best ignored? There is obviously a danger that putting weight on generalisations, however benign the intentions might be, reflects a failure to appreciate the full complexities of an evolving situation. Such essentialist thinking could put people into boxes from which they cannot escape. At the same time, completely ignoring local and regional cultural differences, where they do exist, could result in a misunderstanding of some of the important dynamics affecting the protection of human rights. And there may be some paternalism inherent in the starting point that there is something wrong with the 'boxes' wherein people find themselves.

But can giving a role to such localised specificities be squared with the universalistic aspirations of human rights? The claim that human rights are universal is central to the fact that human rights are widely regarded as the closest that we have to a global moral order, and giving room to local characteristics may undermine these aspirations. Much depends on what one understands universality to mean.[2]

One approach is that the universality of human rights amounts to uniformity of application. The same set of standards is made applicable to everyone. Because of their uniform application, these standards are believed to not merely reflect the desire of one party to impose its will on another; they represent some greater notion of right and wrong.

However, while adherence to uniformity in applicability of norms goes some way towards avoiding charges of the narrow pursuit of self-interest, it presents its own problems, not the least of which is brought to the fore by asking whose norms are presented as generally applicable, in practice, and are given the status of being 'neutral' and therefore 'natural and self-evident'. Invariably, in any given relationship, priority is given to the norms of those who hold the balance of power, and the global community is no exception. To the extent that this is true of international human rights, its moral authority is undermined. Moreover, even if it were possible to disconnect human rights from the interests of those applying them, such an unrooted notion of human rights, located outside history

2 Some of the ideas expressed here were also contained in Christof Heyns and Magnus Killander 'Universality and the growth of regional human rights systems' in D. Shelton (ed) *The Oxford Handbook of International Human Rights Law* (Oxford: Oxford University Press, 2013) p.670. See also Jack Donnelly 'Cultural relativism and universal human rights' *Human Rights Quarterly* 6 (1984) p.400; and Christoph Schreuer 'Universalism vs regionalism' *European Journal of International Law* 6 (1995) p.477. Federico Lenzerini *The Culturalization of Human Rights Law* (Oxford: Oxford Univeristy Press, 2014) calls for a differentiated understanding of rights based on the specific needs of the people involved.

and culture, is prone to be regarded as a 'view from nowhere', which is unlikely to elicit deep adherence anywhere.

Universality, if it is to serve as a foundation for a global moral order, must also have a second element: everyone, and every society, not only the powerful, must have a meaningful role in determining what those norms are in the first place, and how and when they are applied.[3] Human rights must be universal not only in terms of their application, but also in terms of participation. Full universality, in addition to having a top-down element, also has to work bottom-up, and is rooted not only in abstract ideas, but also in concrete histories and cultures. The claim to universality therefore can grant legitimising power to human rights only if it incorporates an element of local specificity, in addition to generality.

The above points toward incorporating regional and cultural specificities and participation in human rights standards and practices, but the illusive question, of course, is how and where to strike the balance between the generality and the specificity of human rights.

For our current purposes, namely to assess the potential role of commissions of inquiry as accountability mechanism in Africa, it may be useful to break down the notion of human rights into its constitutive parts, and to ask whether the balance between setting global standards and leaving room for local choice needs to be struck differently in respect of each element. Does it apply in the same way to the substantive human rights norms as to the accountability part?

The impulse towards generality, and the absolute nature of the requirements of human rights, so strong in the context of the substantive norms, may not apply with equal force to the procedural component of human rights.[4] Accountability is not a goal in itself, but has a derivative nature, to the extent that the goal is the restoration of the substantive norm as well as social relations. Accountability entails that those responsible for wrong-doing have to answer to the victims but also to the community as a whole. These goals may in exceptional cases be in conflict, and where that is the case there may be some room for value pluralism as far as the procedural norms are concerned.[5] Where there is such an unresolved

3 See Christof Heyns, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions* (6 August 2014) [A/69/265] paras.17-18.

4 See also Paolo Carozza 'Subsidiarity as a structural principle of international human rights law' *American Journal of International Law* 97 (2003) pp.56–79.

5 On the concept of 'value pluralism', see the *Stanford Encyclopaedia of Philosophy*, available at https://plato.stanford.edu/entries/value-pluralism/

conflict, the door opens for local values to fill the gap. The question should be, in the particular society, how the goals of accountability can be achieved.

If these goals are better achieved through mechanisms that have stronger resonance with the cultures in which they operate, the overriding goals – restoring the norm and where relevant human relations – are still achieved. There may thus in some cases be more space for some relativity as far as accountability for human rights violations is concerned.

How does this play out in the context of the right to life? The right to life is particularly unyielding right as far as accommodation of local specificity is concerned. This is arguably because of the foundational role that this right plays in the human right project, and the wide recognition that the value of life enjoys in the contemporary world.[6] To focus on the substantive component first: The right against the 'arbitrary deprivation of life', in the language of the International Covenant on Civil and Political Rights,[7] has been described as the 'supreme right'.[8] The African Commission on Human and Peoples' Rights has called it 'the fulcrum of all other rights'.[9] The human rights project as such is premised on the idea of the equal value of all human life on the planet. The applicable international norms – such as legality, necessity and proportionality – are relatively well developed over the years and their application should not differ depending on the region of the world that is at stake.[10]

The argument for a high level of generality as far as the substantive norm is concerned is even stronger if the right to life is considered to protect not only life as continued physical existence, but in the words of the United Nations Human Rights Committee, 'life with dignity.'[11] The African Commission likewise has stated that the right to life protects 'dignified life'.[12] The idea that different levels of dignified life in different

6 For a discussion of the complexities, see Jon Yorke (ed.) *The Right to Life and the Value of Life* (Ashgate, 2010).

7 Art 6.

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

9 See African Commission on Human and Peoples' Rights General Comment 3 on the right to life para.1.

10 See Philip Alston, Christof Heyns, Sarah Knuckey & Thomas Probert (eds) *Alston and Heyns on Extrajudicial, Summary or Arbitrary Executions* (PULP, forthcoming 2020).

11 Human Rights Committee General Comment 36, para.3.

12 African Commission, General Comment 3, para 3.

parts of the world can be contemplated is incompatible with the very notion of human rights.

The right to life is also a particularly unyielding right as far as allowing cultural specificities to play a role in respect of accountability is concerned. There is broad acceptance that a lack of accountability for an unlawful killing, and thus a failure to comply with the procedural element of the right to life, wherever it occurs, in itself constitutes a violation of the right to life.[13] Not requiring accountability for violations of the right to life in some societies, but requiring it in others, would, as is the case in respect of the substantive component of the right, undercut one of the foundational pillars of the human rights, and render it a right in the weak as opposed to the strong sense of the word. Endorsing the idea (though it reflects reality in many cases) that the consequences of taking life may differ because of the location where this happened amounts to being arbitrary about the protection of life.

