



National Commissions of Inquiry:

Towards a Human
Rights-Based Approach



National Commissions of Inquiry: Towards a Human Rights-Based Approach

Acknowledgments

This report was researched and written by Miguel Zumalacarregui (Project Officer), Christina Beninger (Project Coordinator), Alex Conn (Researcher), Yannick Creoff (Researcher), Sanchita Ain (Researcher), Odile Vandebossche (Researcher), Patrick Timmons (Project Coordinator), Jonathan Worgan (Researcher), Isaline Wittorski (Researcher), Mariam Asada (Researcher), Tanima Bansal (Researcher), Marina Themistocleous (Researcher), Pascal Hubatka (Researcher), Charlotte Pier (Researcher), Firuza Khamdamova (Researcher), John Holschuh (Researcher), and under the supervision of Daragh Murray (Programme Manager).

The Human Rights Centre Clinic would like to thank Professor Sir Nigel Rodley (University of Essex), Steve Kostas (Open Society Justice Initiative) and Dr. Clara Sandoval (University of Essex). The views expressed in this report are attributable to the Human Rights Centre Clinic.

© The University of Essex Human Rights Centre Clinic, October 2013
All Rights Reserved

Any Quotation of up to 500 words may be used without permission provided that full acknowledgment is given. Longer quotations or entire chapters of this report may not be reproduced or transmitted in any form or by any means without written permission from The University of Essex Human Rights Centre Clinic

The Human Rights Centre Clinic

University of Essex
Wivenhoe Park, Colchester, CO4 3SQ
United Kingdom
► www.essex.ac.uk/hrc/clinic

Contents

Preface	4
1. What is a national commission of inquiry?	5
1.1. Introduction to national commissions of inquiry and overview	5
1.2. Commissions of inquiry and a 'genuine' investigation	9
1.2.1. State initiation of an investigation	9
1.3. Elements of a genuine investigation	10
1.3.1. Effectiveness	10
1.3.2. Promptness	12
1.3.3. Independence	12
1.3.4. Public scrutiny	12
1.4. Potential benefits of an effective commission of inquiry	13
1.5. Challenges that a commission of inquiry must overcome	14
1.5.1. Cosmetic inquiries	15
1.5.2. Government failure to respond to recommendations	16
1.6. Conclusion	17
2. Establishment of a national commission of inquiry	18
2.1. Mandate	18
2.1.1. Terms of reference	18
2.1.2. Preservation of commission's archives	20
2.1.3. Time frame of the commission	21
2.1.4. Publication of the report	23
2.2. Composition	25
2.3. Funding	28
3. Independence and impartiality	30
3.1. Independence of the commission	30
3.1.1. Structural independence	30
3.1.2. Substantive independence	32
3.2. Impartiality of the commission	33
4. Powers	35
4.1. Subpoena powers	35
4.2. Reliability of the evidence	38
4.3. Protection of witnesses	40
5. National security and public interest	44
6. Participation	47
6.1. Establishment of commission and means of participation should be publicised	47
6.2. Victim/ family participation	47
7. Conclusion	51

Preface

This report is the result of a broader collaborative project undertaken by the University of Essex Human Rights Centre Clinic (HRC Clinic) and the Open Society Justice Initiative (OSJI). One of the objectives of the project was to examine the existing law, policy and, most importantly, practice with regard to the establishment and implementation of national commissions of inquiry (COI). It involved a detailed analysis of 13 national COI, from both Civil and Common Law jurisdictions, and represented a diverse range of issues, from incidents relating to a single individual, to incidents occurring on a single day, to issues relating to over seven years of civil war. In addition, the HRC Clinic undertook a series of interviews with commission members, key stakeholders and NGOs that engaged in the various COI in order to further develop this analysis with a 'behind-the-scene' understanding of the challenges faced by national COI, as well as the strategies advanced to address them. The national COI examined within this report were selected in consultation with OSJI on the basis of requirements relating to the project, as opposed to a methodology specific to this report.

This report addresses the requirements for, and characteristics of, national commissions of inquiry from the perspective of international human rights law. In particular, the report situates the use of national COI in the context of a State's obligation to conduct genuine investigations with respect to violations of international human rights law. In this regard, the report addresses issues such as a commission's mandate, the requirement of independence and impartiality, and powers of a commission, amongst others. Thus, the report aims to identify the standards required for an effective human rights compliant national COI, and further clarify how these standards can be achieved in practical terms.

This report does not purport to be exhaustive, and should not be viewed as such, but rather as an initial examination of firmly established international principles and practice relating to national COI, in light of the requirements under international human rights law. As such, it is intended to be complementary to the existing literature, and to foster a broader, more practical understanding as to what national COI can achieve, the requirements for their operation, and the challenges they must overcome, in order to be effective. It is our hope that this report will serve as the basis for further research and analysis on the future development of a framework for a human rights-based approach to national COI.

A handwritten signature in black ink, appearing to read 'Nathan Derejko'.

Nathan Derejko
Director
Human Rights Centre Clinic
University of Essex

1. What is a national commission of inquiry?

1.1. Introduction to national commissions of inquiry and overview

A national Commission of Inquiry is a body established to investigate an incident or set of incidents that have caused public concern.¹ They are normally established after major incidents – such as ‘large-scale or politically motivated crimes or systemic violations’² – when State agents or institutions are suspected of involvement in the incident(s) and the public does not have faith in the regular investigative system.

As currently understood ‘commissions of inquiry’ represent a wide range of bodies, with significant variances both in purpose and scope.³ With respect to purpose, for example, Chile’s Valech commission of inquiry was established to ‘clarify the truth and promote national reconciliation’ in a broad sense and was explicitly precluded from making determinations as to responsibility for human rights violations.⁴ The Baha Mousa commission in the United Kingdom, on the other hand, was mandated to establish the precise circumstances relating to Baha Mousa’s death, to determine where responsibility for his death lay, and to issue recommendations for administrative and legislative reform that may prevent recurrence.⁵ Similar differences exist with respect to the scope of a commission’s investigation. For example, the Malaysian Royal Commission of Inquiry

¹ It is noted that this report focuses upon national Commissions of Inquiry, as distinct from international Commissions of Inquiry such as UN Fact-Finding Missions.

² UNHRC ‘Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez’ (18 January 2012) UN Doc A/HRC/19/61, para 9.

³ A significant amount of the academic literature refers to truth commissions, as distinct from national commissions of inquiry as understood for the purposes of this paper, see Section 2 below. See, generally, Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (Routledge, 2010); Nigel S. Rodley, ‘Assessing the Goldstone Report’ (2010) 16 *Global Governance; Commissions of inquiry and national security: comparative approaches* (Stuart Farson and Mark Phythian eds., Praeger, 2011); Micaela Frulli, ‘Fact-Finding or Paving the Road to Criminal Justice? Some Reflections on United Nations Commissions of Inquiry’ (2012) 10 *Journal of International Criminal Justice*; Dapo Akande & Hannah Tonkin, ‘International Commissions of Inquiry: A New Form of Adjudication?’, EJIL: Talk, 6 April 2012.

⁴ Decreto Supremo No. 1.040, Ministerio del Interior, Subsecretaria del Interior, 26 September 2003, preamble; Decreto Supremo No. 1.040, Ministerio del Interior, Subsecretaria del Interior, 26 September 2003, Article 3: ‘En el cumplimiento de su objeto, la Comisión no podrá, de manera alguna, asumir de carácter jurisdiccional y, en consecuencia, no podrá pronunciarse sobre la responsabilidad que con arreglo a la ley pudiere haber a personas individuales por los hechos de que haya tomado conocimiento.’ Translated as: ‘In fulfillment of its objective, the Commission cannot in any way assume jurisdiction, and as a consequence it cannot determine individual responsibility under the law for facts which it has taken into consideration.’

⁵ Baha Mousa Public Inquiry Website, Index. Available at: www.bahamousainquiry.org/index.htm Last accessed at 28 August 2013; Malaysia’s 1999 Royal Commission of Inquiry to Enquire Into the Injuries of Dato’ Seri Anwar Ibrahim Whilst In Police Custody: The terms of reference required the Commission to investigate and examine the injuries on Dato’ Seri Anwar Ibrahim whilst he was in police custody, with the aim of determining the cause of the injuries and identifying those responsible for causing or facilitating them. The Commission was also to recommend actions to the Yang di-Pertuan Agong against any officer or officers found to have caused or facilitated the injuries of Dato’ Seri Anwar Ibrahim. Source: Report of the Royal Commission of Inquiry to Enquire into the Injuries of Dato’ Seri Anwar Ibrahim whilst in Police Custody, vi.

into the case of Dato' Seri Anwar Ibrahim⁶, Canada's Maher Arar Commission⁷, Nepal's Ram Hari Shrestha Commission,⁸ and the UK's Baha Mousa Commission,⁹ investigated the treatment of one individual, while the UK's Bloody Sunday Commission led by Lord Saville,¹⁰ and Israel's Salah Shehadeh Commission,¹¹ dealt with a single incident. On the other hand, the Commission of Inquiry on Lessons Learnt and Reconciliation in Sri Lanka was mandated to examine all events relating to the conflict between the Government of Sri Lanka and the Liberation Tigers of Tamil Eelam between 21 February 2002 and 10 May 2009.¹² Other examples of commissions of inquiry investigating series of events

⁶ Report of the Royal Commission of Inquiry to Enquire into the Injuries of Dato' Seri Anwar Ibrahim whilst in Police Custody, 2.

⁷ Maher Arar, a Canadian citizen, was arrested on September 26, 2002, in New York while passing through John F. Kennedy International Airport. Following his arrest, Arar was detained for 12 days and removed to Syria, his country of birth, where he was imprisoned for almost a year. During his detention in Syria, Arar was interrogated, tortured and held in degrading and inhumane conditions. Source: Report of the Events Relating to Maher Arar, 2006, 9-10. Available at: www.pch.gc.ca/cs-kc/arar/Arar_e.pdf. Last accessed at 28 August 2013.

⁸ The People Liberation Army is the Maoist guerrilla that waged a civil war against the State from 1996 to 2006. After the peace agreement in 2006, the PLA was kept in cantonments pending a program of reintegration and rehabilitation that started in 2012. Members of the Maoist party abducted businessman Ram Hari Shrestha on April 27 2008. He later died from injuries suffered during his detention in the cantonment of Chitwan district. Sources: International Crisis Group, Nepal: From two armies to one, August 2011. Available at: www.crisisgroup.org/en/regions/asia/south-asia/nepal/211-nepal-from-two-armies-to-one.aspx. Last accessed at 28 August 2013.; Advocacy Forum and Human Rights Watch, 'Indifference to duty: Impunity for crimes committed in Nepal', (December 2010), 17-18. Available at: www.advocacyforum.org/_downloads/indifference-to-duty-english-version.pdf. Last accessed at 28 August 2013.; Center for Investigative Journalism Nepal, 'Impunity in Nepal: Study of excesses during the transition', (October 2010), 53-58. Available at: asiafoundation.org/resources/pdfs/EnglishImpunitydesignNepal.pdf. Last accessed at 28 August 2013.

⁹ Baha Mousa was an Iraqi civilian who died in September 2003 while in detention at the 1st Battalion, The Queen's Lancashire Regiment Battle Group Main facility in Basra, Iraq. Source: Baha Mousa Public Inquiry Website, Background. Available at: www.bahamousainquiry.org/about/background/index.htm. Last accessed at 28 August 2013.

¹⁰ On January 30th, 1972, following a civil rights march in Londonderry, Northern Ireland, British Army troops opened fire on protesters, killing thirteen and wounding thirteen others. The incident afterwards became known as Bloody Sunday. Source: HC Deb 29 Jan 1998, vol. 305, col. 501.

¹¹ On 22 July 2002, an Israeli plane dropped a one-ton bomb on the house of Hamas military wing commander, Salah Shehadeh. Fifteen people were killed, including thirteen civilians. Dozens of civilians were injured. Source: Rosenzweig, I. and Shany, Y., 'Special Investigatory Commission Publishes Report on Targeted Killing of Shehadeh', in *Terrorism and democracy*, (Issue No.27, March 2011), 1.

¹² Presidential Warrant Establishing the Lessons Learnt and Reconciliation Committee, P.O. No. CA/3/3/24, 15 May 2010, 2.

include the Bahrain Commission,¹³ the Indian Nanavati Commission,¹⁴ the Ivory Coast Commission,¹⁵ and the Valech Commission.¹⁶

Against this backdrop, international experts and institutions have identified a number of goals with respect to national commissions of inquiry. According to the UN Special Rapporteur on Torture they may be established for several purposes, including: 'to contribute to accountability for perpetrators; to respond to the needs of victims; to identify institutional responsibility and propose institutional, legal and personnel reforms; and to promote reconciliation'.¹⁷ The Humans Rights Committee has held that commissions of inquiry are established to conduct an investigation and gather information on a particular incident or set of incidents, then to report the results of their investigations to both the public and the government.¹⁸

¹³ The King of Bahrain established the Bahrain Independent Commission of Inquiry (BICI) on 29 June 2011 to investigate and report on events occurring in Bahrain in February and March 2011. On 14 February 2011, protesters began public demonstrations calling for political reform; these were held in Manama, the country's capital, and across Bahrain. Thousands continued protesting throughout February and March and a State of National Safety was declared by Royal Decree on 15 March 2011. Sources: Royal Order No. 28 of 2011; Royal Decree No. 18 of 2011; BICI, 'Report of the Bahrain Commission of Inquiry' (10 December 2011), Chapter IV.

¹⁴ The Justice Nanavati Commission of Inquiry on the 1984 anti-Sikh riots was the last of the many commissions appointed to inquire into the attacks on members of the Sikh community in Delhi and other parts of India, following the assassination of Mrs. Indira Gandhi, then Prime Minister of India, by her two Sikh bodyguards on 31 October, 1984. The Marwah Commission, Ranganath Misra Commission, leading to the appointment of 3 Committees – i) Kapur-Mittal Committee, ii) Jain-Banerjee Committee (succeeded by Potti-Rosha Committee and Jain-Aggarwal Committee) and iii) Ahuja Committee, Dhillon Committee and Narula Committee (appointed by the State Government) preceded the Nanavati Commission. Sources: www.carnage84.com; Report of the Justice Nanavati Commission of Inquiry, Volume-I, 1. Available at: mha.nic.in/pdfs/Nanavati-I_eng.pdf. Last accessed at 28 August 2013.

¹⁵ President Quattara established the Commission on 20 July 2011 to lead non-judicial investigations on violations of international humanitarian and human rights law committed between October 31, 2010 and May 15, 2011 in Ivory Coast after the Presidential election. Source: *Fraternité Matin*, by Cyprien Tiesse, 'Crise post-électorale/ Matto Loma Cissé (Présidente de la Commission nationale d'enquête): "Notre mission, enquêter sans passion ni parti pris"' (1 Janvier 2012). Available at fr.allafrica.com/stories/201201020683.html?viewall=1. Last accessed at 29 August 2013.

¹⁶ The Comisión Nacional de Prisión Política y Tortura, charged with identifying the victims of political imprisonment and torture in Chile from 1973 to 1990, is commonly known as the Valech Commission, after the head of its eight-member team, Bishop Sergio Valech of the Archdiocese of Santiago. The Valech Commission should not be confused with its predecessor, the 1991 National Commission for Truth and Reconciliation (the Rettig Commission), which examined political killings and disappearances.

¹⁷ UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (18 January 2012) UN Doc A/HRC/19/61, para 8

¹⁸ *Raymond-Jacques Picq v. France* 1632/2007. It is noted that the Committee has also held that States are responsible for establishing Commissions of Inquiry with "effective facilities and procedures to investigate thoroughly" "and ensuring that they are "an appropriate impartial body". See, *Herrera Rubio v. Colombia*, HRC, Comm. No. 161/83, U.N. Doc. CCPR/C/31/D/161/1983, A/43/40, at 190, para 10.3 (1987); *Arévalo Pérez v. Colombia*, HRC, Comm. No. 181/84, U.N. Doc. CCPR/C/37/D/181/1984, A/45/40, at 31, para 10 (1989); *Mojica v. Dominican Republic*, HRC, Comm. No. 449/91, U.N. Doc. CCPR/C/51/D/449/1991, A/49/40 Vol II, at 142, para 5.5 (1994); *Laureano Atachahua v. Peru*, HRC, Comm. No. 540/93, U.N. Doc. CCPR/C/56/D/540/1993, A/51/40 Vol II, at 108, para. 8.3 (1996).

As is apparent from even these brief examples, commissions of inquiry may be convened for a number of different purposes and in relation to a broad spectrum of incidents. This results in a reality whereby there is no common understanding as to the precise role of a national commission of inquiry, creating a confusion of expectations, and opening the possibility for governmental abuse whereby commissions are established in order to provide an illusion of justice while in effect avoiding accountability and entrenching impunity.

One of the most important aspects of a commission of inquiry is that it may set the ground for a future criminal investigation. The UN Human Rights Council has stated that 'every commission of inquiry's primary objective should be to establish accountability for violations that have taken place, ensuring that those responsible for violations are brought to justice.'¹⁹ Ultimately, States must effectively investigate suspected violations, as a failure to do so will contribute towards the creation of a climate of impunity, facilitating future violations of international law.²⁰

International human rights law has established specific criteria to ensure that investigations are conducted in a manner consistent with the requirements of international law such that they may be considered 'genuine'. Commissions of Inquiry can facilitate this process of genuine investigation, by conducting an independent initial assessment that can establish whether further investigation – and in particular criminal investigation – is required. The unique characteristics of a commission of inquiry ensure that a broad perspective on any incident can be secured,²¹ and that public confidence in the proceedings – and the overall accountability process – can be facilitated. It is submitted that national commissions of inquiry should correctly be regarded as fulfilling a component of State's international obligation to investigate violations of international human rights law and international humanitarian law.²²

This report considers national commissions of inquiry in this light: the role of commissions of inquiry within the overall investigative process is evaluated, as are different components of a commission, in order to determine how these individual components can contribute to, or detract from, fulfilment of a State's obligation to investigate.

¹⁹ Academic Platform Switzerland UN & Geneva Academy of International Humanitarian Law and Human Rights, 'The UN Human Rights Council: Commissions of Inquiry Conference Brief' (December 2011), 1. Available at: www.adh-geneve.ch/docs/news/HR-council-inquiry-conference-brief.pdf. Last accessed at 28 August 2013.

