National Commissions of Inquiry: A Comparative Report on Civil Law Jurisdictions

Project Partner: Open Society Justice Initiative

Project Overview:
National Commissions of Inquiry (NCOIs) are ad-hoc investigative mechanisms, set up by a national government, to establish the facts surrounding an event or situation, determine individual responsibility and/or systemic causes, and to advise on future preventative steps. They are often used where actions of the State are in question, or where the complexity of the issue or public lack of trust in existing institutions requires an independent inquiry.

Best practice NCOIs are legally empowered (by statute, constitution or executive order), with a sufficiently-broad and flexible mandate to inquire into a geographically or temporally limited event or series of events. They should be supported by the government, but must be seen to be independent from it. They should be headed by independent and impartial commissioners of sufficient standing to give public confidence in the inquiry, ideally with expertise in fact-finding (often sitting or retired judiciary sit as commissioners). They should have powers to compel documentary and testimonial evidence, and should not be prevented access from information based on state secret or national security grounds. Unless otherwise justified, their hearings should be publicly held and their final reports should be publicly released. They should as best as possible provide the opportunity for victims to provide evidence and tell their story. If compliant with international human rights standards, NCOIs can be one component of a State’s discharge of their obligation to conduct effective investigations into human rights abuses, and may assist in necessary truth-telling in transitional justice situations.

NCOIs should be distinguished from a number of bodies and mechanisms that perform similar functions. In particular international COIs, typically undertaken by Special Procedure holders at the Human Rights Committee or international NGOs are similar insofar as they are fact-finding missions that may determine responsibility. However, they are not empowered by law, nor are they government sanctioned (sometimes they are actively opposed by the government concerned), and do not have compulsory powers.

There may be national bodies also dedicated to fact-finding or determining the cause of events. Examples of these include police units designed to investigate police misconduct, or human rights ombudsmen, or coronial inquiries. These differ from NCOIs due to either a lack of governmental independence, or lack of independence from the state authority concerned, or a limited mandate to investigate the underlying causes of events, or they do not have the capacity to conduct complex inquiries, for example.

Due to the paucity of research on this topic, OSJI worked with the University of Essex Human Rights Center Clinic to draft a comparative report on NCOIs. This report outlined
the principles of effective investigations under international human rights law, and then
described and set these standards against thirteen NCOIs from a range of civil and common
law jurisdictions (however, the weight was heavily on common law countries). The analysis
was high-level and outlined the general categories of matters of issue to NCOIs.

The Essex report placed emphasis on common law jurisdictions (UK, Canada, Sri Lanka etc).
This presents the opportunity to undertake a similar comparative analysis on civil law
jurisdictions. Chiefly omitted were continental European civil law jurisdictions. Dedicated
research is therefore needed on the function, practice and procedure of NCOI (or their
equivalent) in civil law countries, particularly those in the Council of Europe. This work will
result in standalone research, but will feed into a broader project of designing guidelines on
the establishment, practice and procedure of NCOI.

Project Output:
- A comparative report between 20-30 pages describing and evaluating
  - At least 5 but no more than 10 civil law jurisdictions that have engaged in
    NCOIs (or a domestic equivalent), primarily in the Council of Europe, covering:
      - Process of establishment (e.g. within the constitution, by statute, regulation or other);
      - Powers (for instance, to compel testimony);
      - Composition (e.g. of independent persons, judges or politicians);
      - Publicity (i.e. whether they are held in the open or closed session);
      - Procedure (rules governing and a summary thereof: rules of evidence; witness protection);
      - Output (a binding or suggestive report, requiring the government to undertake certain actions)
  - Representative case studies from the above jurisdictions outlining (to give a non-exhaustive list):
    - The history and underlying events leading to the NCOI;
    - The process including: who was interviewed, length and expense of the inquiry;
    - A brief summary of the findings;
    - The impact of the NCOI.
  - The above criteria is illustrative, and shall be finalized in discussion between
    clinic students, the supervisor and the Justice Initiative.

Project timeline & activities:
This project is centered around key research and learning goals and one briefing paper
deliverable.
Project Outline:
Project Phase 1 (November – Mid-December 2016)

Clinic Participants will:

- November 2016: Attend an introductory session: a meeting between students, supervisor and the project partner to discuss the research, the context, and the methodology;
- Acquire skills to design and implement a research project timeline and strategy;
- Undertake preliminary research and reach out to potential domestic experts on NCOIs or equivalent;
- End-November 2016: Present a research project workplan via videoconference;
- Mid-December 2016: Attend a progress meeting between students, supervisor and project partner detailing preliminary findings and present a draft project outline.

Project Phase 2 (January –June 2017)

- Complete comprehensive research for briefing paper;
- Develop writing skills through regular supervisory and peer review exercises;
- March 2017: Attend 2 hour workshop between students, supervisor and project partner presenting research, and discussing finding and conclusions;
- Submit regular drafts to supervisor for review;
- Mid-April 2017 (before Easter break): submit first draft to project partner for review;
- End-April 2017: Project partner will sent comments and edits, convene 1 hour meeting to discuss;
- End-June 2017: submit final draft to project partner. Present research to NCOI workgroup meeting at the Justice Initiative.

Partner Roles:
HRCC: will manage and oversee the day-to-day progress of the Clinic team, including through bi-weekly Clinic team meetings;

OSJI: Provide initial introductory meeting on the research task and methodology; attend and comment on progress meeting; provide commentary on initial outline & provisional written draft prior to final submission. The primary contacts will be Toby Collis, Associate Legal Officer, and Svetlana Bezinyan, Program Officer, Litigation.

Clinic team: 4 students, working from November to end of June will produce the necessary draft outline, written draft, and final project output.

Project Bibliography:
- Materials on International COIs (relevant for inspiration on the issues to cover):
Human Rights Centre Clinic

- Raoul Wallenberg Institute/IBA, “Guidelines on International Human Rights Fact-Finding Visits and Reports” (2009);
- Harvard University, Program on Humanitarian Policy and Conflict Research, “Building Effective Monitoring, Reporting, and Fact-finding Mechanisms” (2012);
- Morten Bergsmo (ed) “Quality Control in Fact-Finding (2013);
- University of Essex, National Human Rights Centre Clinic, “National Commissions of Inquiry: Towards a Human Rights-Based Approach” (2013)
- UN Human Rights Council, “Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez”, January 18, 2012, UN Doc. A/HRC/19/61
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