As with the substantive norm against arbitrary deprivations of life, there is a fair amount of agreement on what the procedural part of the right requires. The elements of accountability under international law that have been identified earlier (in chapter 2) are (i) *investigations* – aimed at establishing what had happened, and thus at establishing the facts and revealing the truth; (ii) *remedies* – aimed at correcting or redressing as far as possible what had happened in the specific case, including through the use of criminal prosecution, if justified by the facts (which may in turn help to achieve rehabilitation, retribution, deterrence and prevention), reparations and actions aimed at the restoration of relationships; and, where appropriate, (iii) *reforms* (also known as guarantees of non-recurrence) – aimed at ensuring, in a more systematic way, that similar situations do not arise again.

However, it could be argued that while accountability is always required, the exact combination of the elements of accountability that is required may differ depending on the context. The derivative nature of the procedural element of the protection of human rights may also affect the exact nature of the accountability required for violations of the right to life. It could be argued for example that as long as the objectives of accountability – the restoration of the norm against wilful killing and the restoration of social relations – are met, there are no fixed rules on the exact combination of the elements set out above that need to be present.

13 African Commission, General Comment 3, para.15

Once this path is taken, the immediate question is whether any of the elements of accountability are indispensable, and must always be present, whatever mixture of elements of account is used. In particular, are prosecutions for right to life violations an indispensable element of accountability? If the emphasis on social solidarity for example has such a consequence, that would be a significant demonstration of the power of local values, because it would apply in respect of the most unyielding right.

We will return to that question of prosecutions later, but for the time being it has to suffice to say that at least as far as the choice of the precise mechanisms that are used to ensure the different elements of accountability for right to life violations, there appears to be room for choice. What is at stake in such a case is not one of the elements of accountability, but how best to ensure that the goals of accountability are achieved. The mechanisms that may be used typically entail courts, but in some instances other mechanisms, including commissions of inquiry, may also be involved. Their respective roles should be determined with reference to their ability to ensure accountability in the specific context.

This brings us back to the question about the extent to which commissions of inquiry in Africa can be expected to serve as mechanisms of accountability for potentially unlawful death if social solidarity plays a strong role on the continent. This issue may be addressed on the basis of a series of cumulative questions:

- The first question is to what extent is there evidence that social solidarity plays a special role in how human rights are viewed in Africa?
- If it is established that social solidarity plays such a role, the second question is: Can commissions of inquiry be expected to have a special resonance on the continent, enhancing some aspects of the accountability process? Can they, for example, help to make the investigation process more inclusive, or help to get closer to the truth?
- But there is also a potential down side: Is there a danger that commissions of inquiry in this environment may result in undermining prosecutions?
- This necessitates the last question: To what extent are prosecutions for right to life violations in fact central to accountability?

After addressing these questions, we will turn to a short case study on the question what the role of the concept of *ubuntu* has been is as far as criminal prosecutions in the South African legal system are concerned. Has it undermined prosecutions and accountability?

2 Social solidarity in Africa

What evidence is there of a special emphasis on social solidarity in Africa, affecting how human rights standards are applied?

Clearly no general answer can be given covering the continent as a whole, that will provide a guide on how all situations will be approached by all members of a particular society. As in all parts of the world, individualism and social cohesion are both powerful orientations that co-exist. However, one society may lean more in one direction than another. This is not a sociological study, and no generalisations about social aptitudes can be made here.

However, the question can be asked to what extent is there is evidence of a general orientation towards social solidarity in the primary human rights sources of Africa. Such an orientation does not necessarily have to prevail at all times, or even mostly, though given the fundamental nature of the values at stake, such an orientation may in some rare cases explain highly significant choices.

One starting point is to look at the African Charter on Human and Peoples' Rights (African Charter) of 1981. The African Charter is the main human rights instrument adopted under the auspices of the Organisation of African Unity (OAU), now the African Union. There can be little doubt that the drafters of the African Charter set out to make the point that social solidarity plays a central role in their conceptualisation of human rights in Africa. For example, the Preamble states that in adopting the Charter the state parties take into consideration 'the virtues of their historical tradition and the values of African civilisation', and in its substantive part espouses duties on those whose rights are protected by the Charter to promote 'social solidarity'.[14]

While the African Charter also recognises the largely individualistic elements one encounters in the typical international human rights instruments, such as civil and political rights, the Charter is unique in the extent to which it embraces a range of notions that are closely linked to an emphasis on the group.

This includes the notion of 'peoples' rights', which can belong to the national population, but also to sub-groups. The concept of 'duties' that rest on the obligations that individuals owe towards their families, society,

14 Art. 29(4).

the state, other legally-recognised communities and the international community, is also aligned with the importance of group formation.[15] The Charter, moreover, recognises socio-economic rights, implying a minimum duty of care that people have for each other.[16] A singular feature of the Charter is also its inclusion of the right to development,[17] and the right to peace.[18]

These concepts don't speak of rights as tools to ward off other people, the society or the state, or carve out a zone of isolation for the individual, but rather emphasise the ties between people and the fact that they are embedded in a social context. The rights that are recognised are presented not as weak rights or mere aspirations, but as strong or enforceable rights, thus requiring accountability.

A review of African constitutions reveals a similar emphasis on social solidarity at the national level. Upon independence, around half a century ago, the constitutions of many African countries – at least those of the former British colonies – were given bills of rights modelled on the European Convention of Human Rights.[19] As such, the emphasis was on civil and political rights and on individualism, while notions of duties, peoples' rights or socio-economic rights hardly featured.

Today, the picture is very different. In a 2006 study (currently being updated) of all the constitutions of Africa a colleague and I explored the extent to which the direct or indirect recognition of the value of social solidarity has gained ground: we found that the concept of duties, for example, was recognised in 40 African constitutions. As far as socio-economic rights are concerned, rights related to work were recognised in 46 African constitutions; the right to education in 45; a right to culture in 41; the right to health in 39; and the right to social security and related

15 According to art. 29(7) of the African Charter, the individual has the duty 'to preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well-being of society'. C.f. Makau Mutua 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties' *Virginia Journal of International Law* 35 (1995) p.339.

16 For a discussion, see Frans Viljoen *International Human Rights Law in Africa* 2nd ed. (Oxford: Oxford University Press, 2012) pp.219–228.

17 Art. 22.

18 Art. 23.

19 Christof Heyns 'African Human Rights Law and the European Convention' *South African Journal on Human Rights* 11 (1995) pp.252–263.

rights in 29. Meanwhile, 24 African constitutions recognised the right to development or related rights.[20]

There is thus an emphasis on social solidarity present in some of the key documents defining human rights on the continent. To what extent is this also reflected in cultural practice, an area in which it is more difficult to make firm statements?

This is not the place to undertake an extensive study in this regard, but let us consider briefly, in this context, the notion of *ubuntu*, since it has had some demonstrable consequences for how human rights are seen in some contexts on the continent.[21] This moral resource has different versions in many African societies. There is no consensus about the exact meaning and role of *ubuntu*, or its level of acceptance, but it remains the African indigenous concept that has made the most inroads into the jurisprudence of at least one African country, South Africa. As such it warrants some attention when questions are asked about the possible impact of notions of social solidarity on accountability and human rights in Africa.