²⁰ *Myrna Mack Chang v. Guatemala*, Inter-Am.Ct.H.R. (Ser. C), No.101, para 156 (Nov. 25, 2003).

²¹ UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (18 January 2012) UN Doc A/HRC/19/61, paras 20, 25, 31, 52; UNHRC, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Phillip Alston' (2 May 2008) UN Doc A/HRC/8/3, paras 18, 23.

²² UN General Assembly, 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, UN Doc. A/Res/60/147 (16 Dec. 2005); Article 146 of the fourth Geneva Convention of 1949; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Article 2; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: resolution adopted by the General Assembly (10 December 1984) UN Doc A/RES/39/46, Article 12.; Rule 158 ICRC Customary Study.

This report draws on positive international practice, international human rights law jurisprudence, and an analysis of 13 national commissions of inquiry.²³

1.2 Commissions of inquiry and a ‘genuine’ investigation

The obligation to investigate violations of international human rights law is established most clearly in the context of the right to life,²⁴ and the prohibition on torture.²⁵ However, it is noted that this obligation is derived from the obligation to protect the right in question. As held in *Al-Skeini v. the United Kingdom*:

The obligation to protect the right to life under this provision, read in conjunction with the State’s general duty under Article 1 of the Convention to “secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention”, requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the State.²⁶

As such, an obligation to investigate may potentially be applicable to all violations of international human rights law, although this does not currently have a clear basis in international law.

1.2.1. State initiation of an investigation

International human rights law requires that, where information indicating that an investigation is necessitated exists, it is the State that should initiate the investigation. The State should not wait to respond to pressure from the victims or civil society. This requirement is derived from two factors. First, if State agents are allegedly involved in

²³ National commissions of inquiry studied for this paper include: the Commission of Inquiry into the Deployment of Canadian Forces to Somalia; the Commission of Inquiry into the actions of Canadian Officials in Relation to Maher Arar; The Saville Report: The UK’s Commission of Inquiry Regarding Bloody Sunday; the Baha Mousa Public Inquiry in the UK; the Commission of Inquiry on the Final Stages of the Civil War between the Liberation Tigers of Tamil Eelam and the Government of Sri Lanka; the National Commission of Inquiry into Post-Election Violence in the Ivory Coast; the Or Commission in Israel; the Special Investigatory Commission on the Targeted Killing of Salah Shehadeh in Israel; the Bahrain International Commission of Inquiry; the *Comisión Nacional de Prisión Política y Tortura* (the Valech Commission) in Chile; the Nanavati Commission of Inquiry on the 1984 anti-Sikh Riots; the Royal Commission of Enquiry to Enquire Into the Injuries of Dato’ Seri Anwar Ibrahim Whilst In Police Custody in Malaysia; and the Ram Hari Shresta Commission of Inquiry in Nepal.

²⁴ See, for example, *Nachova and Others v. Bulgaria*, European Court of Human Rights, Application Nos. 43577/98, 43579/98, 6 July 2005, para. 110.

²⁵ See, for example, Article 12, United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It is noted that an obligation to investigate also exists with respect to grave breaches of the Geneva Conventions. See, for example, Articles 146 and 147 Fourth Geneva Convention 1949; Rule 158 ‘Prosecution of War Crimes’, Jean Marie-Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (ICRC, CUP, 2006).

²⁶ *Al-Skeini and Others v. The United Kingdom*, Judgment, European Court of Human Rights, Application No. 55721/07, 7 July 2011, para. 163.

the incidents in question the burden is on the State to provide a valid explanation;²⁷ if the State does not provide all relevant information this may be seen as validation of the allegations.²⁸ Second, if no other processes are available to establish the facts and find culpability, the State is required to initiate an investigation even where State agents are not implicated.²⁹ Investigations are vital in maintaining public confidence that there is no collusion or tolerance of unlawful acts,³⁰ and so State's must 'act of their own motion'³¹ to investigate: '[t]hey cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures'.³²

1.3 Elements of a genuine investigation

1.3.1 Effectiveness

For an investigation to be considered effective, it 'must be undertaken in a serious manner and not as a mere formality preordained to be ineffective'.³³ An important part of accomplishing this is ensuring that the investigation will 'not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State'.³⁴ Significantly, any investigation must be capable of leading 'to the identification and punishment of those responsible'.³⁵ This is an essential component of an investigation: it must be capable of establishing the truth and ensuring that those responsible are held to account.

²⁷ 'The Court considers that where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused'; *Selmouni v France*, Judgment, European Court of Human Rights, Application No. 25803/94, 28 July 1999, para 87.

²⁸ 'It is inherent in proceedings relating to cases of this nature, where an individual applicant accuses State agents of violating his rights under the Convention, that in certain instances solely the respondent State has access to information capable of corroborating or refuting these allegations. A failure on a Government's part to submit such information as is in their hands without a satisfactory explanation may not only reflect negatively on the level of compliance by a respondent State with its obligations under Article 38 para 1 (a) of the Convention (former Article 28 para 1 (a)), but may also give rise to the drawing of inferences as to the well-foundedness of the allegations.' *Timurtas v Turkey*. Judgment, European Court of Human Rights, Application No. 23531/94, 13 June 2000, para 66.

²⁹ The European Court held that the Article 2(1) 'obligation requires by implication that there should be some form of effective official investigation when there is reason to believe that an individual has sustained life-threatening injuries in suspicious circumstances' *Menson and Others v. United Kingdom*, Admissibility Decision, European Court of Human Rights, Application No. 47916/99, 6 May 2003.

³⁰ '...the national courts should not under any circumstances be prepared to allow life-endangering offences to go unpunished. This is essential for maintaining public confidence and ensuring adherence to the rule of law and for preventing any appearance of tolerance of or collusion in unlawful acts' *Oneriyildiz v Turkey*, Judgment, European Court of Human Rights, Application No. 48939/99, 30 November 2004, para 96.

³¹ *Rantsev v Cyprus and Russia*, Judgment, European Court of Human Rights, Application No. 25965/04, 7 January 2010, para 232.

³² *Rantsev v Cyprus and Russia*, Judgment, European Court of Human Rights, Application No. 25965/04, 7 January 2010, para 232.

³³ *Chumbivilcas v. Peru*, Inter-American Commission on Human Rights, Case 10.559, 1 March 1996.

³⁴ *Bati v. Turkey*, European Court of Human Rights, Application No. 33097/96, 57834/00, 3 September 2004, para 134.

³⁵ *Hugh Jordan v. the United Kingdom*, European Court of Human Rights, Application No. 24746/94, 4 August 2001, para 107.

The European Court of Human Rights has elaborated specific requirements with respect to the process of investigation: the obligation to conduct an effective investigation is 'not an obligation of result, but of means'.³⁶ It is therefore the process, the mechanics of the investigation, which must be tightly regulated and conducted in accordance with international standards. For example, the 'authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury, and an objective analysis of clinical findings, including the cause of death'.³⁷

In many ways this is a self-evident obligation: in order to ensure a credible result the process itself must be credible. As such, the process must be capable of operating effectively and accountability must be a practical, and not merely a theoretical, likelihood. The concept of an effective remedy entails 'a thorough and effective investigation capable of leading to the identification and punishment of those responsible'.³⁸

Accordingly, '[a]ny deficiency in the investigation which undermines its ability to establish [the facts] or the person or persons responsible will risk falling foul of this standard'.³⁹ In *Nachova and Others v. Bulgaria*, the Grand Chamber of the European Court further emphasised that the 'investigation's conclusions must be based on thorough, objective and impartial analysis of all relevant elements'.⁴⁰

With respect to scope, it is imperative that any investigation address the entirety of the incident under investigation. In *Ergi v. Turkey*, the Court concluded that no effective investigation had been conducted because the scope of the domestic investigation did not include examining the whole operation related to the incident.⁴¹ The investigation should be broad enough to permit the investigating authorities to take into consideration not only the actions of the people involved but also all the surrounding circumstances.⁴² This is a particularly important element with respect to commissions of inquiry. Ultimately, in order to be considered 'effective', an investigation must take all appropriate measures to establish the truth, and any potential responsibility: 'any deficiency in the investigation which undermines its ability to establish the cause [...] will risk falling foul of'⁴³ the obligation to conduct an effective investigation.

³⁶ *Finucane v. the United Kingdom*, European Court of Human Rights, Application No. 29178/95, 1 October 2003, para 69.

³⁷ *Finucane v. the United Kingdom*, European Court of Human Rights, Application No. 29178/95, 1 October 2003, para 69.

³⁸ *Aksoy v. Turkey*, European Court of Human Rights, Application No. 21987/93, 18 December 1996, para 98.

³⁹ *Hugh Jordan v. the United Kingdom*, European Court of Human Rights, Application No. 24746/94, 4 August 2001, para 107.

⁴⁰ *Nachova and Others v. Bulgaria*, European Court of Human Rights, Application Nos. 43577/98, 43579/98, 6 July 2005, para 113.

⁴¹ *Ergi v. Turkey*, European Court of Human Rights, Application No. 23818/94, 28 July 1998, para 84.

⁴² *Al-Skeini v. the United Kingdom*, Judgment, European Court of Human Rights, Application No. 55721/07, 7 July 2011, para. 163.

⁴³ *Isayeva, Yusupova, and Bazayeva v. Russia*, European Court of Human Rights, Applications Nos. 57947/00, 57948/00, 57949/00, 6 July 2005, para 211.

1.3.2. Promptness

The European Court of Human Rights has consistently held that: '[i]t is beyond doubt that a requirement of promptness and reasonable expedition is implicit in the context. A prompt response by the authorities in investigating allegations [...] may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.'⁴⁴ This conclusion applies equally to commissions of inquiry, particularly given the unique role of such bodies vis-à-vis public confidence. Of course, while commissions should be convened promptly where appropriate, the passage of time should not be regarded as a legitimate factor precluding an investigation. For example, the Saville Inquiry was launched 26 years after Bloody Sunday, while the Nanavanti commission was launched 16 years after the 1984 riots.

1.3.3. Independence

To be considered independent, a 'tribunal must be subjectively free of personal prejudice or bias',⁴⁵ and 'impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect'.⁴⁶ It is noted that independence and objective impartiality are closely linked.⁴⁷ In addition to the independence of the members of the commission, the evidence that is used by the commission in their investigation must also be independent and not subject to bias. The requirement of independence will be addressed in greater detail below.⁴⁸

1.3.4. Public scrutiny

The European Court of Human Rights has consistently held that 'there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases however, the victim's next-of-kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests'.⁴⁹ It must be noted that this requirement does not hold that the public must have access to 'secret' documents which may legitimately be deemed to affect national security, but rather that there be public scrutiny of the process itself, including the opportunity to challenge any findings.⁵⁰ The requirement of public scrutiny is an essential element with respect to commissions

⁴⁴ *Bati v. Turkey*, European Court of Human Rights, Application No. 33097/96, 57834/00, 3 September 2004, para 136; UN OHCHR, 'Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (9 August 1999) UN Doc HR/P/PT/8/Rev.1, 6.

⁴⁵ *Findlay v. the United Kingdom*, European Court of Human Rights, Application No. 22107/93, 25 February 1997, para 73.

⁴⁶ *Findlay v. the United Kingdom*, European Court of Human Rights, Application No. 22107/93, 25 February 1997, para 73.

⁴⁷ *Findlay v. the United Kingdom*, European Court of Human Rights, Application No. 22107/93, 25 February 1997, para 73.

⁴⁸ See Section 3 on Independence and Impartiality.

⁴⁹ *Finucane v. the United Kingdom*, European Court of Human Rights, Application No. 29178/95, 1 October 2003, para 213.

⁵⁰ UN OHCHR, 'Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (9 August 1999) UN Doc HR/P/PT/8/Rev.1, 7.

of inquiry given that such bodies are typically established consequent to a lack of public confidence in [S]tate agents or institutions. In order to address this issue, public confidence in the working of any commission of inquiry must be facilitated, and a commission should clearly specify how it operates, and on what basis. For example, a commission should define the applicable standard of proof,⁵¹ in order to facilitate a deeper public understanding of the investigated incident(s).⁵²

1.4 Potential benefits of an effective commission of inquiry

Commissions of inquiry can be used to step outside a State's normal investigative mechanism to analyse the system from a broader perspective than that normally possible during an investigation focused on determining individual responsibility. As such, a commission of inquiry can be 'a powerful tool in uncovering and bringing an end to *patterns* of violations'.⁵³ Importantly, when used as a component of a genuine investigation, [C]ommissions of [i]nquiry also contributes towards fulfilment of States' international legal obligations.⁵⁴

The unique characteristics of a commission of inquiry – when compared to traditional criminal investigations – also means that they may promote 'democratic, citizen-driven participation in human rights monitoring',⁵⁵ and facilitate an increased role for the victim, providing an opportunity to tell their story in public. International law recognises that measures of satisfaction facilitated by a commission – such as the public acknowledgement of the truth, the rehabilitation of the victims, or official apologies by the State – constitute a form of reparation;⁵⁶ they take the 'first steps in addressing victims' right to know the truth and identifying reparation measures in consultation with victims'.⁵⁷

⁵¹ Academic Platform Switzerland UN & Geneva Academy of International Humanitarian Law and Human Rights, 'The UN Human Rights Council: Commissions of Inquiry Conference Brief' (December 2011), 2. Available at: www.adh-geneve.ch/docs/news/HR-council-inquiry-conference-brief.pdf. Last accessed at 28 August 2013.; UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (18 January 2012) UN Doc A/HRC/19/61, para 20.

⁵² UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (18 January 2012) UN Doc A/HRC/19/61, para 8.

⁵³ UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (18 January 2012) UN Doc A/HRC/19/61, para 7 (emphasis added).

⁵⁴ Article 146 Geneva Convention IV; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Article 2; UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (18 January 2012) UN Doc A/HRC/19/61, para 7.

⁵⁵ UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (18 January 2012) UN Doc A/HRC/19/61, para 23.

⁵⁶ UN General Assembly, 'Basic principles and guidelines on the right to a remedy and preparation for victims of gross violations of international human rights law and serious violations of international humanitarian law' (21 March 2006) UN Doc E/CN.4/2000/62, para 22.

⁵⁷ UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (18 January 2012) UN Doc A/HRC/19/61, para 23.

For example, in the UK, the strong public demand for an independent and impartial investigation into the events of Bloody Sunday ensured that, unlike a previous inquiry, the Saville Commission conducted its work free from political or governmental influence.⁵⁸ The publication of the report of the Saville commission led the British Minister of Defence and Prime Minister to offer official and public apologies to the victims of Bloody Sunday.⁵⁹ Similarly, the Canadian commission, which examined the extraordinary rendition of Maher Arar, cleared him of any suspicion of possible criminal involvement in terrorist activities.⁶⁰ When established *post-facto*, such inquiries can correct historical records and provide the victims with different measures of satisfaction, notably in the form of public apologies by the State.⁶¹

There are limited instances wherein the findings and recommendations of a commission led to criminal prosecutions. In the commission of inquiry into the deployment of Canadian forces to Somalia, several soldiers' received jail terms as a result of the commission's findings.⁶² However, it should be noted that due to the commission's investigative time being cut short, the commission was unable to trace responsibility through the chain of command,⁶³ as such, this commission cannot be regarded as satisfying the international human rights law obligations relating to an effective investigation, which requires that an investigation be capable of leading to the identification and punishment of all those responsible.⁶⁴

1.5 Challenges that a commission of inquiry must overcome

There is a significant danger that commissions of inquiry will be misused by States in order to evade accountability while providing an illusion of justice;⁶⁵ States can distort a commission's purpose and use it as a means to deflect criticism, to hamper criminal proceedings, and ultimately to avoid accountability.⁶⁶ For example, poorly constructed

⁵⁸ Human Rights Watch, World Report (2011), 436; Amnesty International, 'UK: Bloody Sunday Inquiry – Amnesty reaction' (15 June 2010). Available at: www.amnesty.org.uk/news_details.asp?NewsID=18817. Last accessed at 28 August 2013.; Amnesty International, 'Bloody Sunday inquiry vindicates the innocence of victims' (21 June 2010). Available at: www.amnesty.org.uk/news_details.asp?NewsID=18837. Last accessed at 28 August 2013.

⁵⁹ HC Deb 15 June 2010, vol. 511, col. 740.

⁶⁰ Report of the Events Relating to Maher Arar, 2006, 9. Available at: www.pch.gc.ca/cs-kc/arar/Arar_e.pdf. Last accessed at 28 August 2013.

⁶¹ A good example of this is provided by UK's 1998-2005 Commission of Inquiry Regarding Bloody Sunday in which Prime Minister David Cameron made a formal apology to the victims and their families at a House of Commons session. Source: HC Deb 15 June 2010, vol. 511, col. 740.

⁶² John DeMont and Luke Fisher, 'Somalia Inquiry's Damning Report' (14 July 1997) Maclean's Magazine.

⁶³ John DeMont and Luke Fisher, 'Somalia Inquiry's Damning Report' (14 July 1997) Maclean's Magazine.

⁶⁴ *Hugh Jordan v. the United Kingdom*, European Court of Human Rights, Application No. 24746/94, 4 August 2001, §107.

⁶⁵ Academic Platform Switzerland UN & Geneva Academy of International Humanitarian Law and Human Rights, 'The UN Human Rights Council: Commissions of Inquiry Conference Brief' (December 2011), 1. Available at: www.adh-geneve.ch/docs/news/HR-council-inquiry-conference-brief.pdf. Last accessed at 28 August 2013.

⁶⁶ UNHRC, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Phillip Alston' (2 May 2008) UN Doc A/HRC/8/3, paras 50, 51, 55, 56, 58: 'an ineffective commission can be more than just a waste of time and resources; it can contribute to impunity by deterring other initiatives, monopolizing available resources and making subsequent endeavours to prosecute difficult or impossible.'

mandates 'can lead to numerous problems including investigative irregularities and biased results'.⁶⁷ To avoid such issues, commissions must have the leeway to interpret their mandates in a manner appropriate to the context, in order to ensure the effectiveness of the investigative process.⁶⁸

In cases where the institutional environment was not conducive to a genuine investigative process, commissions of inquiry have been ineffective and have in fact undermined the purposes that they are intended to work towards. In particular, as illustrated by the cases of Ivory Coast and Sri Lanka,⁶⁹ political interference significantly affected the independence of the commission itself and as a result, commissions of inquiry in both countries have frustrated rather than enhanced accountability. Although commissions of inquiry are often created from political pressure, and in response to incidents implicating State agents, it is imperative that they 'transcend political matters and operate with neutrality, impartiality and independence'.⁷⁰ Adherence to international human rights law obligations relating to a genuine investigation can help ensure this outcome.