A frequently used translation of *ubuntu*, a Nguni term prevalent in Southern Africa, is 'I am because you are'.[22] It is also understood to mean 'humaneness', 'humanity' or 'personhood'. Other words are used in different parts of Africa, and indeed in other parts of the world, to convey a similar idea.[23] *Ubuntu* to some extent can be contrasted with René Descartes's adage *cogito ergo sum* ('I think therefore I am'), which places a special premium on individual rationality, associated in particular with the European Enlightenment, as the foundation of human existence, although apt warnings against using *ubuntu* for the 'essentialisation' of both sides have been given.[24]

20 Christof Heyns & Waruguru Kaguongo 'Constitutional Human Rights Law in Africa' *South African Journal on Human Rights* 22(4) (2006) pp.673–717.

21 '*Ubuntu*… implies an interactive ethic, or an ontic orientation, in which who and how we can be as human beings is always being shaped in our interaction with each other'; Drucilla Cornell & Karin van Marle 'Exploring Ubuntu: Tentative Reflections' *African Human Rights Journal* 5 (2005) p.205.

22 For a discussion see for example C. Himonga, M. Taylor & A. Pope 'Reflection on judicial views of *ubuntu*' *Potchefstroom Electronic Law Journal* 16 (2013) p.371; T.W. Bennett '*Ubuntu*: An African equity' *Potchefstroom Electronic Law Journal* 14 (2011) p.30; Lovemore Mbigi & and Jenny Maree *Ubuntu: The Spirit of African Transformation Management* (Randburg: Knowledge Resources, 1995) pp.1–7; Antjie Krog '"This thing called reconciliation": Forgiveness as part of an interconnectedness-towards-wholeness' *South African Journal of Philosophy* 27(4) (2008) pp.353–366.

23 In chapter 8 of this book, on the commission of inquiry in Malawi, for example, the impact of the equivalent concept of *umunthu* on that commission is discussed.

24 James Ogude (ed.) *Ubuntu and Personhood* (Trenton, NJ: Africa World Press, 2018) p.3.

The term *ubuntu* has long been in everyday usage in communities in the southern parts of Africa, but it has only recently been given currency in broader and, indeed, national debates. As will be explored in more detail below, its heyday was probably during the process directly after the transition to a democratic South Africa.

Ubuntu could be understood in different ways, for example, as a description of personal attributes, a standard for social and political structures, or as a philosophy on its own.[25] For our current purposes it will have to suffice to emphasise the premium which *ubuntu* places on social cohesion, without reducing it to that meaning.

Clearly no society in the world is driven exclusively by impulses towards either individualism or social solidarity – it is always a mixture, but the relative role of the different dispositions differs. The above overview of some legal provisions of the continental human rights system and the reference to *ubuntu* suggests that there may in some contexts in Africa be a stronger emphasis on the interests of the group versus the individual than one would for example find in many countries of the North.

An emphasis on social solidarity may, like human rights, also have a substantive as well as a procedural component. The substantive component refers to notions such as socio-economic rights and duties as outlined above. Notions of privacy, and private property, and the importance of the restoration of the norm (mostly a backward-looking process) as opposed to enhancing social solidarity (a more forward-looking approach), may not be as strongly embraced as in many other societies.

The procedural component refers to the question how disputes are resolved. In its recent *Transitional Justice Policy*, the African Union, under the heading of 'African shared values,' emphasises the role of 'inclusive consultative processes'[26] in Africa, after having already recognised the role of 'traditional or non-formal' mechanisms in the resolution of disputes on the continent.[27]

25 For accounts in the studies that were done in parallel to this one at the University of Pretoria, in addition to Ogude's *Ubuntu and Personhood*, see Julian Muller, John Eliastam & Sheila Trahar (eds.) *Unfolding Narratives of Ubuntu in Southern Africa* (Routledge, 2018); James Ogude & Unifier Dyer (eds.) *Ubuntu and the Everyday*, (Africa World Press, 2018); and James Ogude (ed.) *Ubuntu and the Reconstitution of Community* (Indiana University Press, 2019).

26 African Union *Transitional Justice Policy* (adopted February 2019), available at: https://au.int/sites/default/files/documents/36541-doc-au_tj_policy_eng_web.pdf, para.34(ii)

27 *Ibid.*, para.19.

Jared Diamond has described some general characteristics in respect of the resolution of conflict in societies where there is a strong focus on social cohesion.[28] There is an inclination to include members of the community and to act collectively in resolving a dispute and in seeking the truth. In some such societies *ad hoc* dispute resolution takes place by members of the community assembled for that purpose. The assembled members aim at restoring social relations, among other things, through being open to evidence from a wide range of sources, and by not choosing winners and losers. Where possible, the aim is typically to restore social relations, avoid confrontation and preserve the peace, in a forward-looking way.

While prosecutions are not necessarily excluded, there is often resistance against prosecutions and the role of courts, which are seen as inherently confrontational. Apologies often play a role in restoring relationships.[29]

3 Social solidarity and commissions of inquiry

This brings us to the next question: Does an emphasis on social solidarity in some settings in Africa suggest that the use of commissions of inquiry as a vehicle for accountability for human rights violations may have a particular resonance on the continent?

Are there elements of the way in which commissions of inquiry work which may make them specifically attractive to be used somewhere along the line in the process of pursuing the accountability in a situation where social cohesion – in particular its procedural element – is a premium?

If that is the case, it may be a strong argument in favour of using them in appropriate cases on the continent. Accountability mechanisms, as all other state institutions, depend to a significant degree for their effectiveness on their legitimacy or spontaneous acceptance. Some resonance with widely-shared communal values can give legal processes legitimacy and traction and make them more effective and likely to achieve their purpose.[30] What is important is not merely the outcome of accountability measures,

28 See Jared Diamond *The World Until Yesterday: What Can We Learn from Traditional Societies* (New York: Penguin, 2012). Compare Simon Robins 'Restorative justice approaches to criminal justice in Africa: The case of Uganda' in *The Theory and Practice of Criminal Justice in Africa* (African Human Security Initiative Monograph 161) (June 2009).

29 See Desmond Tutu *No Future Without Forgiveness* (Random House, 1999)

30 See David Beetham *The Legitimation of Power* 2nd ed. (New York: Palgrave Macmillan, 2013).

but the process itself.[31] The studies of commissions of inquiry in Africa contained in this book provide examples of how they function and where they have reportedly found resonance with communities.

The commissions studied for this book (as is reflected in the later chapters) have in a number of cases been particularly inclusive in the composition of their members and in their processes of gathering information. Members of commissions, unlike courts, need not be lawyers and in the cases studied they often represented members from different parts of society in the process. In the commission of inquiry in Burkina Faso, for example, civil society representatives outnumbered government officials. In the Malawian commission, a Catholic Bishop chaired the commission of inquiry under discussion, while, as is well known, an Anglican priest chaired the South African Truth and Reconciliation Commission. In Burkina Faso a 'Council of Wisemen' was appointed to take further the work of the commission.

Commissions can in fact include members from opposing sides of the conflict, as was the case with the South African Truth and Reconciliation Commission. The mere fact that people who carry the respect of the different interest groups are seen to participate in a joint effort to resolve a conflict by serving on a commission of inquiry may already in a vicarious way help to restore relationships, and where relationships did not exist before, offer an example that such relationships are possible.

Commissions generally can travel and come close to the community. One of the reasons why the Khayelitsha Commission in South Africa achieved some success in a difficult environment, was its openness to the public. It was known as the 'peoples' commission' and met in the community. In some cases such commissions work closely with civil society.

Commissions of inquiry can also potentially engage in more wide-ranging processes of fact-finding than courts to receive evidence. They can hear and receive evidence which is not only narrowly related to a particular incident, but which deals with the underlying situation in general. The Chad commission, for example, heard more than 1 700 witnesses. The Waki commission in Kenya was overwhelmed by public participation.

31 Robin Antony Duff 'Process, Not Punishment: The Importance of Criminal Trials for Transitional and Transnational Justice' *Minnesota Legal Studies Research Paper* No. 14-03 (29 January 2014) available at: https://ssrn.com/abstract=2387601 or http://dx.doi.org/10.2139/ssrn.2387601

One of the positive features of the commission in Malawi was that it had traversed the country to gather evidence and hear witnesses. It was 'open to all parties' and also served as a 'catalyst for dialogue'. The Waki commission is also reported to have served as a vehicle for local dialogue. The opportunity for narrative and truth-telling reportedly had a 'cathartic effect.'

The evidence heard by commissions does not have to meet the high thresholds of the judicial system. They are not, as courts, aimed at identifying winners and losers, and are thus less confrontational. They can be more *ad hoc* than courts and do not – in systems where this plays a role – create legal precedents. Commissions, moreover, in some instances have the ability to be forward-looking and make recommendations.

In two of the cases studied in this book, public apologies were made – in the case of Burkina Faso by the President, and in the case of the Khayelitsha commission by a Provincial police chief – and had some impact.

The above suggest that commissions of inquiry can often serve to facilitate a collective pursuit of a solution, as opposed to imposing an abstract set of norms upon a community. They have a special ability to be inclusive as far as the gathering and assessment of evidence is concerned, and as such they may strengthen the investigative element of accountability and ensure that the information gathered is as comprehensive and reliable as possible. The same applies to the reform element – given the breadth and the depth of the engagement that they can have with the community, such committees may be well placed to perform this function.

Based on the above, it seems that commissions of inquiry as a mechanism should in general have resonance in societies where social solidarity plays a strong role.

This suggests that commissions of inquiry have much to offer as part of the broader accountability package, not the least of which is that they allow for local participation in conflict resolution. They may for example have a positive effect as far as the investigation and reform elements of accountability are concerned. While these dynamics apply to a greater or lesser extent in all societies, they seem to have particular salience in Africa and in many countries of the South. Including commissions of inquiry in appropriate cases in the mix when accountability is pursued, can be a positive way of recognising local dynamics.

However, it should be kept in mind that commissions do not engage in prosecutions themselves, and there is a wide perception that they can serve to undermine prosecution. An emphasis on social solidarity may strengthen such tendencies. This element has to be dealt with in more detail if the full implications of involving commissions in accountability processes are to be considered.

4 Social solidarity and prosecutions

One of the points made above is that a strong emphasis on social cohesion may weigh against prosecutions, on the basis that they are viewed as confrontational. While the way in which commissions of inquiry function may on the one hand give them a welcome resonance with populations where social cohesion is cherished, these benefits may be worth little on a balance if they invariably become tools of impunity. What does this study show about the track record of commissions of inquiry in Africa as far as prosecutions are concerned?

We will soon take a bird's eye view at the experience with the six commissions studied for this book as far as prosecutions are concerned, but it should be noted at the outset that while commissions in themselves do not conduct prosecutions, they can make it more likely that prosecutions will take place. They can do this for example through the way in which they present evidence and by recommending prosecutions. They can also make it less likely that there will be prosecutions, likewise by the way in which they present the evidence, by not recommending prosecutions, dragging out the process, or botching it. They can also allow public pressure to dissipate. Their actions may result in *de facto* impunity, and in some cases, commissions are granted the power *de jure* to grant amnesty.

Because commissions do not have the power to conduct prosecutions themselves, their track record should not be judged by whether prosecutions eventually ensued. Whether prosecutions take place, and succeed, depends on a myriad of considerations outside their control. In some cases there is simply not enough evidence to initiate prosecution or to secure a conviction. The question should rather be asked whether they served as steppingstones towards prosecutions or as obstacles, assuming there is a factual basis.

What is at stake, however, should also not simply be to what extent they contributed towards *any* prosecutions, but were they willing to point fingers not only at opponents but also at agents of the state, and to make their prosecutions more likely, if that is what the facts dictated? Did the commissions speak truth to power?

As has been noted, there is not a shortage of anecdotal evidence that commissions of inquiry have facilitated impunity in Africa. As a result they are often treated with suspicion as vehicles for accountability. At the same time, the cases on the basis of which this judgement is made have in many cases not been studied in depth, and it is thus difficult to come to firm conclusions. The case studies undertaken for this book, limited as they are, present a more complicated, less negative, picture.

In the case of Chad, the Commission's work contributed significantly towards eventual (successful) prosecution of a former president, though it happened only decades later, and the mandate of the Commission did not allow it to explore evidence that implicated the sitting President who had appointed the Commission. In Burkina Faso the Commission identified members of the Presidential Guard as serious suspects in a high profile killing, and one of them was – also much later – charged. It is also possible that, as in Chad, its report will likely play a role in the forthcoming proceeding against the former-President's brother.

The fact that some of these prosecutions took place only after very long delays suggests that the binary classification of commissions of inquiry as either stepping stones towards prosecutions or obstacles in its way represents an oversimplification. While they may initially act as obstacles, they may in fact in the long run serve an important role in allowing prosecution to take place. This may happen where prosecutions were not a realistic alternative in the immediate aftermath of violations, and the appointment of a commission of inquiry may be the only politically feasible accountability mechanism available under the circumstances.

In Kenya, the material collected by the Commission was sufficiently robust to be the basis of a prosecution in the International Criminal Court, in this case of a sitting president, but through no fault of the commission the prosecution eventually failed. The Commission in Malawi did not focus especially on individual responsibility, and while it made a recommendation that further investigation should be conducted and that those police officers found to have acted unlawfully should be prosecuted.

The Khayelitsha Commission in South Africa was not aimed at producing evidence for potential prosecutions, but its report has since served as grounds for several criminal prosecutions of police officers.

The Zaria Commission of Inquiry in Nigeria seems to be the closest among the case studies to have been a smokescreen. The political pressure was high and the scope of the investigation narrow. However, even in this case there have been prosecutions, though none aimed at achieving

accountability for violations of the right to life by members of the Nigerian army, who were deeply implicated.

There are a number of potential reasons why the commissions studied were able to steer at least to some extent towards prosecutions, in spite of political pressure to the contrary.