Unfortunately, there are numerous examples of commissions of inquiry that are utilised by States in a manner inconsistent with the requirements of a genuine investigation. This typically occurs under one of two situations: through the use of 'cosmetic inquiries' when government interference devalues the process, and where governments fail to respond to the commission's recommendations.

1.5.1. Cosmetic inquiries

In March 2012 the UN Human Rights Council issued a resolution finding that Sri Lanka's Lessons Learnt and Reconciliation Commission did not 'adequately address serious allegations of violations of international law'⁷¹ and called upon the Government of Sri Lanka to fulfil its legal obligation 'to initiate credible and independent actions to ensure justice, equity, accountability and reconciliation for all Sri Lankans'.⁷² The Government tried

⁶⁷ Meeting of Experts on the Establishment of Principles and Best Practices for International and National Commissions of Inquiry, International Institute of Higher Studies in Criminal Sciences (ISISC), Siracusa, Italy, 'An Empirical Analysis of United Nations Commissions of Inquiry: Toward the Development of a Standardized Methodology', March 14 – 17, 2013, 39.

⁶⁸ Academic Platform Switzerland UN & Geneva Academy of International Humanitarian Law and Human Rights, 'The UN Human Rights Council: Commissions of Inquiry Conference Brief' (December 2011), 2. Available at: www.adh-geneve.ch/docs/news/HR-council-inquiry-conference-brief.pdf. Last accessed at 28 August 2013.

⁶⁹ In this regard, see the public statement of the International Independent Group of Eminent Persons mandated to monitor the 2006 Commission of Inquiry to Investigate Alleged Serious Violations of Human Rights.; International Independent Group of Eminent Persons, 'The Presidential Commission's Public Inquiry Process So Far Falls Short of International Norms and Standards', 6 March 2008.

⁷⁰ Meeting of Experts on the Establishment of Principles and Best Practices for International and National Commissions of Inquiry, International Institute of Higher Studies in Criminal Sciences (ISISC), Siracusa, Italy, 'An Empirical Analysis of United Nations Commissions of Inquiry: Toward the Development of a Standardized Methodology', March 14 – 17, 2013, 12.

⁷¹ UN Human Rights Council, 'Promoting reconciliation and accountability in Sri Lanka' (22 March 2012) UN Doc A/HRC/19/L.2. Available at: www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session19/Pages/ResDecStat.aspx. Last accessed at 28 August 2013.

⁷² UN Human Rights Council, 'Promoting reconciliation and accountability in Sri Lanka' (22 March 2012) UN Doc A/HRC/19/L.2. Available at: www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session19/Pages/ResDecStat.aspx. Last accessed at 28 August 2013.

to repair the damage caused by the international response to the Lessons Learnt and Reconciliation Commission, through a 'cosmetic gesture' on accountability by announcing an army court of inquiry.⁷³ This court however, was equally as flawed as the original commission, as General Jagath Jayasuriya, who was the head of security forces in the conflict's primary battle zone, selected the members.⁷⁴

Similarly, the national commission of inquiry established in the Ivory Coast by the Ouattara government, which has been criticised for its partial and hastened investigation, has been perceived as an attempt to nullify the findings made by a previous international commission of inquiry about the responsibility of Ouattara's forces during the conflict.⁷⁵ In Canada, the government forced the commission investigating the torture-killing of Arone in Somalia, among other incidents, to a vastly premature completion date, significantly impairing the ability of the commission to carry out a genuine investigation.⁷⁶

The Valech commission in Chile was expressly barred in its mandate from revealing the identity of the State agents who had perpetrated serious violations of human rights during the Pinochet era.⁷⁷ This was due to the fact that the commission was focused around reparations and reconciliation, not criminal prosecution.⁷⁸

1.5.2 Government failure to respond to recommendations

With respect to the Nanavati commission in India, the government objected to the commission's recommendation for prosecution of senior police and administration officials on the grounds that their names had not been mentioned in any of the regular criminal proceedings that had been initiated, despite the evidence gathered against the officials during the inquiry. In Bahrain, although the commission itself was widely regarded as successful, its long-term effectiveness will depend upon whether the Government of Bahrain effectively accepts its recommendations and implements appropriate reforms. To date, although the Government of Bahrain has accepted the recommendations submitted by the commission,⁷⁹ they have not all been implemented.

⁷³ Human Rights Watch, 'Statement on the human rights situation in Sri Lanka at the Human Rights Council' (2 March 2012). Available at: www.hrw.org/news/2012/03/02/statement-human-rights-situation-sri-lanka-human-rights-council. Last accessed at 28 August 2013.

⁷⁴ Human Rights Watch, 'Statement on the human rights situation in Sri Lanka at the Human Rights Council' (2 March 2012). Available at: www.hrw.org/news/2012/03/02/statement-human-rights-situation-sri-lanka-human-rights-council. Last accessed at 28 August 2013.

⁷⁵ *Fraternité Matin*, by Cyprien Tiesse, 'Crise post-électorale/ Matto Loma Cissé (Présidente de la Commission nationale d'enquête) : "Notre mission, enquêter sans passion ni parti pris"' (1 Janvier 2012). Available at fr.allafrica.com/stories/201201020683.html?viewall=1. Last accessed at 29 August 2013.

⁷⁶ John DeMont and Luke Fisher, 'Somalia Inquiry's Damning Report' (14 July 1997) *Maclean's Magazine*.

⁷⁷ Decreto Supremo No. 1.040, Ministerio del Interior, Subsecretaria del Interior, 26 September 2003, Article. 3: "En el cumplimiento de su objeto, la Comisión no podrá, de manera alguna, asumir de carácter jurisdiccional y, en consecuencia, no podrá pronunciarse sobre la responsabilidad que con arreglo a la ley pudiere haber a personas individuales por los hechos de que haya tomado conocimiento." Translated as: "In fulfillment of its objective, the Commission cannot in any way assume jurisdiction, and as a consequence it cannot determine individual responsibility under the law for facts which it has taken into consideration."

⁷⁸ Decreto Supremo No. 1.040, Ministerio del Interior, Subsecretaria del Interior, 26 September 2003, Article. 2. See also Decreto Supremo No. 1.040, Ministerio del Interior, Subsecretaria del Interior, 26 September 2003, preamble.

⁷⁹ BICI, 'Report of the Bahrain Commission of Inquiry' (10 December 2011), paras 1715 – 1725.

1.6 Conclusion

Commissions of inquiry are vulnerable to misuse by the governments establishing them, and it appears that commissions of inquiry are often used to provide an illusion of investigative rigour, while in fact facilitating continued impunity. In many respects this is unsurprising given that it is State agents or institutions that are often implicated in the events being investigated by such commissions. However, under international human rights law States are subject to an explicit obligation to investigate any alleged human rights violations committed by State authorities, and a number of criteria have been established to regulate this process. Specifically, any investigation must be effective, prompt, independent, and subject to an element of public scrutiny. It is presented that commissions of inquiry should be viewed as an element of this overall investigative process. While a commission of inquiry will not necessarily satisfy the obligation to investigate in and of itself,⁸⁰ it can constitute a vital component in a process of genuine investigation and may facilitate satisfaction of the overall obligation.

In particular, commissions of inquiry have the potential to step outside the State system, ensuring an independent investigation of the facts at hand, and can look more broadly at the State system, thereby identifying issues necessitating further investigation. Indeed this is perhaps the key role of a commission of inquiry: they may inform the public of the truth of certain events, and establish whether a criminal investigation is necessitated. Different components of commissions of inquiry will now be discussed in light of the international obligation to conduct a genuine investigation.

⁸⁰ Recalling that, in certain instances, this obligation can only be satisfied by the prosecution of those responsible. For example, a Commission may establish that there are no grounds for further investigation and as such the State's obligation to investigate may be fulfilled (provided that the process was genuine). On the other hand, if the Commission finds that further investigation is necessitated, States will be required to take further steps to fulfil the obligation, namely criminal investigation and, if appropriate, prosecution.

2. Establishment of a national commission of inquiry

2.1 Mandate

2.1.1 Terms of reference

How a commission's terms of reference are defined significantly impacts on its success *vis-à-vis* the public scrutiny requirement associated with a genuine investigation.⁸¹ The terms of reference can give legitimacy to the proceedings, assist the commissioners in determining the inquiry's scope, and establish criteria by which a commission's findings may be judged.⁸² Public disclosure around the commission's terms of reference and working methods is essential to ensuring public confidence in the proceedings and the commission's findings.⁸³ Accordingly, it is important for the commission to keep the public informed of any amendments to its initial mandate.⁸⁴

As Méndez recommends, a commission should be created by a legal instrument that is appropriate to the context and reflects the status that States should afford to such bodies.⁸⁵ The commission must be characterised as an 'official body' whose findings will be respected by the State,⁸⁶ regardless of their technical legal status.⁸⁷ According to the Commission on Human Rights, the decision to establish a commission, and its composition, should be based upon broad public consultations, which pay particular regard to views of victims and survivors.⁸⁸

Regardless of the form of the legal instrument creating the commission of inquiry, it should clearly define the terms of reference of the commission's mandate, with particular attention paid to the establishment of a clear temporal and/or geographical framework

⁸¹ UNHRC, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Phillip Alston' (2 May 2008) UN Doc A/HRC/8/3, para 34.

⁸² Academic Platform Switzerland UN & Geneva Academy of International Humanitarian Law and Human Rights, 'The UN Human Rights Council: Commissions of Inquiry Conference Brief' (December 2011). Available at: www.adh-geneve.ch/docs/news/HR-council-inquiry-conference-brief.pdf. Last accessed at 28 August 2013.

⁸³ UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (18 January 2012) UN Doc A/HRC/19/61, para 66. It is worth noting that this project has been able to access the terms of reference of all the researched commissions with the exception of Malaysia's 1999 Royal Commission of Inquiry to Enquire Into the Injuries of Dato' Seri Anwar Ibrahim Whilst In Police Custody.

⁸⁴ UN OHCHR, 'Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (9 August 1999) UN Doc HR/P/PT/8/Rev.1, para 107.; Minnesota Protocol: United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (1991) UN Doc E/ST/CSDHA/.12, Section D.

⁸⁵ UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (18 January 2012) UN Doc A/HRC/19/61, para 64.

⁸⁶ UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (18 January 2012) UN Doc A/HRC/19/61, para 65.

⁸⁷ Such as whether or not they must be implemented.

⁸⁸ Commission on Human Rights, Promotion and Protection of Human Rights, 'Updated Set of principles for the protection and promotion of human rights through action to combat impunity', (8 February 2005) UN Doc E/CN.4/2005/102/Add.1, principle 6.

appropriate to the issue being investigated.⁸⁹ The terms of reference must delimit the inquiry's scope, citing with precision the events and issues to be investigated and addressed in the commission's final report in a neutral manner so that they do not suggest a predetermined outcome.⁹⁰ To this end, in order to satisfy the requirement of effectiveness of the investigation, terms of reference must not limit investigations inappropriately.⁹¹ Accordingly, commissions must be able to interpret their mandate in a flexible way,⁹² and this is in fact a feature common to most of the researched commissions of inquiry: either an ability to interpret the mandate is specified explicitly in the terms of mandate,

⁸⁹ UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (18 January 2012) UN Doc A/HRC/19/61, para 64. It is worth mentioning that unlike the previous commissions on the same issue, the terms of reference of India's 2000 Nanavati Commission of Inquiry on the 1984 anti-Sikh Riots were quite detailed and exhaustive in terms of the scope and subject matter of its inquiry, the time frame and the geographical limits. Source: Notification of Appointment of the Commission, Report of the Justice Nanavati Commission of Inquiry, Volume-II, Annexure-I. Available at: mha.nic.in/pdfs/Nanavati-II_eng.pdf. Last accessed at 28 August 2013. Moreover, in the UK's 2008-2011 Baha Mousa Public Inquiry the terms of reference were neither overly broad, nor overly narrow in that the Inquiry could address not just the death of Baha Mousa, but also of those detained alongside Baha Mousa, and the specific practice of conditioning detainees. As such, the terms of reference conform with section 5(6) Inquiries Act 2005.

⁹⁰ UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (18 January 2012) UN Doc A/HRC/19/61, para 64; UN OHCHR, 'Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (9 August 1999) UN Doc HR/P/PT/8/Rev.1, para 107; Minnesota Protocol: United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (1991) UN Doc E/ST/CSDHA/12, Section D.

⁹¹ UN OHCHR, 'Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (9 August 1999) UN Doc HR/P/PT/8/Rev.1, para 107; Minnesota Protocol: United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (1991) UN Doc E/ST/CSDHA/12, Section D.; *Ergi v. Turkey*, European Court of Human Rights, Application No. 23818/94, 28 July 1998, para 84; Al-Skeini case at para 163. UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (18 January 2012) UN Doc A/HRC/19/61, para 64; UN OHCHR, 'Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (9 August 1999) UN Doc HR/P/PT/8/Rev.1, para 107; Minnesota Protocol: United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (1991) UN Doc E/ST/CSDHA/12, Section D.;

⁹² Academic Platform Switzerland UN & Geneva Academy of International Humanitarian Law and Human Rights, 'The UN Human Rights Council: Commissions of Inquiry Conference Brief' (December 2011), 2. Available at: www.adh-geneve.ch/docs/news/HR-council-inquiry-conference-brief.pdf. Last accessed at 28 August 2013.

or the commission[s] interpreted their mandate as including this flexibility.⁹³ However, it is important to note that flexibility concerning the interpretation of the terms of reference does not necessarily imply that the commissions satisfied the requirements of a genuine investigation.

The authorising instrument should also establish the commission's powers and attributes including the power to seek the assistance of law enforcement authorities if required, including for the purpose of calling for testimonies, inspecting physical locations as appropriate, and/or calling for the delivery of relevant documents.⁹⁴ An important task of any commission of inquiry is to analyse facts on the ground with regard to applicable law. Thus, it is crucial that a commission can independently and freely conduct investigations on the ground in order to establish the facts for itself. In this regard it is essential that the commission is given sufficient time to work effectively.⁹⁵

2.1.2. Preservation of commission's archives

The terms of reference of commissions of inquiry should highlight the importance of preserving the commission's archives. At the outset of their work, commissions should clarify the conditions that will govern access to their documents, including conditions aimed at preventing disclosure of confidential information while facilitating public access to their archives.⁹⁶ The previous experience on this matter does not show a clear pattern with some inquiries granting public access and others denying it and even destroying the documents after a period of time. On the one hand, the UK's 1998-2005 Commission of Inquiry Regarding Bloody Sunday published all the material collected and considered by the Commission, including the daily transcripts and the preliminary rulings, as they were

⁹³ Canada's 1995-1997 Commission of Inquiry into the Deployment of Canadian Forces to Somalia: the Commission was able to interpret its terms of reference as permitting it to inquire into racist conduct, insofar as it reflected systemic problems within the Canadian Forces. Source: Report of the Somalia Commission of Inquiry, Introduction, 1997. Available at: www.dnd.ca/somalia/vol1/v1c1e.htm. Last accessed at 28 August 2013.; India's 2000 Nanavati Commission of Inquiry on the 1984 anti-Sikh Riots: The Commission enjoyed autonomy in its work and had the power to regulate its own procedure on matters not provided under the Rules. Accordingly, it discussed the procedure to be adopted with the persons present in the first public hearing and framed its rules after hearing all the parties. Source: Report of the Justice Nanavati Commission of Inquiry, Volume-I, 11&13. Available at: mha.nic.in/pdfs/Nanavati-I_eng.pdf. Last accessed at 28 August 2013.; Malaysia's 1999 Royal Commission of Inquiry to Enquire Into the Injuries of Dato' Seri Anwar Ibrahim Whilst In Police Custody: The Commission was free to interpret the terms of reference. It decided that in case of any conflict between the Bahasa Malaysia text and its English translation, the Bahasa Malaysia text would prevail. The Commission referred to the relevant sections of the Penal Code to derive the contextual meaning of the terms used in the terms of reference. Source: Report of the Royal Commission of Inquiry to Enquire into the Injuries of Dato' Seri Anwar Ibrahim whilst in Police Custody, 9-13.

⁹⁴ UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (18 January 2012) UN Doc A/HRC/19/61, para 65; Commission on Human Rights, Promotion and Protection of Human Rights, 'Updated Set of principles for the protection and promotion of human rights through action to combat impunity', (8 February 2005) UN Doc E/CN.4/2005/102/Add.1, Principle 8..

⁹⁵ Academic Platform Switzerland UN & Geneva Academy of International Humanitarian Law and Human Rights, 'The UN Human Rights Council: Commissions of Inquiry Conference Brief' (December 2011), 2. Available at: www.adh-geneve.ch/docs/news/HR-council-inquiry-conference-brief.pdf. Last accessed at 28 August 2013.

⁹⁶ Commission on Human Rights, Promotion and Protection of Human Rights, 'Updated Set of principles for the protection and promotion of human rights through action to combat impunity', (8 February 2005) UN Doc E/CN.4/2005/102/Add.1, Principle 8.

reviewed.⁹⁷ At the conclusion of the Inquiry, the website was updated to contain all the relevant information.⁹⁸ On the other hand, Israel's 2000-2003 Or Commission,⁹⁹ Chile's 2004 *Comisión Nacional de Prisión Política y Tortura*¹⁰⁰ and Bahrain's 2011 International Commission of Inquiry denied public access to the archives.¹⁰¹

2.1.3 Time frame of the commission

Méndez notes that in order to ensure public confidence in the working methods and findings of a commission of inquiry, it is essential that the public be informed in advance of when to expect the publication of the commission's final report.¹⁰² The commissions studied operated on the basis of different timeframes and some general lessons can be extracted from these experiences.

In order to meet the requirement of carrying out an effective investigation some flexibility might be required and extra time should be granted if required to fulfill the mandate of the commission. This was the case with respect to the Nanavanti,¹⁰³ and Bahrain¹⁰⁴ commissions of inquiry, in which extensions of the deadline were granted. However, it is

⁹⁷ UK's 1998-2005 Commission of Inquiry Regarding Bloody Sunday, 'Opening Statement', para 39.