In a number of the case studies the inquiries acquired what we have elsewhere called 'a life of its own', meaning that the members of the commission, once they had an – at least nominally – independent role to play in respect of something as serious as the loss of life, lived up to that role, through conscience or peer pressure, or that the inquiry otherwise went further than expected in pursuing prosecutions.

This happened for example in Chad where the original mandate of the commission did not include the making of recommendations, let alone recommending prosecutions. However, the Commission simply assumed those powers. Likewise, the relatively conservative members of the Council of Wisemen in Burkina Faso surprisingly made hard-hitting recommendations. In the case of the Waki Commission in Kenya, the strong leadership role of the chairperson in reaching the ultimate conclusion has been noted.

Not all of the impetus to take a more oppositional approach has come from within the various bodies themselves. In the case of the Burkina Faso Commission, the work of the Commission was given external life by country-wide demonstrations. In the case of the inquiry in Chad, the work of the Commission came to life many years and indeed decades after the Commission had finished its work, due *inter alia* to the role of international NGOs.

At the same time, in some cases the commissions failed to achieve their full objectives, or the implementation of their recommendation was frustrated, or the recommendations were skewed, or they were otherwise held back because of political interference, resulting for example in not being able to push prosecutions against government agents.

For example, in the case of Chad the Commission was not constrained by its mandate from also investigating atrocities committed by President Déby, who had appointed him, but there seems to have been a clear understanding in the Commission that this was not politically possible, and they focussed exclusively on President Habré and those who remained close to him.

In the case of Burkina Faso, two of the three government members of the Commission refused to sign the report, clearly under government pressure. The prosecutions of the President and his deputy in the ICC that followed in the wake of the Waki Commission in Kenya were derailed by the lack of cooperation of the government with the ICC. In the case of the Malawi Commission there was a change of government and the public largely lost interest in the work of the commission. The Khayelitsha Commission in South Africa, appointed on the provincial level by the opposition party, faced considerable pressure in terms of its mandate from the central government. The Commission in Nigeria was largely independent but criticised as not being impartial. As a result, important players did not participate.

The above does not suggest that the commissions of inquiry studied in this book generally reflect an aversion to prosecutions as such. There could however be a problem that in some instances prosecutions were not instituted against those in power. The main problems relate to governmental interference which affected their impartiality and independence and, more saliently, a failure of executive and judicial (prosecutorial) authorities to follow through on recommendations. As in other parts of the world, this is a difficult problem that has to be addressed, because commissions are creations of the dominant political power in society.

The major example on the continent of a case where the aim was explicitly to grant immunity remains the Truth and Reconciliation Commission in South Africa, which dealt with the violence and killings of apartheid South Africa, but which granted amnesties in exchange for the truth and resulted in very few prosecutions. The approach followed was expressly based on the notion of *ubuntu*. A very different approach may have been followed in countries with a different cultural disposition. We will return to this case below.

5 Prosecutions and accountability

The mixed record of commissions of inquiry in terms of prosecutions for right to life violations presented above brings us back to the question to what extent prosecutions should be seen as an indispensable element of accountability.

As was stated earlier, accountability is required for all right to life violations, if the right to life is to be seen as a right in the strong sense of the word.

But are all the elements of accountability always required to be present? Generally, it may be said that *investigations* are always required where there is reason to believe that a violation of the right to life may have taken place.[32] A commission of inquiry which cannot or does not do proper investigations cannot be seen as an appropriate accountability mechanism. It was argued above the some of the commission studied appeared to play a strong role on this front.

Reform, on the other hand, is not always required – if there is a fully functional judicial system an isolated case of murder may not require reform. While commissions of inquiry can be very appropriate tools to pursue this objective, this is not in all instances a minimum requirement for accountability.

Some form of *remedy* is required to ensure accountability, but since remedies may take different forms, does this mean that there must always be prosecution?[33]

Accountability serves, in the first place, to restore the substantive norm that has been violated, in the case of unlawful killing the norm against the arbitrary deprivation of life. The focus is on ensuring justice in one form or another. In doing so, prosecutions play an important role. One of the strongest ways in which a substantive norm can be reasserted is if the person who has breached the norm is punished as a result of a public process, and for example sent to prison for a long time. Impunity, on the other hand, may result in the norm not being re-asserted.

Accountability may, however, also in some cases have a further restorative function. In some cases it may be aimed at the restoration of human relations. This is typically the case where there is a major social transition. The need for accountability to be aimed at restoring relations in such a situation is bound to have added cogency in societies where social cohesion is seen as an important goal. Moreover, the inclusion of this goal is inherent in the substantive norm, if what is protected is seen as 'a life in dignity'.

32 See Human Rights Committee General Comment 36, para. 27 and the Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016) para. 15.

33 Cf. *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* (2005) adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

The restoration of relations is also grounded in investigations, and may be pursued through remedies and, if needed, through reforms. But how is this goal affected by prosecutions?

While both the restoration of the substantive norm and the restoration of relationships are integral and often complementary parts of accountability, these two objectives may, in some cases, also hold the potential for conflict as far as the question of prosecutions is concerned. This is evidenced by the justice versus peace debates.[34]

Impunity, one argument runs, can sometimes be the price for peace. In other words, where both goals cannot be achieved, the restoration of social relationships may be more important than the restoration of the substantive norm. In such an extreme case, where there is genuinely an irreconcilable clash, prosecutions are not necessarily required. An emphasis on social solidarity implies that if such a rare case arises, and a choice cannot be avoided, social relations should prevail over prosecutions.

A different argument holds that justice is an overriding value, and in any event long-term peace can only be based on justice, in the pursuit of which prosecutions play an essential role. Prosecutions are always required. International law places a high premium on prosecutions for potential right to life violations, where substantiated by the facts, and requires it as an almost absolute rule.[35]

Principle 18 of the 1989 *UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* for example stipulates in categorical terms that:

> Governments shall ensure that persons identified by the investigation as having participated in extra-legal, arbitrary or summary executions in any territory under their jurisdiction are brought to justice. Governments shall

34 For a discussion on the peace versus justice debate, see C Baker & J Obradovic-Wochnik 'Mapping the nexus of the transitional justice and peacebuilding' *Journal of Intervention and Statebuilding* 10(3) (2016) p.281.

35 For an overview see Anja Seibert-Fohr 'Amnesties' *Max Planck Encyclopedias*, available at https://opil-ouplaw-com.uplib.idm.oclc.org/view/10.1093/law:epil/9780199231690/law-9780199231690-e750?rskey=PGKxuC&result=2&prd=MPIL. For a discussion of the recent decrease in tolerance for amnesties in transitional contexts, see Priscilla Hayner 'In pursuit of justice and reconciliation' in Cynthia Arnson (ed.) *Comparative Peace Processes in Latin America* (Washington: Woodrow Wilson Center, 1999); Dan Kuwali & Juan Pablo Perez-Leon Acevedo 'Smokescreens: A survey of the evolving trends in Amnesty Laws in Africa and Latin America' *Malawi Law Journal* 2 (2008) pp.115–134; Christina Binder 'The prohibition of amnesties by the Inter-American Court of Human Rights' *German Law Journal* 12 (2011) pp.1203–29.

> either bring such persons to justice or cooperate to extradite any such persons to other countries wishing to exercise jurisdiction. This principle shall apply irrespective of who and where the perpetrators or the victims are, their nationalities or where the offence was committed.

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* (2005) follows a categorical approach concerning international crimes:

> In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him.

In the *Updated Set of principles for the protection and promotion of human rights through action to combat impunity* (2005) the right to criminal justice and the right to remedy and repair are presented as interconnected though distinct rights. They all have to be realised, so if the different obligations come into conflict, arguably, a choice may be required.[36]

The African Commission, in its 2015 General Comment 3 on the right to life, put it as follows:[37]

> Accountability … 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.

The *Minnesota Protocol on the Investigation of Potentially Unlawful Killings (2016)* provides as follows:[38]

> Where an investigation reveals evidence that a death was caused unlawfully, the State must ensure that identified perpetrators are prosecuted and, where appropriate, punished though a judicial process. Impunity stemming from, for example, unreasonably short statutes of limitations or blanket amnesties

36 For a full discussion of these principles, see Frank Haldeman and Thomas Unger (eds.) *The United Nations Principles to Combat Impunity: A Commentary* (Oxford: OUP, 2018)

37 Para.17.

38 Para.8(c).

> (de jure impunity), or from prosecutorial inaction or political interference (de facto impunity), is incompatible with this duty.

In the 2018 General Comment of the UN Human Rights Committee on the right to life, the Committee described the prohibition of amnesties as follows:[39]

> Immunities and amnesties provided to perpetrators of intentional killings and to their superiors, and comparable measures leading to *de facto* or *de jure* impunity, are, as a rule, incompatible with the duty to respect and ensure the right to life, and to provide victims with an effective remedy.

In its afore-mentioned 2019 *Transitional Justice Policy* document, the African Union said that it did not envisage[40]

> a one-size-fits-all approach to [transitional justice] at the national level. The choice of [transitional justice] should be context-specific, drawing on society's conceptions and needs of justice and reconciliation …A society in transition may choose, through inclusive consultative processes, to put more or less emphasis on the reconciliation…

Moreover,[41]

> Cooperation with alleged perpetrators through provision of amnesties has to be for the purpose of preventing further violence and the facilitation of accountability and reconciliation, including the rights of victims to truth and reparations. … Where amnesties are used in transitional processes, they should be formulated with the participation and consent of affected communities, including victim groups, and have regard to the necessity of the right of victims to remedy, particularly in the form of getting the truth and reparations. … Transitional processes should not allow "blanket" or unconditional amnesties that prevent investigations (particularly of the most serious crimes referred to in Article 4(h) of the AU Constitutive Act), facilitate impunity for persons responsible for serious crimes or perpetuate negative institutional cultures.

It is clear that, in the vast majority of cases, there is no room for choice: amnesties may not be granted and prosecution must take place. Amnesties may for example not be granted for grave breaches of the Geneva

39 See Human Rights Committee, General Comment 36, para.27.

40 African Union, Transitional Justice Framework, paras.35-37.

41 *Ibid*. paras.89-91.

Conventions (1949) during armed conflict and for some serious violations of human rights, such as genocide[42] and torture.[43]

Is there any room, however, in the most exceptional cases, where prosecutions may not be required for right to life violations, provided that criteria such as that the amnesties are not blanket but tied to individual assessment are met? Where different elements of accountability come into irreconcilable conflict, it may be necessary to make a choice.[44]

It could be argued that there may be truly exceptional, 'once in a life time' kind of situations where a massive and historical social transformation of an entire society is at stake, where the question could be asked whether such a case is at hand. One of the considerations to determine whether this is appropriate will be to what extent the other elements of accountability are strengthened by such amnesties – for example, where the investigations are helped significantly through disclosure of the truth in exchange for amnesty. Of further relevance may be questions such as the extent to which such an outcome was endorsed by the electorate, or at least, as in South Africa, not widely opposed. Also: Is there a realistic prospect that such an arrangement may contribute towards establishing a new society in which the reform recommendations of the commission will in fact be implemented?

Even then, the arguments in favour of granting immunity and prosecution may still be evenly balanced. Such a context may conceivably constitute the rare, significant kind of event where a broadly-based cultural disposition in which social solidarity is a core value, could tip the scales away from prosecution. This may be what happened in South Africa during the transition.[45]

To the extent that this is the case, two points should be noted. In the first place, this can occur only on the most exceptional cases. But secondly, and

42 Art 1 of the Convention on the Prevention and Punishment of the Crime of Genocide.

43 *Prosecutor v Furundžija (Anto),* Trial judgment, Case No IT-95-17/1-T, ICL 17 (ICTY 1998), [1998] ICTY 3.

44 Mark Freeman, *Necessary Evils* (Cambridge: CUP 2009) p. 59.

45 Regarding South Africa, see Alex Boraine 'Transitional Justice: A Holistic Interpretation' *Journal of International Affairs* 60 (2006) pp.17–27. On the more recent case of Colombia, see Marie-Claude Jean-Baptiste 'Cracking the toughest nut: Colombia's endeavour with amnesty for political crimes under Additional Protocol II to the Geneva Conventions' *Notre Dame Journal of Journal of International and Comparative Law* 7 (2017) pp.27–63; Douglas Jacobson 'A break with the past or justice in pieces: Divergent paths on the question of amnesty in Argentina and Colombia' *Journal of International and Comparative Law* 35 (2006) pp.175–204.

tied to the first point, if such an occasion arises, it is of great significance. It signifies that even in respect of that most unyielding on rights, the right to life, (some interpretation of) local values may at some point away from the general ones. This is bound to remain controversial.

In such an exceptional case, the resulting accountability will on the one hand be narrower that the traditional conception of accountability, because of the absence of prosecutions. On the other hand, it may offer the prospect of a broader and fuller conception of accountability, because the other elements of the accountability are enhanced and the second goal of accountability, the restoration of relationships, is pursued.

6 *Ubuntu* in the South African courts

This chapter concludes with a case study of probably the most well-known example of the role that an explicit reliance on the value of social solidarity has played in legal decision-making concerning accountability, including for potential right to life violations, in modern Africa, namely, the notion of *ubuntu* in the South African legal system. It is submitted that as a general rule it can be said that the invocation of *ubuntu* has not led the courts to eschew prosecutions – again, with the notable exception of the Truth and Reconciliation Commission.

What makes *ubuntu* of special interest to the present inquiry is that it has been given content by the South African courts in cases involving violent crimes. Although most of the cases do not reflect the work of commissions of inquiry, but rather that of courts, it does provide an interesting case study of the use of the value of *ubuntu* and by extension an emphasis on social solidarity within state-based legal mechanisms. The most important of these cases, the *Azapo* case, addressed the Truth and Reconciliation Commission, which dealt with accountability for right to life violations, and which granted amnesties, with reference to the concept of *ubuntu.* The central question was whether these amnesties were compatible with the requirement of accountability for such human rights violations.