⁹⁸ This information was composed of the Inquiry's background, including the entire Report, witnesses and evidence heard, and transcripts of the proceedings; press notices; and rulings and judgments related to the proceedings. Source: 'The Bloody Sunday Inquiry' (The Bloody Sunday Inquiry, 17 Oct. 2010). Available at: webarchive.nationalarchives.gov.uk/20101103103930/www.bloody-sunday-inquiry.org/index.html. Last accessed at 28 August 2013.

⁹⁹ This Commission led to public claims for the archives to be made publicly accessible. Source: Adalah – The Legal Research Center for Arab Minority Rights in Israel, 'Summary of the Findings and Conclusions of Adalah's 'The Accused' (October 2006), 2. Available at: www.adalah.org/features/october2000/accused-s-en.pdf. Last accessed at 28 August 2013.

¹⁰⁰ The evidence was sealed for 50 years therefore not being accessible for prosecutions. Source: United States Institute for Peace, Commission of Inquiry: Chile 03. Truth Commissions Digital Library. Available at: www.usip.org/publications/commission-inquiry-chile-03. Last accessed at 28 August 2013.

¹⁰¹ The records, including the database used by the Commission, would continue to exist outside Bahrain on a securely stored hard drive for a period of ten years after the report's submission. When ten years elapsed, the hard drive would be destroyed in order to protect the identity of all persons who gave information and evidence to the Commission. Source: Report of the Bahrain Commission of Inquiry, 10 December 2011, para 36.

¹⁰² UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (18 January 2012) UN Doc A/HRC/19/61, para 74.

¹⁰³ As required under S. 3(1) of the Act, the notification of appointment provided that the Commission shall submit its report to the Central Government as soon as possible but not later than six months from the date of its first sitting. The term of office of the Commission was extended from time to time by the Central Government and it was allowed to complete and submit its report.

¹⁰⁴ The establishing decree stipulates that the report must be submitted to the King no later than 30 October 2011. However, on the Commission's recommendation, the King extended the deadline for the Report's submission until 23 November 2011. Sources: Royal Order No. 28 of 2011, Article. 9; BICI, 'Report of the Bahrain Commission of Inquiry' (10 December 2011), appendix C, "Letter from His Majesty Granting Extension to the Commission."

noted that in Chile¹⁰⁵ and Malaysia¹⁰⁶ extensions were granted but that this was anticipated in the Presidential Decree in the case of Chile and in the Commissions of Inquiry Act for Malaysia, allowing for improved public scrutiny of the work of the commission.

It is important to note that reducing the expected time frame of a commission might severely impact the public's confidence with respect to the work of the commission and the government's commitment towards an effective investigation. This was the case regarding Canada's 1995-1997 Commission of Inquiry into the Deployment of Canadian Forces to Somalia where despite extensive powers provided in the Inquiries Act, and the request by the Commission for an extension, the Government decided that the Inquiry had lasted long enough and imposed an unexpectedly shortened deadline.¹⁰⁷ This was an unprecedented decision in Canada that was attributed to political reasons.¹⁰⁸ Nepal's Commissions of Inquiry Act authorises the Government to dissolve the Commission at any time if it deems that there is no need for the procedure any more,¹⁰⁹ without appropriate regulation this power can facilitate unwarranted interference in the work of a commission.

The timeframe a commission of inquiry has to work within will affect the standard of proof it can employ. The shorter the time the commission has to complete its work, the less rigorously the facts can be tested or established, and a lower standard of proof may have to be employed.¹¹⁰ However, the experience of UK's 1998-2005 Commission of Inquiry Regarding

¹⁰⁵ The presidential decree authorized the Commission to function for six months, with the possibility of a three-month extension if needed to complete its work. Source: Decreto Supremo No. 1.040, Ministerio del Interior, Subsecretaria del Interior, 26 September 2003, Article. 7.

¹⁰⁶ The Yang di-Pertuan Agong or the State Authority, as the case may be, can extend the tenure of the Commission from time to time. Source: Section 5 of the Commissions of Inquiry Act, Revised Act 119 Laws of Malaysia.

¹⁰⁷ The Inquiry did not even have time to consider the torture/killing of Arone, which was one of the main triggers for the Inquiry. The decision of January 10, 1997, removed any possibility of taking the Commission to its logical conclusion and fully expanding the focus up the chain of command. Sources: Report of the Somalia Commission of Inquiry, Executive Summary, 1997. Available at: www.dnd.ca/somalia/vol0/v0s1e.htm. Last accessed at 28 August 2013.; John DeMont and Luke Fisher, 'Somalia Inquiry's Damning Report' (14 July 1997) Maclean's Magazine.

¹⁰⁸ This imposed deadline was without precedent in Canada, which undoubtedly compromised and limited the Commission's findings. Suggestions were also made that the Inquiry was cut short to accommodate the 1997 election. Sources: Report of the Somalia Commission of Inquiry, Executive Summary, 1997. Available at: www.dnd.ca/somalia/vol0/v0s1e.htm. Last accessed at 28 August 2013.; Canadian Judicial Council, Reference Guide for Judges Appointed to Commissions of Inquiry, 2011, Appendix A, 38. Available at: www.cjc-ccm.gc.ca/cmslib/general/cjc_guide_judges_commissions_inquiry_en.pdf. Last accessed at 28 August 2013.

¹⁰⁹ Article 7 of the Act authorizes the Government to dissolve the Commission at any time by notification in the *Nepal Gazette*, if it deems that there is no need for the procedure any more. Source: . English version of the Act accessible on the website of the the Nepal Law Commission at www.lawcommission.gov.np/en/documents/func-startdown/1020/. Last accessed at 28 August 2013.

¹¹⁰ Academic Platform Switzerland UN & Geneva Academy of International Humanitarian Law and Human Rights, 'The UN Human Rights Council: Commissions of Inquiry Conference Brief' (December 2011), 3. Available at: www.adh-geneve.ch/docs/news/HR-council-inquiry-conference-brief.pdf. Last accessed at 28 August 2013.

Bloody Sunday also makes it clear that if the time frame of the commission is too long, it may impact the public confidence and lead to criticism both in terms of its effect on the victims and by means of the cost dominating the public debate rather than the findings.¹¹¹

2.1.4. Publication of the report

Both the Alston Report and the Istanbul Protocol recommend that commissions should be empowered to issue a public report within a reasonable period of time,¹¹² and it is submitted that this is imperative in terms of both satisfaction of the public scrutiny requirement associated with a genuine investigation and the broader goal of ensuring public confidence in the proceedings. It is vital that the content of the final report be determined solely by the commission members and is not subject to any form of prior censorship by any governmental authority.¹¹³ If a situation arises in which the commission is not unanimous in its findings, dissenting and concurring opinions by individual commissioners should be made a part of the report.¹¹⁴

¹¹¹ The majority of public criticism in the UK was due to the high costs of the investigation, which led Prime Minister David Cameron, in his speech on the day of the Report's publication, to insist that there would be "no more open-ended and costly inquiries into the past." The length of time of the Inquiry, over twelve years, was also criticised as affecting the report's relevance, and a human rights organisation reported that the lengthiness of the process was traumatising to the victims' families. Douglas Murray, in his book *Bloody Sunday: Truth, Lies, and the Saville Inquiry*, noted that the time and cost of the inquiry dominated the media, thereby diminishing the Inquiry's findings. Sources: Clarke, 'Was the Bloody Sunday report value for money?' at <www.bbc.co.uk/news/10292828>; 'Bloody Sunday inquiry "diminished" by delays and costs' Available at: www.bbc.co.uk/news/10183716. Last accessed at 28 August 2013.; Swaine, 'Bloody Sunday inquiry chairman Lord Saville works in £60,000 shed', Available at www.telegraph.co.uk/news/uknews/northernireland/7822335/Bloody-Sunday-inquiry-chairman-Lord-Saville-works-in-60000-garden-shed.html. Last accessed at 28 August 2013.; HC Deb 15 June 2010, vol. 511, col. 741.

¹¹² UN OHCHR, 'Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (9 August 1999) UN Doc HR/P/PT/8/Rev.1.; UNHRC, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Phillip Alston' (2 May 2008) UN Doc A/HRC/8/3, para 25.

¹¹³ UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (18 January 2012) UN Doc A/HRC/19/61, para 74.

¹¹⁴ UN OHCHR, 'Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (9 August 1999) UN Doc HR/P/PT/8/Rev.1.; UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (18 January 2012) UN Doc A/HRC/19/61, para 74.

The researched commissions of inquiry demonstrate many different approaches to the question of publication. The Indian,¹¹⁵ Malaysian,¹¹⁶ Nepali,¹¹⁷ and Israeli¹¹⁸ commissions examined did not have the power to publish their report and it was up to the government whether or not to make it public. On the other hand, commissions such as the UK's 2008-2011 Baha Mousa Public Inquiry or the 2010-2011 Commission of Inquiry on the Final Stages of the Civil War between the Liberation Tigers of Tamil Eelam and the Government of Sri Lanka, had the power to publish their report. The UK's 1998-2005 Commission of Inquiry Regarding Bloody Sunday reported its conclusions to the Secretary of State for Northern Ireland before they were made public, allegedly to check for national security concerns or breached human rights provisions, resulting in some distrust *vis-à-vis* public opinion.¹¹⁹ In Canada's 2004-2006 Commission of Inquiry into the actions of Canadian Officials in Relation to Maher Arar the Commission was tasked with writing two reports for the factual inquiry. A private report that incorporated matters of national security and confidentiality, and a public report that made the greatest possible reference

¹¹⁵ India's 2000 Nanavati Commission of Inquiry on the 1984 anti-Sikh Riots: After repeated requests from the public to make the report immediately public, the Government released it after tabling the report before Parliament. All records, including the evidence tendered before the Commission, was to be retained by the Commission and submitted along with the report to the Central Government under R.7 of the Rules. The Act nowhere expressly provides that the report has to be made public. The Government was not bound to make it public, irrespective of whether it accepted or rejected the report. Section 3 (4) only requires the Government to place it before the Parliament or the Legislature along with a Memorandum within six months of its submission. Source: Report of Working Group of National Integration Council to Study Reports of the Commissions of Inquiry on Communal Riots, Ministry of Home Affairs, Government of India (2007), 4, para 8.

¹¹⁶ Malaysia's 1999 Royal Commission of Inquiry to Enquire Into the Injuries of Dato' Seri Anwar Ibrahim Whilst In Police Custody: "Having fully publicized these proceedings, we are firmly of the opinion that the interests of the Nation will be best served if this Report is made public immediately after its presentation to your Most Excellent Majesty." Source: Report of the Royal Commission of Inquiry to Enquire into the Injuries of Dato' Seri Anwar Ibrahim whilst in Police Custody, 88. There was much public concern and outrage about the confidentiality of the admission of assault before the Commission. The public welcomed making the report public, and was joined in this respect by the European Union.

¹¹⁷ Nepal's 2008 Ram Hari Shrestha Commission of Inquiry: The Commissions of Inquiry Act somewhat limits the Commissioners' independence by restricting their capacity to make public their findings, a decision which is left to the discretion of the government. Indeed, Article 8.A states that all the activities of the Commission shall be kept secret, and that only information which does not contradict national interests in terms of sovereignty, public peace and order and other strategic matters, should be made public. Source: Commission of Inquiry Act 1969, Article 8.A (English version of the Act accessible on the website of the the Nepal Law Commission at www.lawcommission.gov.np/en/documents/func-startdown/1020/).

¹¹⁸ Israel's 2008-2011 Special Investigatory Commission on the Targeted Killing of Salah Shehadeh: Under Article 4 of the Appointment Letter of the Prime Minister, the rules set regarding "military investigation" in Article 539A of the Military Justice Law 1955 or Article 17 of the General Security Services law 2002 do apply to the committee of examination. Such articles can lead to a powerless committee of examination, whose findings are confidential and cannot be used to determine criminal accountability. Source: HCJ [The Supreme Court sitting as the High Court of Justice] 8794/03, Hess v. The Military Advocate General (decision delivered on 23 December 2008), para 10. Dealing with secret evidence and according to Article 6 of the Appointment Letter, the committee produced two reports; one for publication and one classified report containing the main point of the report, including "facts that cannot be disclosed for reasons of national security". Source: www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings/Salah_Shehadeh-Special_Investigatory_Commission_27-Feb-2011, para 5. Last accessed at 28 August 2013.

¹¹⁹ HC Deb 29 Jan 1998, vol. 305, col. 502; Eamonn McCann, 'Cooking the Bloody Sunday Report,' *The Guardian* (London, 24 Feb. 2010). Available at: www.guardian.co.uk/commentisfree/2010/feb/24/bloody-sunday-report-retained. Last accessed at 28 August 2013.

to matters heard in confidential hearings and the basis for any conclusions made by Justice O'Connor.¹²⁰

The report should be disseminated widely and thus published in a manner that makes it accessible to the broadest audience possible.¹²¹ To ensure public confidence in the working methods and findings of a commission of inquiry, it may be beneficial that the public be informed in advance of when to expect the publication of the commission's final report,¹²² something specifically allowed by Malaysia's Law.¹²³

2.2 Composition

The Méndez Report suggests that commissioners should be chosen according to criteria that ensure both the impartiality and independence of the commission.¹²⁴ Commissioners should 'enjoy a stature and recognition within the local community that will inspire confidence in the public.'¹²⁵ Moreover, commissioners should be 'persons of such high moral character and professional achievement' that they dispel fears of participation and make the commission an approachable and trustworthy body.¹²⁶ Canada's 1995-1997

¹²⁰ Canadian Judicial Council, Reference Guide for Judges Appointed to Commissions of Inquiry, 2011, Appendix A, 32. Available at: www.cjc-ccm.gc.ca/cmslib/general/cjc_guide_judges_commissions_inquiry_en.pdf. Last accessed at 28 August 2013.

¹²¹ UNHRC, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Phillip Alston' (2 May 2008) UN Doc A/HRC/8/3, para 25.; UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (18 January 2012) UN Doc A/HRC/19/61, para 77.

¹²² UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (18 January 2012) UN Doc A/HRC/19/61, para 74.

¹²³ At the discretion of the Yang di-Pertuan Agong or the State Authority, the instrument of appointment may also determine issues such as the date of submission of the final report. Source: Section 2 ,Revised Act 119 Laws of Malaysia. However, in this case the Commission was authorised to determine an appropriate period of time to complete the inquiry and submit its report. Report of the Royal Commission of Inquiry to Enquire into the Injuries of Dato' Seri Anwar Ibrahim whilst in Police Custody, vii

¹²⁴ UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (18 January 2012) UN Doc A/HRC/19/61, para 60.

¹²⁵ UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (18 January 2012) UN Doc A/HRC/19/61, para 60; Commission on Human Rights, Promotion and Protection of Human Rights, 'Updated Set of principles for the protection and promotion of human rights through action to combat impunity', (8 February 2005) UN Doc E/CN.4/2005/102/Add.1, Principle 7.; UNHRC, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Phillip Alston' (2 May 2008) UN Doc A/HRC/8/3, para 25.

¹²⁶ UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (18 January 2012) UN Doc A/HRC/19/61, para 60.

Commission of Inquiry into the Deployment of Canadian Forces to Somalia¹²⁷ and Sri Lanka's Commission¹²⁸ serve as examples of how the appointment of members perceived as non-independent might be interpreted as evidence of a lack of commitment to the Inquiry on the part of the Government. According to the Minnesota Protocol, there is no ideal number of commissioners that should make up a commission; however if the number of commissioners is limited to just one or two individuals, the objectivity of the investigation and findings may be diminished, either in fact or perception.¹²⁹

The desired profile of a commissioner varies according to the particular circumstances in which the commission is established and each State's legal culture.¹³⁰ For example, Méndez suggests that 'States may wish to ensure representation of the entire political or ideological spectrum, while others may not', but in all cases they must not be partisan.¹³¹ Additionally, commissions must have the appropriate expertise to conduct effective investigations.¹³² This includes, but is not limited to, the inclusion of individuals with experience in fact-finding methodologies and the assessment of evidence quality, including those with backgrounds in medicine, psychiatric and forensic science, law, and journalism.¹³³

¹²⁷ The original Orders in Council appointed Anne-Marie Doyle, a career public servant, as a commissioner. Following intense media scrutiny and public pressure that she had been selected for her closeness to Deputy Defence Minister Fowler, she was replaced by Judge of the Ontario Court of Justice, Robert Rutherford. Anne-Marie Doyle's selection was considered, by Judge Létourneau, to reflect a lack of commitment to the Inquiry on the part of the Government. Sources: John DeMont and Luke Fisher, 'Somalia Inquiry's Damning Report' (14 July 1997) Maclean's Magazine.; Canadian Judicial Council, Reference Guide for Judges Appointed to Commissions of Inquiry, 2011, Appendix A, 37. Available at: www.cjc-ccm.gc.ca/cmslib/general/cjc_guide_judges_commissions_inquiry_en.pdf. Last accessed at 28 August 2013.

¹²⁸ 2010-2011 Commission of Inquiry on the Final Stages of the Civil War between the Liberation Tigers of Tamil Eelam and the Government of Sri Lanka: The U.N. Panel expressed deep concern that at least three of the commissioners had "*serious conflicts of interest*," which compromised the LLRC's ability to function with impartiality and independence, and also undermined the public perception of the commission as independent. Source: UN Secretary-General (UNSG), 'Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka' (31 March 2011) para 306. Available at: www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf. Last accessed at 18 July 2012.

¹²⁹ Minnesota Protocol: United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (1991) UN Doc E/ST/CSDHA/.12, Section D.

¹³⁰ UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (18 January 2012) UN Doc A/HRC/19/61, para 61.

¹³¹ UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (18 January 2012) UN Doc A/HRC/19/61, para 61.

¹³² UNHRC, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Phillip Alston' (2 May 2008) UN Doc A/HRC/8/3, para 32.

¹³³ Minnesota Protocol: United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (1991) UN Doc E/ST/CSDHA/.12, Section D.; UN OHCHR, 'Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (9 August 1999) UN Doc HR/P/PT/8/Rev.1, para 109.; Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (1989) UN Doc E/1989/89, Principle 11; Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Assembly resolution 55/89, Annex, Principle 5(a).