The main legislative foundation for the body of jurisprudence that has developed around *ubuntu* was the so-called Post-amble of the interim Constitution of 1994, which set a number of goals for the new democracy and then provided as follows under the heading 'National Unity and Reconciliation': 'These can now be addressed on the basis that there is a

need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.'[46]

Ubuntu thus was described as the opposite of victimisation, and on par with 'understanding' and 'reparation'. The reference to *ubuntu* was not repeated in the final Constitution of 1996, but it has become a recognised concept in the jurisprudence. One of the most distinct features of the South African Constitution, its justiciable socio-economic rights, has been closely associated with *ubuntu.*[47]

While our primary interest is how *ubuntu* has been invoked in cases involving violent crime, it is worth mentioning that it has also been relied upon in other contexts. The South African Constitutional Court, starting with *Port Elizabeth Municipality v Various Occupiers,* has closely linked *ubuntu* to the notion of restorative justice.[48] According to Justice Sachs, '[t]he spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy [and emphasises] human interdependence, respect and concern.'[49]

Courts should thus be cautious to grant a request for eviction where it is not 'satisfied that all reasonable steps had been taken to get an agreed, mediated solution'.[50] The point of reference is not some abstract notion of right and wrong, but rather a basis of communitarian solidarity.

According to Ann Skelton, this is in line with customary African law processes, where 'acceptance of responsibility, making restitution and promoting harmony are the key outcomes desired in all kinds of disputes'.[51]

The role of *ubuntu* in the context of criminal law has largely been in the context of sentencing policy. The most well-known application of *ubuntu* was in the case of *S v Makwanyane*,[52] where the Court found the

46 South African Interim Constitution (1994).

47 See Thaddeus Metz '*Ubuntu* as a moral theory and human rights in South Africa' *Africa Human Rights Law Journal* 11 (2011) pp.532–59.

48 *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

49 *Ibid*, para.37.

50 *Ibid*, para.61.

51 Ann Skelton 'Face to face: Sachs on restorative justice' *South African Public Law* 25 (2010) p.95.

52 *S v Makwanyane & Another* [CCT3/94] 1995 (3) SA 391 (CC).

death penalty to be in violation *inter alia* of the right to dignity in the South African Constitution.

According to Justice Chaskalson, for the Constitution to live up to the aspirations of the South African society to be consonant to the value of *ubuntu*, 'ours should be a society that "wishes to prevent crime … [not] to kill criminals simply to get even with them"'.[53]

Justice Langa emphasised the overlap between *ubuntu* and human rights. *Ubuntu* signifies that 'the life of another person is at least as valuable as one's own' and 'respect for the dignity of every person is integral to this concept'.[54] Interestingly, he also emphasised that 'heinous crimes are the antithesis of *ubuntu*'.[55] The murder committed by the accused thus violated *ubuntu*, but *ubuntu* at the same time precluded the imposition of the death penalty.

Justice Mokgoro described it as a '"metaphorical expression", describing the significance of group solidarity on survival issues'.[56] Life and dignity, she wrote, are 'two sides of the same coin' and 'the concept of *ubuntu* embodies them both'.[57]

Makwanyane points away from extreme forms of retribution, but not from prosecution and punishment. It is worth noting that the Court conceivably could have argued that *ubuntu* prioritises social solidarity, and that murder endangers the community as a whole. As Justice Langa said, murder is the antithesis of *ubuntu*. If the Court stopped there, they could on that basis have developed an argument *in favour* of the death penalty. The Court chose differently. They understood traditional values in a way that was compatible with human rights and relied on *ubuntu* to protect the accused – the individual.

In *Van Vuuren v Minister of Correctional Services* the Constitutional Court commuted a sentence of life imprisonment on the basis of *ubuntu* and restorative justice.[58] In *Du Plooy v Minister of Correctional Services* the High Court ruled that a terminally-ill prisoner had to be given parole. The

53 *Ibid*., para.131.

54 *Ibid*., para.225.

55 *Ibid*.

56 *Ibid*, para.307.

57 *Ibid*, para.310.

58 *Van Vuuren v Minister of Correctional Services* 2012 (1) SACR 103 (CC).

applicant was 'in need of humanness, empathy and compassion. These are values inherently embodied in *ubuntu*.'[59]

Perhaps more controversially, in the case of *S v Sibaya* a provincial High Court held that direct imprisonment for breaching a protection order while serving a suspended sentence for a domestic violence conviction was not warranted. The Court substituted a suspended sentence 'based upon an application of the principles of *ubuntu* by effecting a reconciliation between the victim and the offender'.[60] In all these cases the individuals were treated with some leniency based on *ubuntu*.

In *Crossley v National Commissioner of the South African Police Services* the accused in a murder trial sought an interdict against the burial of the deceased to undertake a forensic investigation, which they argued was necessary to ensure that they would receive a fair trial.[61] The family were in the process of preparing, in accordance with African custom, for the burial where it had to be done the following day, and the Court held that the dignity and religious customs of the family members had to prevail over the interests of the applicants in obtaining the evidence. The burial could go ahead. Here the emphasis was on respecting the culture.

On the other hand, *ubuntu* has also been used to support prosecution and punishment in a case involving the depravation of life. *S v Mandela,* the only case where *ubuntu* so far has made an appearance in substantive criminal law, concerned the plea of necessity by an accused who claimed that he had been forced to be involved in a murder.[62] However, the accused could not prove that an immediate life-threatening situation gave him no choice but to do so. The Cape High Court ruled that such a low standard for the protection of life could not be accepted. This was required by '*ubuntu* and respect for life'.[63] According to the Court this involved an 'exquisite balance' of 'this most precious of rights', namely, the right to life.[64] Here the scale was tipped in favour of the broader population, in line with Justice Langa's statement that murder was the antithesis of *ubuntu*.

59 *Du Plooy v Minister of Correctional Services* 2004 (3) All SA 613 (T) para.29.

60 *S v Sibaya* 2010 (1) SACR 284 (GNP) para.13. See also *S v Du Plessis* (K/S36/2014) 2016 ZANCHC 21 (15 March 2016).

61 *Crossley v National Commissioner of the South African Police Services* 2004 (3) All SA 436 (T).

62 *S v Mandela* 2001 (1) SACR 156 (C). The accused was not Nelson Mandela.

63 *Ibid.*, paras.168 A–C.

64 *Ibid.*, para.167 C.

This brings us to the case of *AZAPO v President of the Republic of South Africa,* which concerned the constitutionality of the section of the founding Act of the South African Truth and Reconciliation Commission, which gave that body the right to grant amnesty for a number of crimes committed during the apartheid era, including murder.[65] *Ubuntu* was expressly referenced in the Preamble to the Act. As a result of the grant of amnesty, a particular perpetrator could not be held criminally or civilly liable.

The Constitutional Court upheld the constitutionality of the section. It acknowledged that the section limited the applicant's right in terms of section 22 of the interim Constitution to 'have justiciable disputes settled by a court of law', including disputes about violations of the right to life. However, limitations of rights are permissible either if sanctioned by the Constitution or if justified in terms of the limitation section of the Constitution. The Court held that the Post-amble to the interim Constitution, which contains the reference to *ubuntu* (quoted above) sanctioned the limitation on the rights of the family members of activists who had died during the struggle against apartheid to have access to the courts.