Where the violations subject to the commission's investigation have ethnic, racial or religious dimensions, the inclusion of individuals who understand the maltreatment of such groups is important.¹³⁴ However, Méndez argues that such factors should be taken into account in determining a commissions' composition only in so far as they do not diminish 'the standards of expertise and professionalism'.¹³⁵ It is noted that the lack of diversity of the Sri Lankan commission led to criticism from the UN.¹³⁶

On this matter, it is worth noting that in England and Australia there are no specific qualifications for the appointment of commissioners. During the last 25 years, however, there has been a distinct tendency to appoint lawyers, whether practitioners or serving, or retired judges, as members of commissions of inquiry.¹³⁷ However, the participation of serving judges was called into question during the Bosire Commission in Kenya.¹³⁸ The Commission in its report specifically recommended that in future serving judges should not be appointed to membership of a commission of inquiry because judges who serve in politically charged inquiries run the risk of being dragged into politics and having their reputation for impartiality tainted. Moreover, although judges would be suitable for appointment to inquisitorial inquiries, they may not be well versed in the specific techniques required in social research.¹³⁹ In the United States, the American Bar Association in 1969 issued the American Code of Judicial Conduct, which prohibits judges from serving on inquiries unless these are concerned with law reform or the administration of justice.¹⁴⁰

It is widely acknowledged that impartial, expert counsel should assist commissions of inquiry.¹⁴¹ In the researched commissions, the assistance by experts and advisors

¹³⁴ UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (18 January 2012) UN Doc A/HRC/19/61, para 62; Commission on Human Rights, Promotion and Protection of Human Rights, 'Updated Set of principles for the protection and promotion of human rights through action to combat impunity', (8 February 2005) UN Doc E/CN.4/2005/102/Add.1, Principle 7; UNHRC, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Phillip Alston' (2 May 2008) UN Doc A/HRC/8/3, para 25.

¹³⁵ UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (18 January 2012) UN Doc A/HRC/19/61, para 62.

¹³⁶ The UN Panel also found that the commissioners did not reflect the diversity of Sri Lankan society, did not provide differing perspectives of the conflict, and that all of the commissioner's expertise was not clearly relevant to the inquiry. Source: UN Secretary-General (UNSG), 'Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka' (31 March 2011) para 309. Available at: www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf. Last accessed at 18 July 2012.

¹³⁷ Africa Centre for Open Governance, 'A study of Commissions of Inquiries in Kenya' (2007), 4.

¹³⁸ See, 'Probe for Kenya's biggest scandal', BBC News, 24 February 2003; 'Public inquiry into Kenya gold scam', BBC News, 14 March 2003.

¹³⁹ Africa Centre for Open Governance, 'A study of Commissions of Inquiries in Kenya' (2007), 6-7.

¹⁴⁰ Africa Centre for Open Governance, 'A study of Commissions of Inquiries in Kenya' (2007), 6.

¹⁴¹ Minnesota Protocol: United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (1991) UN Doc E/ST/CSDHA/12, Section D; UN OHCHR, 'Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (9 August 1999) UN Doc HR/P/PT/8/Rev.1, para 111.

appears as a regular feature.¹⁴² If such a commission is tasked with investigating alleged governmental misconduct, then such counsel should be drawn from outside that State's civil service,¹⁴³ although it is noted that this factor alone will not satisfy the requirements of independence and impartiality.¹⁴⁴ Moreover, technical expertise should be available to commissions, such as in pathology, forensic science and ballistics.¹⁴⁵ Finally, the impartiality, comprehensiveness, and credibility of a commissions' investigation hinges on the extent to which a commission can rely on its own investigators.¹⁴⁶

2.3 Funding

Transparent funding and the provision of sufficient resources to carry out the mandate are also factors by which the formal independence of a commission can be assessed.¹⁴⁷ A number of the researched commissions of inquiry demonstrated transparency concerning

¹⁴² Canada's 1995-1997 Commission of Inquiry into the Deployment of Canadian Forces to Somalia: Numerous military personnel and independent experts and consultants were contacted for information on military ethics, training, and leadership. Source: Report of the Somalia Commission of Inquiry, Introduction, 1997, Annex 8. Available at: www.dnd.ca/somalia/vol1/v1c1e.htm. Last accessed at 28 August 2013.; Canada's 2004-2006 Commission of Inquiry into the actions of Canadian Officials in Relation to Maher Arar: was authorised to rent facilities in accordance with Treasury Board policies and hire experts and other persons. Source: Canadian Judicial Council, Reference Guide for Judges Appointed to Commissions of Inquiry, 2011, Appendix A, 32. Available at: www.cjc-ccm.gc.ca/cmslib/general/cjc_guide_judges_commissions_inquiry_en.pdf. Last accessed at 28 August 2013.; 2011-2012 Ivory Coast's 2011-2012 National Commission of Inquiry into Post-Election Violence: The head of the Commission, Matto Loma Cissé stated that the Commission was supported by experts as well as investigators recruited from the population based on their studies or education. Source: *Fraternité Matin*, by Cyprien Tiesse, 'Crise post-électorale/ Matto Loma Cissé (Présidente de la Commission nationale d'enquête) : "Notre mission, enquêter sans passion ni parti pris"' (1 Janvier 2012). Available at frallafrica.com/stories/201201020683.html?viewall=1. Last accessed at 29 August 2013.; India's 2000 Nanavati Commission of Inquiry on the 1984 anti-Sikh Riots: The Commission had the power to appoint persons with special knowledge of any matter connected to the inquiry as assessors to assist and advise it, with the advice not being binding on the commission. The Commission, in its report, however, does not make any mention of advisers, if any, appointed by the Commission, or assistance sought from any investigative agency. Source: S. 5-B of the Act and R. 6 of the Rules.

¹⁴³ Minnesota Protocol: United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (1991) UN Doc E/ST/CSDHA/.12, Section D.

¹⁴⁴ See, for example, the extent of influence exerted by the Attorney General's office in relation to the 2006 Commission of Inquiry to Investigate and Inquire Into Alleged Serious Violations of Human Rights in Sri Lanka, in International Independent Group of Eminent Persons, 'The Members of the IIEGP Submit Their Concluding Public Statement on the Work of the Commission of Inquiry and Find a Lack of Political Will to Support a Search for the Truth', 15 April 2008.

¹⁴⁵ Minnesota Protocol: United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (1991) UN Doc E/ST/CSDHA/.12, Section D.

¹⁴⁶ Minnesota Protocol: United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (1991) UN Doc E/ST/CSDHA/.12, Section D.

¹⁴⁷ UNHRC, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Phillip Alston' (2 May 2008) UN Doc A/HRC/8/3, para 25.

its cost,¹⁴⁸ while Bahrain's commission was subject to an external audit to ensure accuracy and transparency.¹⁴⁹

However, the UK's 1998-2005 Commission of Inquiry Regarding Bloody Sunday was criticised for its high cost and serves as evidence of the fact that commissions perceived as overly costly, or as improperly managing public resources might also harm the public perceptions of commissions of inquiry.¹⁵⁰ The public criticism in the UK due to the high costs of the investigation, led Prime Minister David Cameron, in his speech on the day of the Report's publication, to insist that there would be 'no more open-ended and costly inquiries into the past.'¹⁵¹

¹⁴⁸ Canada's 1995-1997 Commission of Inquiry into the Deployment of Canadian Forces to Somalia: The Commission of Inquiry cost was publicly available. Source: John DeMont and Luke Fisher, 'Somalia Inquiry's Damning Report' (14 July 1997) *Maclean's Magazine*; UK's 1998-2005 Commission of Inquiry Regarding Bloody Sunday: The cost was publicly available. Lord Saville defended the costs of the inquiry in front of the Northern Ireland Affairs Committee. Sources: 'Bloody Sunday Inquiry: Saville has "no regrets,"' BBC News (London, 13 Oct. 2010). Available at www.bbc.co.uk/news/uk-northern-ireland-11536743. Last accessed at 28 August 2013. For analysis of costs, see 'Was the Bloody Sunday report value for money?'. Available at www.bbc.co.uk/news/10292828. Last accessed at 28 August 2013; UK's 2008-2011 Baha Mousa Public Inquiry: The inquiry's structural independence is reinforced by its transparent funding and it seems to be provided with sufficient resources to operate. The Secretary of State was accountable to Parliament for the funding and overall support given to the Inquiry. The Inquiry Chairperson was responsible and accountable for the proper management of public resources and any expenditure resulting from Inquiry business through supervision of the Inquiry Secretary by the Permanent Secretary of the Ministry of Defence. Sources: Baha Mousa Public Inquiry Financial Memorandum paras. 10-12. Available at: www.bahamousainquiry.org/linkedfiles/baha_mousa/administration/management_statement.pdf. Last accessed at 28 August 2013. Baha Mousa Public Inquiry Website, Costs Index. Available at: www.bahamousainquiry.org/costs/index.htm. Last accessed at 28 August 2013.

¹⁴⁹ Bahrain's 2011 International Commission of Inquiry: The Commission had a budget determined by its Chair and in line with UN standards on expenses and compensation. The Commission was financially independent from the Government of Bahrain and two accounting firms audited the Commission's accounts, "to ensure accuracy and transparency." Sources: Royal Order No. 28 of 2011, Article. 11; BICI, 'Report of the Bahrain Commission of Inquiry' (10 December 2011), para 33.

¹⁵⁰ 'Bloody Sunday inquiry chairman Lord Saville works in £60,000 shed,' Available at: www.telegraph.co.uk/news/uknews/northernireland/7822335/Bloody-Sunday-inquiry-chairman-Lord-Saville-works-in-60000-garden-shed.html. Last accessed at 28 August 2013.; See also, 'Was the Bloody Sunday report value for money?'. Available at: www.bbc.co.uk/news/10292828. Last accessed at 28 August 2013.; 'Bloody Sunday inquiry "diminished" by delays and costs,' Available at: www.bbc.co.uk/news/10183716. Last accessed at 28 August 2013.

¹⁵¹ See, e.g., Clarke, 'Was the Bloody Sunday report value for money?'. Available at: www.bbc.co.uk/news/10292828. Last accessed at 28 August 2013.; 'Bloody Sunday inquiry "diminished" by delays and costs'. Available at: www.bbc.co.uk/news/10183716. Last accessed at 28 August 2013.; Swaine, 'Bloody Sunday inquiry chairman Lord Saville works in £60,000 shed'. Available at: www.telegraph.co.uk/news/uknews/northernireland/7822335/Bloody-Sunday-inquiry-chairman-Lord-Saville-works-in-60000-garden-shed.html. Last accessed at 28 August 2013.; HC Deb 15 June 2010, vol. 511, col. 741.

3. Independence and impartiality

3.1 Independence of the commission

From an objective point of view, a commission can be said to be independent only when there are sufficient safeguards to exclude any legitimate doubt as to its independence. The commission should not only be independent in fact, but in order to enjoy public confidence, the commission must have the appearance of independence as well.¹⁵² As Alston explains, a commission of inquiry must be independent, impartial and competent.¹⁵³ The independence of the commission can be secured by ensuring its structural, substantive and personal independence.

3.1.1. Structural independence

The independence of the commission does not mean that the commissioners have complete control over the commission itself. The commissioners remain bound by law, as determined by the terms of reference and the legislation, if any, under which the commission is appointed.

A commission must be established as an institution separate from the government to be structurally independent.¹⁵⁴ Whether a commission is formally independent can additionally be determined through examination of the commission's terms of reference or of the commission's early investigatory practices.¹⁵⁵ Transparent funding and the provision of sufficient resources to carry out the mandate¹⁵⁶ are also factors by which the formal independence of a commission can be assessed.¹⁵⁷ To this end, the terms of reference of commissions of inquiry should respect the guidelines developed in the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity.¹⁵⁸

¹⁵² The Canadian Supreme Court held that an individual who wishes to challenge the independence of a tribunal – in this instance a military tribunal – “need not prove an actual lack of independence. Instead the test for this purpose is the same as the test for determining whether a decision-maker is biased. The question is whether an informed and reasonable person would *perceive* the tribunal as independent.” *R. v. Genereux*, 1. S.C.R. 259, [1992]. Emphasis added; See also, *Findlay v. the United Kingdom* where the European Court held regarding impartiality, “[f]irst, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect”, *Findlay v. the United Kingdom*, European Court of Human Rights, Application No. 22107/93, 25 February 1997, para 73.

¹⁵³ UNHRC, ‘Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Phillip Alston’ (2 May 2008) UN Doc A/HRC/8/3, para 25.

¹⁵⁴ UNHRC, ‘Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Phillip Alston’ (2 May 2008) UN Doc A/HRC/8/3, para 34.

¹⁵⁵ UNHRC, ‘Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Phillip Alston’ (2 May 2008) UN Doc A/HRC/8/3, para 34.

¹⁵⁶ For more information on this issue please see section 2.3 on Funding.

¹⁵⁷ UNHRC, ‘Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Phillip Alston’ (2 May 2008) UN Doc A/HRC/8/3, para 25.

¹⁵⁸ Commission on Human Rights, Promotion and Protection of Human Rights, ‘Updated Set of principles for the protection and promotion of human rights through action to combat impunity’, (8 February 2005) UN Doc E/CN.4/2005/102/Add.1.

Commissions of inquiry should be constituted in a manner that ensures their independence, and in accordance with criteria making clear to the public the competence and impartiality of [their] members. Where commissioners are not independent, either in fact or perception, the commission's findings are unlikely to be accepted by the public and witnesses may be too afraid to come forward.¹⁵⁹ There is a widespread agreement that commissioners should be chosen for their recognised impartiality, competence and independence as individuals.¹⁶⁰

Moreover, the terms of reference should grant security of tenure of commission members during their terms of office and establish the procedure under which a commissioner may be removed. This procedure should be exclusively based on grounds of incapacity or behavior rendering them unfit to discharge their duties and must ensure fair, impartial and independent determinations.¹⁶¹ The security of tenure of the commissioners for the lifetime of the commission is important to ensure that they are not vulnerable to influence. The Baha Mousa Commission is a good example of a commission securing the security of tenure of the commissioners,¹⁶² while the Sri Lankan Commission provides a negative example, in which the President was empowered to replace the commissioners at any time.¹⁶³ It is equally problematic if the terms of reference do not provide for any grounds of removal at all as happened with Israel's Or Commission.¹⁶⁴

¹⁵⁹ UNHRC, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Phillip Alston' (2 May 2008) UN Doc A/HRC/8/3, para 38.

¹⁶⁰ UN OHCHR, 'Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (9 August 1999) UN Doc HR/P/PT/8/Rev.1, para 109.; Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (1989) UN Doc E/1989/89, Principle 11); Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Assembly resolution 55/89, Annex, Principle 5(a); Minnesota Protocol: United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (1991) UN Doc E/ST/CSDHA/12, Section D.

¹⁶¹ Commission on Human Rights, Promotion and Protection of Human Rights, 'Updated Set of principles for the protection and promotion of human rights through action to combat impunity', (8 February 2005) UN Doc E/CN.4/2005/102/Add.1, Principle 7; UNHRC, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Phillip Alston' (2 May 2008) UN Doc A/HRC/8/3, para 25 (a).

¹⁶² The Inquiries Act, 2005 provides that the relevant minister could terminate the appointment due to incapacity, failure to comply with any duty, direct interest in the related matters if unaware at the time of appointment or if found guilty of misconduct.

¹⁶³ The Commissions of Inquiry Act empowered the President to appoint the commissioners; add commissioners; replace commissioners if they died, resigned, desired to be discharged, or refused or became unable to act; and at any time alter the warrant in regards to adding or replacing members. Source: Commissions of Inquiry Act, Sections 2, 3, 5.

¹⁶⁴ From an examination of the report of the Or Commission, it is apparent that, once appointed, the members remain at their posts until the conclusion of the inquiry and the submission of the report, as there is no explicit mention of rotation of the members or their removal.

Furthermore, the members of the commissions should enjoy whatever privileges and immunities are necessary for their protection, including in the period following their mission, especially in respect of any defamation proceedings or other civil or criminal action brought against them on the basis of facts or opinions contained in the commissions' reports.¹⁶⁵

Finally, the Istanbul Protocol mandates that commissions of inquiry should also have impartial, expert counsel.¹⁶⁶ If a commission is tasked with investigating alleged governmental misconduct, then such counsel should be external to that State's civil service.¹⁶⁷ Moreover, since the impartiality, comprehensiveness, and credibility of a commissions' investigation hinges on the extent to which a commission can rely on its own investigators,¹⁶⁸ technical expertise should be available to commissions as necessary, for example in pathology, forensic science and ballistics.¹⁶⁹

3.1.2. Substantive independence

Commissions of inquiry must not just be formally independent, but must also be actually independent.¹⁷⁰ In order to function independently, it is not only necessary that there are no legal limitations restricting the independence of the commission, but it should also be free from any *de facto* interference by the government or other institutions;¹⁷¹ 'in a number of countries, the investigating body, which was given an independent or quasi-independent status [...] did not, in reality, secure its independence.'¹⁷² A prominent example in this regard is the 2006 Commission of Inquiry to Investigate and Inquire Into Alleged Serious Violations of Human Rights in Sri Lanka, which faced extensive interference from, in particular, the Attorney General's Office.¹⁷³ Once a commission has been appointed, the working of the commission should not be influenced by any directive or order of the Executive or by the enactment of a new legislation. Also, any process of the commission

¹⁶⁵ Commission on Human Rights, Promotion and Protection of Human Rights, 'Updated Set of principles for the protection and promotion of human rights through action to combat impunity', (8 February 2005) UN Doc E/CN.4/2005/102/Add.1, Principle 7; UNHRC, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Phillip Alston' (2 May 2008) UN Doc A/HRC/8/3, para 25 (b).

¹⁶⁶ UN OHCHR, 'Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (9 August 1999) UN Doc HR/P/PT/8/Rev.1, para 111. For more information on this issue please see Section 2.2 on Composition of the Commissions of Inquiry.

¹⁶⁷ Minnesota Protocol: United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (1991) UN Doc E/ST/CSDHA/12, Section D.

¹⁶⁸ Minnesota Protocol: United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (1991) UN Doc E/ST/CSDHA/12, Section D.

¹⁶⁹ Minnesota Protocol: United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (1991) UN Doc E/ST/CSDHA/12, Section D.

¹⁷⁰ UNHRC, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Phillip Alston' (2 May 2008) UN Doc A/HRC/8/3, para 36.

¹⁷¹ UNHRC, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Phillip Alston' (2 May 2008) UN Doc A/HRC/8/3, para 36.

¹⁷² UNHRC, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Phillip Alston' (2 May 2008) UN Doc A/HRC/8/3, para 36.

¹⁷³ See, International Independent Group of Eminent Persons, 'The Members of the IIEGP Submit Their Concluding Public Statement on the Work of the Commission of Inquiry and Find a Lack of Political Will to Support a Search for the Truth', 15 April 2008, section 3(a).

cannot be questioned on the ground that the individual has already been absolved by the judiciary. An example of a commission where substantive independence was expressly guaranteed was that of Bahrain.¹⁷⁴

Substantive independence means not only direct non-interference, but it includes independence from indirect interference as well. Preventing the commission from doing its work properly by making lengthy delays in providing significant information and tampering with the evidence would also mean preventing the commission from enjoying substantive independence.¹⁷⁵

It is not only necessary that the working of the commission is not actually interfered with, it is also important that it is seen as not being interfered with. As previously mentioned, the report of the Bloody Sunday Commission was first submitted to the Northern Ireland Secretary before publication, allegedly to check for national security concerns or breached human rights provisions.¹⁷⁶ This led some to claims of censorship of the inquiry since the Ministry of Defense would be the authority consulted regarding security concerns.¹⁷⁷

3.2 Impartiality of the commission

While the concept of independence is defined in relation to the appointing authority, the notion of impartiality is connected to the attitude of the commissioners towards the matter under inquiry and the stakeholders. The Human Rights Committee observed that the notion of impartiality 'implies that judges must not harbor preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties.'¹⁷⁸ The European Court of Human Rights considers that the notion of impartiality contains both a subjective and an objective element. The tribunal must not only be impartial such that no member of the tribunal should hold any personal prejudice or bias, but it must also be impartial from an objective viewpoint, i.e. it must offer guarantees to exclude any legitimate doubt.¹⁷⁹

¹⁷⁴ Royal Order 28 of 2011: "No administrative or judicial body shall have the authority of stopping, curtailing, preventing, or influencing the Commission's work and its results."

¹⁷⁵ As happened in the case of the Somalia Commission where the tenure was also cut short by the Government of Canada because of which it did not even have time to consider the torture-killing of Arone, one of the main triggers for the Inquiry. According to one of the Commissioners Peter Desbarats, significant information was made available to the Commission only after lengthy delays and there was clear evidence that documents were being tampered with. In the case of the Nepali Commission the International Commission of Jurists reported that it is often the Ministry of Home Affairs that in practice initiates and supervises the Commissions.

¹⁷⁶ McCann, 'Cooking the Bloody Sunday Report'. Available at: www.guardian.co.uk/commentsfree/2010/feb/24/bloody-sunday-report-retained. Last accessed at 28 August 2013.

¹⁷⁷ McCann, 'Cooking the Bloody Sunday Report'. Available at: www.guardian.co.uk/commentsfree/2010/feb/24/bloody-sunday-report-retained. Last accessed at 28 August 2013.

¹⁷⁸ Human Rights Committee, *Arvo O. Karttunen v Finland* (1992) Communication No. 387/1989 UN Doc CCPR/C/46/D/387/1989, 7.2

¹⁷⁹ Eur. Court HR, Case of *Daktaras v. Lithuania*, judgment of 10 October 2000, para 30; For the text see the Courts's web site: echr.coe.int. Last accessed at 28 August 2013.

Objective criteria for appointment, the appointment of commissioners with appropriate expertise, the appointment of those known for their integrity, and the appointment of individuals representative of concerned communities or groups, are a few of the guarantees that may help ensure that there is no legitimate doubt regarding the impartiality of the commissioners. Additionally, the commissioners should not have an interest in any of the stakeholders involved in the inquiry. Reference may be made to the Israel's 2008-2011 Special Investigatory Commission on the Targeted Killing of Salah Shehadeh where doubts were raised with regard to the impartiality of the commissioners because of their 'security background'.¹⁸⁰ Similarly, with respect to the Lessons Learnt and Reconciliation Commission in Sri Lanka, the UN Panel of Experts on Accountability in Sri Lanka noted that 'at least three of its members have serious conflicts of interest that both directly compromise their ability to function with independence and impartiality, and undermine public perception of them as independent'.¹⁸¹ In the Ivory Coast, the 17 members of the commission were appointed by ministries and parliamentary groups under the control of President Ouattara's political coalition.¹⁸²

¹⁸⁰ HCJ [The Supreme Court sitting as the High Court of Justice] 8794/03, Hess v. The Military Advocate General (decision delivered on 23 December 2008).

¹⁸¹ UN Secretary-General (UNSG), 'Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka' (31 March 2011) para 306. Available at: www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf. Last accessed at 18 July 2012.

¹⁸² Human Rights Watch, 'Côte d'Ivoire: Inquiry's Shortcuts Raise Red Flags' (23 February 2012). Available at: www.hrw.org/news/2012/02/23/c-te-d-ivoire-inquiry-s-shortcuts-raise-red-flags. Last accessed at 28 August 2013.

4. Powers

4.1 Subpoena powers

There is general consensus that a commission should be assigned the authority to obtain all information necessary to the inquiry.¹⁸³ In practice, this may include the authority to compel testimony under legal sanction,¹⁸⁴ to order the production of documents including government and medical records, and to protect witnesses, families of the victim and other sources.¹⁸⁵ To a certain extent the granting of these powers is widely documented in the commissions examined,¹⁸⁶ in some cases they were identical to those enjoyed by national courts as was the

¹⁸³ Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (1989) UN Doc E/1989/89, Principle 11; Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Assembly resolution 55/89, Annex, Principle 5(a).

¹⁸⁴ UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (18 January 2012) UN Doc A/HRC/19/61, para 65.

¹⁸⁵ Minnesota Protocol: United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (1991) UN Doc E/ST/CSDHA/12, Section D; Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, E/1989/89 (1989), Principle 10; UN OHCHR, 'Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (9 August 1999) UN Doc HR/P/PT/8/Rev.1, para 116..

¹⁸⁶ Canada's 1995-1997 Commission of Inquiry into the Deployment of Canadian Forces to Somalia: The 1985 Inquiries Act sets out the statutory powers and responsibilities of inquiries, generally giving the Commission broad powers to summon and enforce the attendance of witnesses and to require the production of documents. Source: Report of the Somalia Commission of Inquiry, Introduction, 1997. Available at: www.dnd.ca/somalia/vol1/v1c1e.htm. Last accessed at 28 August 2013.; Canada's 2004-2006 Commission of Inquiry into the actions of Canadian Officials in Relation to Maher Arar: The Commission had full powers under the Inquiries Act including the power of summoning before it any witnesses, and requiring them to provide and give evidence, orally or in writing, and on oath or on solemn affirmation. The Commission also had powers to summon witnesses to produce documents and other evidence the Commissioner deems requisite to the full investigation of the matter. Sources: Reg Whitaker, 'Arar: The Affair, the Inquiry, the Aftermath', Institute for Research and Public Policy, May 2008 Vol.9 No.1, 12. Section 4, Inquiries Act 1985; 2010-2011 Commission of Inquiry on the Final Stages of the Civil War between the Liberation Tigers of Tamil Eelam and the Government of Sri Lanka: The Commissions of Inquiry Act granted the Commission the power to summon witnesses, issue subpoenas, and issue offenses of contempt, which were punishable by the Court of Appeal. Source: Commissions of Inquiry Act, Sections 7, 10,11, 12.

case with respect to the commissions under India's,¹⁸⁷ Malaysia's¹⁸⁸ or Nepal's¹⁸⁹ Commissions of Inquiry Acts or under the UK's Tribunals of Inquiry Act,¹⁹⁰ while in other cases, like Bahrain's 2011 International Commission of Inquiry,¹⁹¹ Chile's 2004 *Comisión Nacional de Prisión Política y Tortura*,¹⁹² or Israel's 2008–2011 Special Investigatory Commission on the Targeted Killing of Salah Shehadeh,¹⁹³ the commissions did not have the subpoena power to compel witnesses to appear before [them]. However, in the cases of Malaysia¹⁹⁴ and Nepal¹⁹⁵ the difference between the legal powers and their effective implementation has been highlighted.

¹⁸⁷ Under Section 4 of the Act, the Commission had all powers enjoyed by a civil court during trials in India; such as the ability to summon and enforce the attendance of witnesses, and discovery and production of documents. The Commission could issue a warrant for arrest, seize and sell property, impose a fine not exceeding five hundred rupees or order to furnish security for appearance, and if necessary commit the person to civil prison for default under Section 32 of the Code of Civil Procedure. Source: Commissions of Inquiry Act 1952, Section 9.

¹⁸⁸ The Commissioners had the same powers as enjoyed by First Class Magistrates in Malaysia, in respect of recovery of the costs awarded, enforcement of warrant of arrest, and orders of imprisonment and fines. However, the Commission was of the view that it had broad jurisdiction like that of the High Court in the sense that its jurisdiction was not limited by the value of the subject-matter, nor was it excluded from giving declaratory relief, except that its area of inquiry was specified by the terms of reference. However, it is worth noting that Malaysia's 1999 Royal Commission of Inquiry to Enquire Into the Injuries of Dato' Seri Anwar Ibrahim Whilst In Police Custody examined only twenty-one witnesses, from a list of thirty-seven given to it by the Executive Officer. The report does not mention if the Commission made any effort to enforce their attendance and does not make clear who issued summons to the witnesses. Sources: Section 20 of the Commissions of Inquiry Act; Report of the Royal Commission of Inquiry to Enquire into the Injuries of Dato' Seri Anwar Ibrahim whilst in Police Custody.

¹⁸⁹ The Act grants significant powers to the Commissions in relation to investigation and access to evidence. Indeed, Article 4.3 confers subpoena powers equivalent to those of a court. The Commission is authorised to summon any person to give their deposition and to produce any documents that the Commission deems relevant. The same article expressly empowers the Commission to access secret evidence by extending the application of the subpoena powers to all governmental or public offices. Furthermore, Article 5 gives power to the Commission to either obtain search warrant or conduct the search and collection of evidence itself. Source: Commission of Inquiry Act 1969, Article 4, para 3.

¹⁹⁰ Under the Tribunals of Inquiry (Evidence) Act, 1921 the Tribunals are given the same powers as the High Court in respect to "enforcing the attendance of witnesses and examining them on oath;" "compelling the production of documents;" and, "subject to the rules of court, the issuing of a commission or request to examine witnesses abroad." Source: Tribunals of Inquiry (Evidence) Act (1921), Section 1.

¹⁹¹ Royal Order No. 28 of 2011, Article. 4.

¹⁹² The Commission could not subpoena or compel witnesses to present testimony. Instead, it sought information only on a voluntary basis. Source: Comisión Nacional sobre Prisión Política y Tortura, 'Síntesis: Informe' (Chile, 2004), 10.

¹⁹³ Since it is not legally established, the committee lacks the power needed to carry out criminal investigations. No criminal sanctions are meant to apply to unreliable witnesses appearing before the committee. Because there is no legal support for its activities, the committee of examination has no power to compel witnesses to testify under oath, to compel witnesses to appear before it or to issue search warrants. However, under Article 7 of the Appointment Letter, any soldier, Israel Security Agency workers or any other public servants will report to the Commission upon its request and will relay to it any information or relevant documentation it might request. Source: HCJ 6728/06, *Ometz Addoscian v. The Prime Minister* (decision delivered on 30 November 2006), para 28-29 of Justice Procaccia's ruling; Email from ALMA member, Adv. Ady Niv, to research team (3 March 2013).

¹⁹⁴ It is worth noting that Malaysia's 1999 Royal Commission of Inquiry to Enquire Into the Injuries of Dato' Seri Anwar Ibrahim Whilst In Police Custody examined only twenty-one witnesses, from a list of thirty-seven given to it by the Executive Officer. The report does not mention if the Commission made any effort to enforce their attendance and does not make clear who issued summons to the witnesses.

¹⁹⁵ The discrepancy between the legal powers and their effective implementation has been underlined by the International Commission of Jurists as a recurring weakness of Commission of Inquiry in Nepal. Source: International Commission of Jurists, 'Commissions of Inquiry in Nepal: denying remedies, entrenching impunity', 28.

Moreover, commissions should be empowered to obtain warrants to search certain locations and seize any and all material evidence found.¹⁹⁶ However, Alston warns that care must be taken to avoid obtaining evidence in a way that may threaten the possibility of successful subsequent prosecution.¹⁹⁷ The authority to obtain all information necessary ultimately requires the commission to have at its disposal all the necessary budgetary and technical resources for effective investigation.¹⁹⁸

With regard to evidence given voluntarily, individuals should be invited as well as informed of the means available to them to testify and to submit relevant information and written statements to the commission,¹⁹⁹ as happened with Bahrain's 2011 International Commission of Inquiry.²⁰⁰ Furthermore, the commissions should be able to conduct on-site visits and to receive evidence from witnesses and organisations located outside the country. An example of the latter can be found in Chile's 2004 *Comisión Nacional de Prisión Política y Tortura* where the Foreign Ministry was instructed to help the Commission gather information from those who lived outside Chile.²⁰¹ On the other hand, the Lessons Learnt and Reconciliation Commission in Sri Lanka was criticised both for spending insufficient time with witnesses and victims in the principally affected areas,²⁰² and for treating these victims in a manner inconsistent with their inherent dignity.²⁰³

¹⁹⁶ UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (18 January 2012) UN Doc A/HRC/19/61, para 65; Minnesota Protocol: United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (1991) UN Doc E/ST/CSDHA/12, Section D..

¹⁹⁷ UNHRC, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Phillip Alston' (2 May 2008) UN Doc A/HRC/8/3, para 46.

¹⁹⁸ Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (1989) UN Doc E/1989/89, Principle 10; Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Annex at Article 3a.

¹⁹⁹ UN OHCHR, 'Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (9 August 1999) UN Doc HR/P/PT/8/Rev.1, para 114; Minnesota Protocol: United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (1991) UN Doc E/ST/CSDHA/12, Section D..

²⁰⁰ The Royal Order established that "anyone seeking to make contact with the Commission or its staff" must be able to do so, and at the Committee's request, the government would facilitate access to such individuals. Source: Royal Order No. 28 of 2011, Article 6.

²⁰¹ Comisión Nacional sobre Prisión Política y Tortura, 'Síntesis: Informe' (Chile, 2004), 10. Cf, the recommendation of the IIEGP to allow for the collection of testimony from witnesses who had left Sri Lanka, but which was not allowed by the Government of Sri Lanka; International Independent Group of Eminent Persons, 'The Members of the IIEGP Submit Their Concluding Public Statement on the Work of the Commission of Inquiry and Find a Lack of Political Will to Support a Search for the Truth', 15 April 2008, recommendation (c).

²⁰² UN Secretary-General (UNSG), 'Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka' (31 March 2011) para 324. Available at: www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf. Last accessed at 18 July 2012.

²⁰³ UN Secretary-General (UNSG), 'Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka' (31 March 2011) para 325. Available at: www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf. Last accessed at 18 July 2012.

The Istanbul Protocol indicates that in a situation where government or other officials refuse to comply, commissions should have the authority to impose fines or sentences if government officials or other individuals refuse to comply.²⁰⁴ An example of this power can be found in Israel's²⁰⁵ and India's²⁰⁶ Commission of Inquiry Laws.

4.2 Reliability of the evidence

The criminal law standard of proof 'beyond reasonable doubt' is perhaps too high for commissions of inquiry, whose function is not to establish individual criminal responsibility.²⁰⁷ Rather, the starting point should more appropriately be a balance of probabilities. However, commissions need not apply only one form of standard of proof, various degrees of standard of proof can be applied on a sliding scale, the highest tier of which is considered to be that of 'overwhelming probability',²⁰⁸ if different standards of proof are utilised it is imperative that this be clearly specified. Moreover, it is necessary to keep in mind that the goal of a commission of inquiry should be to prompt a criminal investigation should its findings establish that this is required. Consequently, the standard of proof utilised may appropriately reflect the standard of proof required to begin an investigation. With respect to the Office of the Prosecutor of the International Criminal Court, for example, an investigation may be launched where there is a 'reasonable basis' to believe that a crime within the jurisdiction of the court has been committed.²⁰⁹

However, the timeframe a commission of inquiry has to work within will affect the standard of proof it can employ. The shorter the time the commission has to complete its work, the less rigorously the facts can be tested or established, and a lower standard of proof may

²⁰⁴ UN OHCHR, 'Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (9 August 1999) UN Doc HR/P/PT/8/Rev.1, para 115.

²⁰⁵ Article 11 dealing with the refusal of the witnesses to testify has a provision in situations of non-compliance. The Commission can impose a fine on such witnesses and where a further non-appearance exists, the Commission of Inquiry Law provides that such a person shall be liable to imprisonment for a period of 2 years, and that the imposition of a fine shall not bar the filing of a charge against such a person. Further, the Chairman of the Commission, with the sanction of the rest of the Commission, has the power to compel the attendance of a person who has failed to appear without satisfactory reasons.

²⁰⁶ Owing to the nature of the inquiry and other circumstances of the case, the Central Government also granted additional powers to the Commission under S. 5 (1) - (5) of the Act, whereby it could require any person, subject to any privilege claimed, to furnish relevant and useful information and such person would be legally bound to do so. Such persons could be punished under the Indian Penal Code for omitting to produce a document, refusing oath or affirmation, refusing to answer, refusing to sign a statement, or intentionally offering insult or causing interruption. Sources: Notification of Appointment of the Commission, Report of the Justice Nanavati Commission of Inquiry, Volume-II, Annexure-I. Available at: mha.nic.in/pdfs/Nanavati-II_eng.pdf. Last accessed at 28 August 2013.; Indian Penal Code, Sections 175, 178, 179, 180, 228.

²⁰⁷ See discussion relating to the role of a national Commission of Inquiry in Section 2, above.

²⁰⁸ Academic Platform Switzerland UN & Geneva Academy of International Humanitarian Law and Human Rights, 'The UN Human Rights Council: Commissions of Inquiry Conference Brief' (December 2011), 3. Available at: www.adh-geneve.ch/docs/news/HR-council-inquiry-conference-brief.pdf. Last accessed at 28 August 2013.