The Court held that amnesty for criminal as well as civil liability was permitted by the Preamble, because without the possibility of amnesty there would not be a sufficient incentive for offenders to disclose the truth about past atrocities, and because these disclosures could in turn assist in the process of reconciliation and reconstruction. Further, the Court noted that such an amnesty was a crucial component of the negotiated settlement itself, without which the Constitution would not have come into being. It should be noted that this case has been met with a fair measure of criticism.[66]

In a sequel to *AZAPO*, in *Albutt v Centre for the Study of Violence and Reconciliation* the Constitutional Court dealt with a special pardon provided by the President to those who had not participated in the TRC process.[67]

65 *Azanian Peoples Organization (AZAPO) & Others v President of the Republic of South Africa & Others* 1996 (4) SA 672 (CC).

66 See for example Ziyad Motala 'The Constitutional Court's Approach to International Law and Its Method of Interpretation in the Amnesty Decision: Intellectual Honesty or Political Expediency?' *South African Yearbook of International Law* 21 (1996) pp.29–59. For a defence of the Court's finding, see Albie Sachs 'War, Violence, Human Rights, and the Overlap Between National and International Law: Four Cases Before the South African Constitutional Court' *Fordham International Law Journal* 28 (2004) pp.432–48.

67 *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC).

The question was whether victims were to be given a voice in this process. The Court held that it was essential. Justice Froneman said that South Africa's participatory democracy was based on an ancient principle of traditional African methods of government.[68]

What are the implications of the above overview of the South African court cases for accountability for right to life violations by commissions of inquiry?

One view is that *ubuntu* is so ambiguous that it carries little distinct meaning.[69] It could be argued that courts have instrumentalised *ubuntu* to achieve whatever goal they sought to achieve. As other open-ended concepts such as dignity, it can be used by both sides in a dispute. Dignity sometimes is called a 'conversation stopper', and one can readily imagine the same being said about *ubuntu* in a legal context.

At the same time, culture and values are dynamic, and develop over time, not always in a linear fashion. As such, some measure of open-endedness in norms is not by definition a bad thing: it allows the community to imbue the concepts with their own interpretation. The above review of the jurisprudence moreover shows that some trends have emerged. Based among other things on *ubuntu*, restorative justice and involving communities in such processes now are some of the central aims of South Africa's sentencing policy.[70]

There clearly is a danger that such a nebulous concept may be used to block prosecutions or undo them. At the same time, the above overview does not reveal the use of a reliance on *ubuntu* by the courts to undermine the notion of prosecutions and individual criminal responsibility as such. It has been invoked in relatively few instances in criminal cases in the South African courts, to pursue specific goals which are not alien to human rights. In a few cases it was done to protect the right to dignity in very much the same way that notions of mercy are invoked in other jurisdictions, for example in *Van Vuuren* and *Du Plooy*. In *Crossley* the aim was to protect the rights to dignity and religion of a cultural group. In *Mandela, ubuntu* in fact was invoked to support prosecution and conviction.

The only case in which the idea of indemnity was accepted, and then only on the basis that certain conditions were met, was *AZAPO*. However,

68 *Ibid.*, para.90.

69 See for example Rosalind English '*Ubuntu*: The Quest for an Indigenous Jurisprudence' *South African Journal on Human Rights* 12 (1996) pp.641–648.

70 See Bennett, '*Ubuntu*: An African Equity' p.35.

it can be argued that the TRC and thus the *AZAPO* case present a very exceptional set of circumstances. The case arose out of the transfer of power to the new democratic government after apartheid, a condition that is not likely to recur, in the context of a truth commission conducted during one of the outstanding social transformations of recent times. The process facilitated inclusive investigations which in some cases revealed startling truths. The process held the promise of establishing a new community in which the reform proposals and the reform process that was under way could be implemented. Compensation was paid as a form of remedy, and the subsequent elections at least did not convey a message of rejection of the process.

7 Conclusion

I made the point at the outset that local specificity must play some role alongside normative uniformity to ensure the full universality of human rights. A strong emphasis on social solidarity may be viewed as such a local specificity in many contexts in Africa.

There is, however, little room for local specificity to play a role as far as the substantive content of the right to life is concerned. This is because the concept of the right to life, and the idea that every person has an equal right to a life to dignity, plays a central role in the human rights project and across cultures. That said, there may be more room for variation and moral plurality as far as the procedural element of the right is concerned.

All right to life violations require accountability, of which the elements are investigations, remedies (including prosecutions, where the evidence point in that direction, as well as the restoration of social relations) and, where applicable, reform. Yet the exact form that the accountability can take may vary to some extent according to the environment. Where there are genuine conflicts between the elements and indeed the goals of accountability – for example restoration of the norm through criminal justice and restoration of social relations – then there is a normative gap that has to be filled, and local values may play a role.

There is in particular room for variation as far as the mechanisms of accountability are concerned. It was argued that commissions of inquiry as mechanisms for the pursuit of accountability may resonate with many aspects of the way in which societies with a strong emphasis on social cohesion deal with conflict resolution, for example by including a range of community members in a common endeavour to resolve a communal problem. This may enhance the legitimacy of the entire process.

Commissions of inquiry are often viewed with scepticism as far as prosecutions are concerned. In Africa and other regions of the world where social solidarity often plays a strong role, this concern may be enhanced. Are they inherently to be regarded as unreliable as far as broader accountability is concerned and in general to be avoided?

I caution against such an approach. At least from the limited sample of commissions studied in detail for the purposes of this book, it appears that such bodies can strengthen the investigative and recommendatory elements of accountability, and afford broader participation and thus legitimacy to the process, especially where there is a strong emphasis on social cohesion.

In all the cases studied for this book, commissions, to a greater or lesser extent, contributed to prosecutions, though their record in respect of prosecutions of those in power is mixed, which calls for care to be taken.

The main example where a commission was used expressly to avoid prosecutions, also for right to life violations, was that of the Truth and Reconciliation Commission in South Africa, where it was done with reference to the concept of *ubuntu*.

Accountability for right to life violations is an absolute rule, and it is a general rule that this must include prosecutions. Only in the most exceptional, 'once in a lifetime' kind of situation can it be conceived that – provided a number of conditions are met – amnesties may be considered, and in such a case commissions of inquiry present themselves as suitable tools. That may occur where there is an irreconcilable clash between the imperative of criminal prosecutions and social relations.

One of the considerations that may play a role in resolving such a conflict is a deference to a widely-held propensity towards social cohesion in the society in question, pointing away from prosecution and in the direction of the restoration of social bonds. This may constitute a very narrow, but significant example of an instance where even a right as unyielding as the right to life may have to give way to some degree of local determination.

The evidence presented in this book can hardly be seen as supporting the contention that commissions of inquiry should be avoided as accountability mechanisms in Africa. Provided the problem of political interference can be curtailed, they may in fact in appropriate cases be particularly well-suited to play a role in accountability processes, including for right to life violations.