²⁰⁹ UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, Article 53.

have to be employed.²¹⁰ The challenge with regard to the standard of proof is to ensure that a balance is struck to allow not only flexibility but also to ensure that findings are credible. It is essential that findings can stand up to public scrutiny.²¹¹

While evidence collected by a commission of inquiry is often inadmissible in a court of law owing to the lower standards of evidence used by commissions to encourage broad participation, such information may be used as background information and provide further evidentiary leads.²¹² Whether the information is admissible or not in a court, it is relevant to note that a fundamental element for the credibility of any commission of inquiry is that all the information received by the commission must be assessed to determine reliability and probity.²¹³ Again, it is important that the commission's findings in this regard are clearly stated.

The Istanbul Protocol states that corroboration of evidence from several sources increases the probative value of such evidence and the reliability of hearsay evidence. Moreover, the reliability of hearsay evidence must be carefully considered before it is accepted as fact.²¹⁴ Caution must also be taken concerning testimony not tested by cross-examination.²¹⁵ As in-camera testimony preserved in a closed record or not recorded at all is frequently not subject to cross-examination it may, as a consequence, be given less weight.²¹⁶ In contrast, the Méndez Report notes that commissions can take a more flexible approach to evidence. The report goes on to say that testimony not subject to cross-examination should still be accepted by the commission and moreover, the commission should also avail itself of testimony that would be excludable in court as hearsay.²¹⁷ Both the Istanbul Protocol and

²¹⁰ Academic Platform Switzerland UN & Geneva Academy of International Humanitarian Law and Human Rights, 'The UN Human Rights Council: Commissions of Inquiry Conference Brief' (December 2011), 3. Available at: www.adh-geneve.ch/docs/news/HR-council-inquiry-conference-brief.pdf. Last accessed at 28 August 2013.

²¹¹ Academic Platform Switzerland UN & Geneva Academy of International Humanitarian Law and Human Rights, 'The UN Human Rights Council: Commissions of Inquiry Conference Brief' (December 2011), 3. Available at: www.adh-geneve.ch/docs/news/HR-council-inquiry-conference-brief.pdf. Last accessed at 28 August 2013.

²¹² UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (18 January 2012) UN Doc A/HRC/19/61, para 8.

²¹³ UN OHCHR, 'Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (9 August 1999) UN Doc HR/P/PT/8/Rev.1, para 117; UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (18 January 2012) UN Doc A/HRC/19/61, para 68.

²¹⁴ UN OHCHR, 'Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (9 August 1999) UN Doc HR/P/PT/8/Rev.1, para 117.

²¹⁵ UN OHCHR, 'Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (9 August 1999) UN Doc HR/P/PT/8/Rev.1, para 117.

²¹⁶ UN OHCHR, 'Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (9 August 1999) UN Doc HR/P/PT/8/Rev.1, para 117.

²¹⁷ UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (18 January 2012) UN Doc A/HRC/19/61, para 68.

the Méndez Report specify that when evaluating oral testimony, the commission should take into account the behaviour and overall credibility of the witness while at the same time be sensitive to social, cultural and gender issues that may affect behaviour.²¹⁸

Finally, the benefits of obtaining evidence from other proceedings that could provide relevant information has been highlighted by the Minnesota Protocol.²¹⁹ For instance, the commission could acquire findings from an inquest into cause of death conducted by a coroner or medical examiner. Subsequent to a review to determine if the inquest was conducted thoroughly and impartially, such findings are entitled to be given great weight.²²⁰

4.3 Protection of witnesses

The Alston Report identifies that the work of some commissions has been severely hampered by the inadequate protection offered to both commission members and witnesses appearing before the commission.²²¹ Therefore, to be effective, commissions should be empowered to protect witnesses, victims and their families who testify, against possible reprisals.²²² It is worth noting that the majority of commissions subjected to analysis were empowered to make appropriate arrangements for the safety of witnesses even though not all of them used this power. The UK's 1998-2005 Commission of Inquiry Regarding Bloody Sunday constitutes a good example on this matter,²²³ while Ivory Coast's 2011-2012 National Commission of Inquiry into Post-Election Violence,²²⁴ and the 2010-2011 Commission of Inquiry on the Final Stages of the Civil War between the Liberation Tigers of Tamil Eelam and the Government of Sri Lanka provide examples of

²¹⁸ UN OHCHR, 'Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (9 August 1999) UN Doc HR/P/PT/8/Rev.1, para 117; UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (18 January 2012) UN Doc A/HRC/19/61, para 68.

²¹⁹ Minnesota Protocol: United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (1991) UN Doc E/ST/CSDHA/.12, Section D.

²²⁰ Minnesota Protocol: United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (1991) UN Doc E/ST/CSDHA/.12, Section D.

²²¹ UNHRC, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Phillip Alston' (2 May 2008) UN Doc A/HRC/8/3, para 39.

²²² UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (18 January 2012) UN Doc A/HRC/19/61, para 65.

²²³ The tribunal was granted the power to make appropriate arrangements for the safety of witnesses, and, in order to protect some soldiers, moved parts of the Inquiry from Northern Ireland to London. Source: Report of the Bloody Sunday Inquiry at vol. X, Section. A1.1.33; UK's 1998-2005 Commission of Inquiry Regarding Bloody Sunday, 'Opening Statement', para 22.

²²⁴ Human Rights Watch stated that there were serious concerns of a one-sided report and stressed that to achieve impartial justice as claimed by the President Ouattara, the Commission needed to reach out to everyone who suffered and witnessed abuses, regardless of which side might have been responsible. This might demand greater efforts by the Commission to solicit the testimony from victims of abuses committed by pro-Ouattara forces and to protect victims and witnesses from reprisals. Source: Human Rights Watch, 'Côte d'Ivoire: Inquiry's Shortcuts Raise Red Flags' (23 February 2012). Available at: www.hrw.org/news/2012/02/23/c-te-d-ivoire-inquiry-s-shortcuts-raise-red-flags. Last accessed at 28 August 2013.

a commission that treated witnesses inappropriately.²²⁵ It is also relevant to point out that Nepal's Commissions of Inquiry Act does not grant powers to the Commission in relation to the protection of victims or witnesses, and is actually silent on this issue.²²⁶

The Istanbul Protocol specifies that the duty to protect complainants, witnesses, those conducting the investigation, and their families from violence, threats of violence or any other form of intimidation is on the [S]tate.²²⁷ Thus, if the commission has reason to believe that the life, health or safety of a person concerned by its inquiry is threatened or that there is a risk of losing an element of proof, it may seek court action under an emergency procedure or take other appropriate measures to end such threat or risk.²²⁸

The Minnesota Protocol recognises the important role written statements may play as a source of evidence if their authors fear giving testimony, are unable to travel to proceedings, or are otherwise unavailable.²²⁹ Serious consideration should also be given to the possibility of the State bearing all expenses incurred by those giving testimony.

²²⁵ Witnesses were not informed as to the nature of their appearance before the Commissioners. Moreover, there was ample evidence of the commission's pro-government bias, which led several witnesses to report a distrust and fear of the commission. The small amount of time allocated to receiving testimony in the North and East was "*dramatically insufficient*." The UN Panel noted the lack of a victim-centered approach; the "*curt and dismissive*" approach to victims raising human rights issues and the limited time allocated to witness testimony was "*not respectful of (their) dignity*" and did not provide a fair opportunity to present their evidence and accounts of suffering. In addition, the names of several witnesses and several people accused of serious violations were included in transcripts on the LLRC's website, subjecting them to danger. On occasions uniformed military officers were present in the hearing room, photographing witnesses and the audience and there were reports that witnesses had been warned not to testify and pressure had been placed on officials not to provide too much information. Inconsistent statements by witnesses implied that pressure was put on witnesses to change their testimony. Accordingly, the International Crisis Group reported that witnesses had been threatened by the military, and Amnesty International reported that witnesses had been threatened by armed men, allegedly part of a Tamil political party who had opposed the LTTE. As a consequence, the UN Panel expressed its concern for the lack of witness protection measures in Sri Lanka, which were not contained in either the Presidential Warrant or the Commissions of Inquiry Act. Sources: UN Secretary-General (UNSG), 'Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka' (31 March 2011) paras 314, 324, 325, 328, 334, 337. Available at: www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf. Last accessed at 18 July 2012.; International Crisis Group (ICG), 'Reconciliation in Sri Lanka: Harder than Ever', Asia Report N°209 (18 July 2011) 24, 25, 92, 93, Available at [www.crisisgroup.org/~media/Files/asia/south-asia/sri-lanka/209%20Reconciliation%20in%20Sri%20Lanka%20-%20Harder%20than%20Ever.pdf](http://www.crisisgroup.org/~/media/Files/asia/south-asia/sri-lanka/209%20Reconciliation%20in%20Sri%20Lanka%20-%20Harder%20than%20Ever.pdf). Last accessed at 28 August 2013.; Amnesty International, 'When will they get Justice?', 22, 40, 53.

²²⁶ Commission of Inquiry Act 1969.

²²⁷ UN OHCHR, 'Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (9 August 1999) UN Doc HR/P/PT/8/Rev.1, para 112.; Minnesota Protocol: United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (1991) UN Doc E/ST/CSDHA/12, Section D.

²²⁸ Commission on Human Rights, Promotion and Protection of Human Rights, 'Updated Set of principles for the protection and promotion of human rights through action to combat impunity', (8 February 2005) UN Doc E/CN.4/2005/102/Add.1, Principle 8.

²²⁹ Minnesota Protocol: United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (1991) UN Doc E/ST/CSDHA/12, Section D.

An example of this can be found in the Sri Lankan Commissions of Inquiry Act, although the 2010-2011 Commission of Inquiry on the Final Stages of the Civil War between the Liberation Tigers of Tamil Eelam and the Government of Sri Lanka opted not to do so.²³⁰

General principles of criminal procedure dictate that hearings should be conducted in public.²³¹ Hearings that are open to the public where victims and witnesses are given the opportunity to speak directly to the public in their own voices are vital to the working of the commission.²³² It is equally important that open hearings be conducted in a manner that respects the dignity of each victim and witness, and protects the rights of alleged perpetrators, in the criminal law setting, from any breach in the presumption of innocence.²³³

In addition, if the commission believes there is a reasonable fear of persecution, harassment or harm to any witness or prospective witness, it may be considered necessary to take appropriate measures including keeping the identity of an informant or witness confidential and using only evidence that will not risk identifying the witness, while establishing mechanisms for corroboration of the information.²³⁴ Concerning the option of allowing witnesses to provide information anonymously, it is noted that the UK's 1998-2005 Commission of Inquiry Regarding Bloody Sunday was empowered to grant anonymity to witnesses, although these decisions were subject to appeal.²³⁵ Of course, any protection measures must be effectively implemented unlike in the case of

²³⁰ Although the Commissions of Inquiry Act empowered the Commission to recommend the minister reimburse any person implicated in the inquiry, including for travelling or legal representation, the LLRC did not provide support to those travelling great distances or bear any other costs. Source: Commissions of Inquiry Act at sec 17; UN Secretary-General (UNSG), 'Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka' (31 March 2011) para 329. Available at: www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf. Last accessed at 18 July 2012.

²³¹ UN OHCHR, 'Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (9 August 1999) UN Doc HR/P/PT/8/Rev.1, para 113.; Minnesota Protocol: United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (1991) UN Doc E/ST/CSDHA/12, Section D.

²³² UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (18 January 2012) UN Doc A/HRC/19/61, para 67.

²³³ UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (18 January 2012) UN Doc A/HRC/19/61, para 67.

²³⁴ Commission on Human Rights, Promotion and Protection of Human Rights, 'Updated Set of principles for the protection and promotion of human rights through action to combat impunity', (8 February 2005) UN Doc E/CN.4/2005/102/Add.1, Principle 10.; UN OHCHR, 'Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (9 August 1999) UN Doc HR/P/PT/8/Rev.1, para 112.; Minnesota Protocol: United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (1991) UN Doc E/ST/CSDHA/12, Section D.

²³⁵ The Tribunal's initial decision refusing to grant anonymity to military witnesses was overturned on appeal. Anonymity was eventually granted to all military witnesses unless their name was already in the public domain, in addition to security service employees, paramilitary witnesses, and a small number of other witnesses who had applied to the Tribunal. Source: Report of the Bloody Sunday Inquiry at General Introduction, para 11; *Id.* at vol. X, sec. A1.1.28-A1.1.30.

the Sri Lankan commission in which, although the commission stated that witnesses could present testimony in private without their identities revealed, the UN Panel found no practical measures ensuring this.²³⁶

Finally, witnesses may not be compelled to testify against themselves²³⁷ and some commissions of inquiry have gone beyond this requirement by granting the witnesses a certain degree of immunities or privileges.²³⁸ For instance the UK's Tribunals of Inquiry Act grants witnesses the same immunities and privileges as High Court witnesses²³⁹ and Sri Lanka's Commissions of Inquiry Act grants witnesses the same immunities of a court of law.²⁴⁰

²³⁶ Commission of Inquiry on Lessons Learnt and Reconciliation, 'Report of the Commission of Inquiry on Lessons Learnt and Reconciliation' (15 Nov. 2011), para 1.10; UN Secretary-General (UNSG), 'Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka' (31 March 2011) para 336. Available at: www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf. Last accessed at 18 July 2012.

²³⁷ UN OHCHR, 'Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (9 August 1999) UN Doc HR/P/PT/8/Rev.1, para 116.

²³⁸ India's 2000 Nanavati Commission of Inquiry on the 1984 anti-Sikh Riots: The statements made by the witnesses before the Commission could not be used against them in any civil or criminal proceeding, except if they gave false evidence; Malaysia's 1999 Royal Commission of Inquiry to Enquire Into the Injuries of Dato' Seri Anwar Ibrahim Whilst In Police Custody: The witnesses were protected from self-incrimination in civil and criminal proceedings, except if they gave or fabricated false evidence. All the evidence given by the witnesses for the purposes of the inquiry, were privileged, in the sense that they could not be held liable to any suit or other civil proceeding in respect of the evidence. However, the evidences were not privileged for the purposes of any criminal proceeding. Source: Section 11 and 21 of the Commissions of Inquiry Act.

²³⁹ Tribunals of Inquiry (Evidence) Act(1921), Section 3. For instance in the UK's 1998-2005 Commission of Inquiry Regarding Bloody Sunday immunity was granted to witnesses in regards to evidence presented by them. However, due to this, the Commission revoked witness' privilege against self-incrimination. Source: Report of the Bloody Sunday Inquiry, General Introduction, para 11, vol. X, sec. A1.1.30-A1.1.31 and sec. A1.1.16.

²⁴⁰ Witnesses were not excused from answering self-incriminating questions, although their answers could not subject them to arrest or prosecution. Sources: Commissions of Inquiry Act, Section 13; Evidence Ordinance at Section 13.

5. National security and public interest

Commissions of inquiry should be able to inspect all relevant documentation, including documentation classified as secret or of limited distribution because of national security or public interest purposes.²⁴¹ As noted by Alston, commissions have been refused access to evidence necessary for the inquiry on that basis.²⁴² However, a commission needs to have all the information necessary to arrive at fully informed conclusions, and as such, this will often mean that a commission requires the authority to compel the production of documents and witness testimony.²⁴³ It must be noted that this requirement does not hold that the public must have access to 'secret' documents which may legitimately be deemed to affect national security, but rather that there be public scrutiny of the process itself, including the opportunity to challenge any findings.²⁴⁴

General principles of criminal procedure dictate that hearings should be conducted in public.²⁴⁵ The Human Rights Committee pointed out that 'the publicity of hearings is an important safeguards in the interest of the individual and of society at large'.²⁴⁶ However, article 14(1) of the International Covenant on Civil and Political Right (ICCPR) acknowledges that courts have the power to exclude all or part of the public under exceptional circumstance for reasons of morals, public order or national security in a democratic society. Nevertheless, this is only possible to the extent strictly necessary in the opinion of the court and in those special circumstances.²⁴⁷ The burden is on the [S]tate to show that a trial is necessary to be conducted in private under these very narrow circumstances. Even in cases in which the public is excluded from trial, a criminal judgment must be made public, unless the cases involved juveniles, matrimonial disputes or the guardianship of children.²⁴⁸

²⁴¹ UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (18 January 2012) UN Doc A/HRC/19/61, para 65.

²⁴² UNHRC, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Phillip Alston' (2 May 2008) UN Doc A/HRC/8/3, para 12.

²⁴³ UNHRC, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Phillip Alston' (2 May 2008) UN Doc A/HRC/8/3, para 12.

²⁴⁴ UN OHCHR, 'Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (9 August 1999) UN Doc HR/P/PT/8/Rev.1, 7. For more information in relation to the access to information please see: concerning the EU: www.right2info.org/exceptions-to-access/national-security. Last accessed at 28 August 2013.; concerning the USA: ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4067&context=flr. Last accessed at 28 August 2013; www.fas.org/spp/crs/secretary/R41742.pdf. Last accessed at 28 August 2013.

²⁴⁵ UN OHCHR, 'Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (9 August 1999) UN Doc HR/P/PT/8/Rev.1, para 113; Minnesota Protocol: United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (1991) UN Doc E/ST/CS/DHA/12, Section D.

²⁴⁶ Human Rights Committee, General Comment 32, para 28.

²⁴⁷ Human Rights Committee, General Comment 32, para 29.

²⁴⁸ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Article 14.

The same approach has been taken by Méndez concerning commissions of inquiry. His report recognises that when there are legitimate claims of national security interests in-camera proceedings may also be resorted to.²⁴⁹ For instance, some of the commissions of Inquiry including Canada's Commission for Somalia,²⁵⁰ the Bloody Sunday Commission,²⁵¹ and the Sri Lankan Commission²⁵² followed this principle. Nevertheless, it is relevant to note that for some of the above-mentioned commissions, claims of national scrutiny were not subject to appropriate scrutiny and therefore may not qualify as legitimate.

However, it is permissible that in-camera proceedings may be used to protect the safety of a witness. In-camera proceedings should be recorded and then sealed, with an unpublished record kept in a known location. Occasionally, complete secrecy may be required to encourage testimony, and the commission may want to hear witnesses privately, informally or without recording testimony. Méndez also emphasises that under no circumstances should 'secrets of State' be invoked as a justification to conceal the commission of human rights violations. The members of the commission of inquiry should alone be the judges of whether confidential or closed proceedings are necessary. Only in exceptional circumstances should hearings be confidential; in such cases, the precise justification for the confidentiality must be transparent and disclosed to the public.²⁵³

²⁴⁹ UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (18 January 2012) UN Doc A/HRC/19/61, para 67.

²⁵⁰ The Commissioners directed to hold in camera hearings in certain circumstances in order to protect information relating to national security or any other matters considered by the Commission to be in the public interest. However, the Commission had to balance the need for secrecy against the public's right to know, and thus applied the following test detailed in section 38 of the Canada Evidence Act: "A document will not be disclosed to the public if disclosure would likely be injurious to national security or international relations and if such injury would outweigh the importance and benefit of the disclosure to the public in the inquiry proceedings." Sources: Canadian Judicial Council, Reference Guide for Judges Appointed to Commissions of Inquiry, 2011, Appendix A, 38. Available at: www.cjc-ccm.gc.ca/cmslib/general/cjc_guide_judges_commissions_inquiry_en.pdf. Last accessed at 28 August 2013.; Section 38 of the Canada Evidence Act.

²⁵¹ The Commission's power to declassify secret evidence was limited; state agencies could, and did, make successful applications to the Tribunal to withhold documents from the public on the basis of the 'public interest'. The Tribunals of Inquiry (Evidence) Act, 1921 mandated that all of the proceedings must be open to the public, unless it was in the public interest not to do so due to reasons regarding the "*subject matter of the inquiry or the nature of the evidence to be given...*" Sources: *Report of the Bloody Sunday Inquiry* at vol. X, sec. A1.1.38; Tribunals of Inquiry (Evidence) Act (1921), p 2 s (a)

²⁵² The Presidential Warrant granted the Commission the discretion to determine when to hold sessions in public. Public officials did not have to disclose official communications if the "*public interest would suffer*," and no one was permitted to produce unpublished official records without permission of the head of the department concerned, subject to the control of the Minister. Thus, the Commission's ability to uncover classified information was extremely restricted. Sources: Commissions of Inquiry Act at sec 13; Sri Lanka Evidence Ordinance at pt 3, ch XI, sec 123. Available at: [www.lawnet.lk/process.php?st=2001Y1V14C&hword=""&path=5](http://www.lawnet.lk/process.php?st=2001Y1V14C&hword=). Last accessed at 28 August 2013.; Evidence Ordinance, pt 3, ch XI, sec. 123, 124; UN OHCHR, 'Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (9 August 1999) UN Doc HR/P/PT/8/Rev.1, para 113.; Minnesota Protocol: United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (1991) UN Doc E/ST/CSDHA/12, Section D.; UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (18 January 2012) UN Doc A/HRC/19/61, para 67.

²⁵³ UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (18 January 2012) UN Doc A/HRC/19/61, para 67.

Excessive restrictions regarding the public disclosure of evidence will contribute towards undermining the public perception of the commission's credibility as happened with Canada's 2004-2006 commission of inquiry into the actions of Canadian Officials in Relation to Maher Arar.²⁵⁴ However, despite the overcautious approach of the Canadian government concerning national security, some potential positive practices can be extracted from this commission's work in terms of how restricted information is dealt with. Under the Rules of Procedure and Practice Justice O'Conner, the Chair of the Commission, was required to assess the validity of the national security claims made by the Government, and had the authority to overrule the government, and to prepare summaries of the in-camera evidence that could be publicly disclosed.²⁵⁵ This also allowed Arar the ability to have access in part to what was being dealt with in the closed and camera sessions.²⁵⁶

²⁵⁴ One of the main difficulties faced by the inquiry was the restrictions on public disclosure of much of the supporting evidence for some of the findings. This raised questions of the public's confidence in the inquiry. As discussed above the inquiry experienced difficulties concerning the public disclosure of evidence. The Government's overcautious interventions challenging public disclosure of evidence was seen by many as excessive, and undermined its own credibility. This gave the public the impression that the Government was obstructing the Commission's work and inadvertently enhanced public perception of the Commission's credibility. Sources: Reg Whitaker, "Arar: The Affair, the Inquiry, the Aftermath", Institute for Research and Public Policy, May 2008 Vol.9 No.1, 3, 10, 13.

²⁵⁵ Report of the Events Relating to Maher Arar, 2006, 285. Available at: www.pch.gc.ca/cs-kc/arar/Arar_e.pdf. Last accessed at 28 August 2013.

²⁵⁶ Report of the Events Relating to Maher Arar, 2006, 285. Available at: www.pch.gc.ca/cs-kc/arar/Arar_e.pdf. Last accessed at 28 August 2013. However, this was initially insufficient and only after lengthy negotiations were declassified versions of key pieces of evidence released. Arar represented a challenge throughout the process because of the issues with disclosure. The government restrictively interpreted the rules for disclosure causing delays and significantly adding to the overall cost of the inquiry. The process for the factual inquiry was amended in a ruling dated April 7, 2005, because of these issues. The approach of producing summaries of the in camera evidence was discontinued and instead after hearing of the evidence, Justice O'Connor issued a report with his conclusions, indicating which parts could be made public. Sources: Reg Whitaker, "Arar: The Affair, the Inquiry, the Aftermath", Institute for Research and Public Policy, May 2008 Vol.9 No.1, 13; Report of the Events Relating to Maher Arar, 2006, 296. Available at: www.pch.gc.ca/cs-kc/arar/Arar_e.pdf. Last accessed at 28 August 2013.

6. Participation

6.1 Establishment of commission and means of participation should be publicised

The establishment of a commission and the subject of the inquiry should be widely publicised. Means by which notice of the establishment of a commission can be given include: dissemination through newspapers, magazines, radio, television, leaflets and posters.²⁵⁷ A good example is India's 2000 Nanavati Commission of Inquiry on the 1984 anti-Sikh Riots.²⁵⁸ With regards to evidence given voluntarily, individuals should be invited as well as informed of the means available to them to testify and to submit relevant information and written statements to the commission.²⁵⁹

6.2 Victim/family participation

Commissions of inquiry normally provide for considerable victim participation in both the establishment of the facts and in identifying remedial priorities,²⁶⁰ and this may assist victims with healing and provide family members with closure.²⁶¹ Moreover, the decision to establish a commission, and how it is composed, should be based upon broad public consultations that pay particular regard to the views of victims and survivors.²⁶²

As stated by Méndez, 'when used correctly, a commission of inquiry may be a powerful tool in uncovering and bringing an end to repetitive human rights violations; taking first

²⁵⁷ UN OHCHR, 'Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (9 August 1999) UN Doc HR/P/PT/8/Rev.1, para 114.; Minnesota Protocol: United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (1991) UN Doc E/ST/CSDHA/12, Section D.

²⁵⁸ The Commission issued a notification, widely published in various English and Hindi newspapers with circulation throughout India, "inviting all individuals, groups of persons, associations, institutions and organizations having knowledge directly or indirectly of facts and circumstances relating to the matters referred to the Commission and having interest in the proceedings before the Commission or who wished to assist the Commission in making suggestions, to furnish their statements of facts or recommendations within six weeks from the publication of that notification." Sources: R. 5 (2) (b) of the Commissions of Inquiry (Central) Rules, 1972; Report of the Justice Nanavati Commission of Inquiry, Volume-I, 10. Available at: mha.nic.in/pdfs/Nanavati-I_eng.pdf. Last accessed at 28 August 2013.

²⁵⁹ UN OHCHR, 'Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (9 August 1999) UN Doc HR/P/PT/8/Rev.1, para 114.; Minnesota Protocol: United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (1991) UN Doc E/ST/CSDHA/12, Section D.

²⁶⁰ UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (18 January 2012) UN Doc A/HRC/19/61, para 28.

²⁶¹ UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (18 January 2012) UN Doc A/HRC/19/61, para 30.

²⁶² Commission on Human Rights, Promotion and Protection of Human Rights, 'Updated Set of principles for the protection and promotion of human rights through action to combat impunity', (8 February 2005) UN Doc E/CN.4/2005/102/Add.1, Principle 6.

steps in addressing victims' rights to know the truth and identifying reparations measures in consultation with victims; ensuring accountability of State institutions and compliance with international human rights law; and promoting democratic, citizen-driven participation in human rights monitoring.²⁶³ For some victims and others, the importance of public truth-telling is not only that it reveals new information, but also provides a forum that officially acknowledges facts.²⁶⁴

The Istanbul Protocol recognises the important role that victims play in the conduct of investigations and as such specifies the need for those alleging that they have been victims of crimes, their legal representatives, and their families to be informed of and have access to any hearing and all information relevant to the investigation.²⁶⁵ It further specifies that they must be entitled to present evidence.²⁶⁶ The record of the commissions of inquiry studied for this paper on the question of victim participation is uneven. Some, such as the Bloody Sunday Commission²⁶⁷ may be seen as granting the participation of

²⁶³ UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (18 January 2012) UN Doc A/HRC/19/61, para 23.

²⁶⁴ UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (18 January 2012) UN Doc A/HRC/19/61, para 9.

²⁶⁵ UN OHCHR, 'Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (9 August 1999) UN Doc HR/P/PT/8/Rev.1, para 116.; Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (1989) UN Doc E/1989/89, Article 16..

²⁶⁶ UN OHCHR, 'Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (9 August 1999) UN Doc HR/P/PT/8/Rev.1, Annex I, Article 4..

²⁶⁷ The Tribunal granted 'interested party status' to those injured on Bloody Sunday, the families of the deceased, and the soldiers present on Bloody Sunday. These groups were entitled to legal representation, were given the ability to question witnesses, and, after the closing of evidence, were able to make recommendations to the Tribunal regarding the findings they should make. Source: Tribunals of Inquiry (Evidence) Act(1921), vol. X, sec. A1.1.9, vol. X, sec. A1.1.12 and vol. X, sec. A1.1.80. The Tribunal noted that allowing interested parties to question witnesses was a good decision, see Tribunals of Inquiry (Evidence) Act(1921), vol. X, sec. A1.1.13.

victims, while others like the Malaysian,²⁶⁸ the Sri Lankan,²⁶⁹ or the Ivorian Commissions²⁷⁰ were considered biased in terms of participation of the witnesses and the victims.

However, some international human rights law jurisprudence considers that disclosure or publication of police reports and investigative materials may involve sensitive issues with possible prejudicial effects to private individuals or other investigations. Therefore, it cannot be regarded as an automatic requirement following the requirement for access of the public or the victim's relatives since it may be provided for in other stages of the available procedures.²⁷¹ Nevertheless, it has been acknowledged in international human rights law that, in all cases, the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.²⁷²

An example of positive practice in terms of ensuring the participation of victims when dealing with in-camera hearings is Canada's 2004-2006 Commission of Inquiry into the actions of Canadian Officials in Relation to Maher Arar. In order to ensure fairness to the parties with standing that were restricted from the in camera hearings, Commission counsel would meet periodically with them to receive suggestions about areas for cross-

²⁶⁸ The Commission could not allow all the interested parties to attend the proceedings as the court room provided was quite small and could only accommodate a maximum of 50 persons even after the court fixtures were removed. However, unlike the case of the general public, it is not clear if the number of journalists was also restricted due to lack of space in the court room. Moreover, the Commission did not allow the cross-examination of all witnesses by Dato' Seri Anwar Ibrahim, as it was of the view that permission for cross-examination of all or a particular witness was a matter of discretion "to be exercised according to the justice of the case." Nonetheless, the summoned police officers were allowed to cross-examine all the evidence that could prejudicially affect them. This was because they all were the potential accused persons. But Dato' Seri Anwar Ibrahim, even after being referred to as an accused person for lying about his injuries, was not granted the right to cross-examine all the evidence. Finally, another issue that arose during the inquiry was that the pending criminal case involving Dato' Seri Anwar Ibrahim. The court postponed the trial on 23 February 1999 so that Dato' Seri Anwar Ibrahim could appear before the Commission in compliance with the summons issued against him. However, he could not appear to complete his testimony on 25 February 1999 as the court asked him to choose between appearing before the trial or the Commission. The Commission sat on 28 February 1999, which was a Sunday, to enable Dato' Seri Anwar Ibrahim to appear before the Commission without absenting himself from the trial. However, the Commission refused to issue an order requiring the presence of Dato' Seri Anwar Ibrahim for the whole of the inquiry, as it was of the opinion that it could "only compel the attendance of a person to give evidence and should release him once his testimony had been completed, and his presence was no longer required for the evidentiary purposes of the other witnesses (e.g. for identification)." Sources: Report of the Royal Commission of Inquiry to Enquire into the Injuries of Dato' Seri Anwar Ibrahim whilst in Police Custody, 3, 82, 84, 85.

²⁶⁹ Only a small fraction of time was given to hearing victim and witness testimony in the North and East, and it appeared witness selection in these areas was applied differently than in Colombo, implying differences in treatment to different groups of witnesses. Source: UN Secretary-General (UNSG), 'Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka' (31 March 2011) para 325, 340. Available at: www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf. Last accessed at 18 July 2012. For more information on the biased Sri Lankan approach to witnesses, please see the section 4.3 on the Protection of Witnesses.

²⁷⁰ Accordingly, for the UN officials and Ivorian activists, the vast majority of victims who suffered abuses by the pro-Ouattara Republican Forces do not feel secure speaking to the Commission. For more information on the biased Ivorian approach to victims, please see the section 4.3 on the Protection of Witnesses.

²⁷¹ Shanaghan v. the United Kingdom, no. 37715/97, para 105.

²⁷² *Güleç v. Turkey*, p. 1733, para 82, where the father of the victim was not informed of the decisions not to prosecute; *Öğür v. Turkey*, para 92, where the family of the victim had no access to the investigation and court documents; *Gül v. Turkey* judgment, para 93.

examination.²⁷³ Commission counsel then incorporated into witness examinations the perspectives of those who had an interest, but could not take part in the proceedings, thus helping to address the shortcoming in the process resulting from the exclusion of those parties.²⁷⁴

However, the importance of giving an opportunity to be heard to all other interested parties is also emphasised.²⁷⁵ Special mention needs to be made of the participation of non-governmental organisations (NGOs). Both national and international commissions of inquiry often result from concerted demands by civil society or the international community.²⁷⁶ As a consequence, the relationship between commissions of inquiry and NGOs has been recognised as important.²⁷⁷ For the most part, NGOs that have been working on the subject and in the geographic area will lead the initial collection of evidence of human rights abuses. Moreover, NGOs may also be able to provide vital access to sources and witnesses that might potentially otherwise be out of a commission's reach.²⁷⁸ This was the approach taken by Chile's 2004 *Comisión Nacional de Prisión Política y Tortura*²⁷⁹ and India's 2000 Nanavati Commission of Inquiry on the 1984 anti-Sikh Riots.²⁸⁰

²⁷³ Report of the Events Relating to Maher Arar, 2006, 291. Available at: www.pch.gc.ca/cs-kc/arar/Arar_e.pdf. Last accessed at 28 August 2013.

²⁷⁴ Report of the Events Relating to Maher Arar, 2006, 292. Available at: www.pch.gc.ca/cs-kc/arar/Arar_e.pdf. Last accessed at 28 August 2013.

²⁷⁵ UN OHCHR, 'Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (9 August 1999) UN Doc HR/P/PT/8/Rev.1, para 116.

²⁷⁶ UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (18 January 2012) UN Doc A/HRC/19/61, para 7.

²⁷⁷ Academic Platform Switzerland UN & Geneva Academy of International Humanitarian Law and Human Rights, 'The UN Human Rights Council: Commissions of Inquiry Conference Brief' (December 2011). Available at: www.adh-geneve.ch/docs/news/HR-council-inquiry-conference-brief.pdf. Last accessed at 28 August 2013.

²⁷⁸ Academic Platform Switzerland UN & Geneva Academy of International Humanitarian Law and Human Rights, 'The UN Human Rights Council: Commissions of Inquiry Conference Brief' (December 2011), 3. Available at: www.adh-geneve.ch/docs/news/HR-council-inquiry-conference-brief.pdf. Last accessed at 28 August 2013.

²⁷⁹ The decree instructed the Commission to hear from victims' groups, human rights and humanitarian aid organizations, intergovernmental and non-governmental organizations, in order to identify the victims. Source: Decreto Supremo No. 1.040, Ministerio del Interior, Subsecretaría del Interior, 26 September 2003, Article 5.

²⁸⁰ The Commission permitted the Delhi Sikh Gurudwara Prabandhak Committee, the November '84 Carnage Justice Committee, and the Shiromani Akali Dal (Badal Group) to represent the riot victims before it, with other organisations directed to submit their evidence and suggestions through these organisations. It directed the applicants who wished to participate personally in the inquiry to submit their evidence and suggestions. Source: Report of the Justice Nanavati Commission of Inquiry, Volume-I, 11-12. Available at: mha.nic.in/pdfs/Nanavati-I_eng.pdf. Last accessed at 28 August 2013.

Conclusion

National commissions of inquiry offer a potentially valuable means of securing accountability for human rights violations, and facilitating victims' right to a remedy, particularly with respect to human rights violations alleged to have been committed by agents of the [S]tate. The realisation of this potential, however, is encumbered by the prevailing uncertainty as to the precise purpose and role of national commissions of inquiry, the principles and procedures for their establishment and implementation, and the wide disparities in existing, and at times disconcerting, [S]tate practice. It is for such reasons that national commissions of inquiry are vulnerable to manipulation and in danger of being (ab)used by [S]tates in order to provide an illusion of justice and accountability, while in effect entrenching impunity.

This report contends that, in order to overcome such challenges and guard against potential abuse, national commissions of inquiry should be appropriately understood as a component of [S]tates' international obligation to conduct a genuine investigation into suspected violations of international human rights law, and should be established and implemented in accordance within international human rights law. To this end, this report has identified and analysed a number of fundamental issues and constitutive elements with respect to national commissions of inquiry from the perspective of international human rights law. Such as the procedures for the establishment of a commission, including the specification of the mandate and the publication of the final report; the independence and impartiality of the commission and the commissioners; the powers of the commission; how the commission addresses issues of national security; and, finally, participation in the operation of a commission.

Considering the ever-increasing support for their establishment, and reliance upon their findings, additional research is necessary to further develop the concept of national commissions of inquiry into a more clearly defined investigative mechanism, complete with practical guidelines for their establishment and detailed requirements for their operation that conform to states obligations under international human rights law. It is our hope that this report will serve as the basis for further research and analysis on the future development of a framework for a human rights-based approach to national commissions of inquiry.



Human Rights Centre Clinic
www.essex.ac.uk/hrc/clinic