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PROMOTION AND PROTECTION OF ALL HUMAN RIGHTS, CIVIL, POLITICAL, ECONOMIC, SOCIAL AND CULTURAL RIGHTS, INCLUDING THE RIGHT TO DEVELOPMENT

Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston* **

Summary

The present report details the principal activities of the Special Rapporteur in 2007 and the first three months of 2008. It also examines in depth three issues of particular importance: (a) the role of national commissions of inquiry in impunity for extrajudicial executions; (b) the right to seek pardon or commutation of a death sentence; and (c) prisoners running prisons.

* Late submission.
** Owing to time constraints, the footnotes in the present document are reproduced as received, without formal editing.

I. INTRODUCTION

1. In the present report, the Special Rapporteur on extrajudicial, summary or arbitrary executions documents the main activities undertaken during 2007 and the first three months of 2008 to address the grave problem of extrajudicial executions around the world. [1] He focuses on three issues of particular importance: (a) the role of national commissions of inquiry in impunity for extrajudicial executions; (b) the right to seek pardon or commutation of a death sentence; and (c) prisoners running prisons.

2. The report is submitted pursuant to Human Rights Council decision 1/102, and takes account of information received and communications sent in the period from 1 December 2006 to 15 March 2008.

3. An overview of the mandate, a list of the specific types of violations of the right to life upon which action is taken, and a description of the legal framework and methods of work used in implementing this mandate can be found in document E/CN.4/2005/7, paragraphs 5 to 12.

4. I am grateful to the staff of the Office of the United Nations High Commissioner for Human Rights for their highly professional assistance in relation to the mandate, to William Abresch, and to Sarah Knuckey and Jason Morgan-Foster of the Project on Extrajudicial Executions at New York University Law School, who provided invaluable expert assistance and advice.

6. A brief statistical profile of the communications sent during the period under review shows that 127 communications were sent to 46 countries, [2] including 58 urgent appeals and 69 allegation letters. The main issues covered in the communications were the death penalty (32), deaths in custody (23), the death penalty for minors (18), excessive use of force (15), impunity (11), attacks or killings (10), armed conflict (8) and death threats (6).

7. As in previous years, the proportion of Government replies received to communications sent during the period under review is problematically low. The precise percentage figures in this regard are provided in the communications addendum.

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III. ISSUES OF PARTICULAR IMPORTANCE

A. Role of national commissions of inquiry in impunity for extrajudicial executions

12. The duty arising under international human rights law to respect and protect life imposes an obligation upon Governments to hold an independent inquiry into deaths where an extrajudicial execution may have taken place.[3] While an independent police investigation will often suffice for this purpose, the creation of an official commission of inquiry with a human rights mandate is a time-honoured and oft-repeated response, especially to incidents involving multiple killings or a high-profile killing. These commissions vary greatly as to the terminology used, and their composition, terms of reference, time frames and powers. Even elementary Internet research provides the details of a plethora of examples of royal commissions, independent commissions, judicial commissions, parliamentary commissions and the like. While such inquiries are by definition established at the initiative of the government authorities, they are most often a result of concerted demands by civil society and sometimes also by the international community. Indeed it is now almost standard practice for a commission to be demanded in the aftermath of major incidents in which the authorities which would normally be relied upon to investigate and prosecute are feared to be reluctant or unlikely to do so adequately.

13. In historical terms, the technique of creating inquiries can be traced back to many examples in the early part of the twentieth century, including in colonial and immediately post-colonial contexts. More recently, the number and range of inquiries has been expanded significantly by two relatively new

phenomena. The first is the considerable increase in internationally mandated inquiries, set up by bodies like the Human Rights Council or its predecessor. The second is the proliferation of transitional justice commissions, including truth and reconciliation commissions, designed to review historical injustices and help map a balanced response. The focus in the present analysis, however, is upon nationally mandated inquiries.

14. The thrust of the analysis is that the mere setting up of a commission of inquiry and even its formal completion will often not be adequate to satisfy the obligation to undertake an independent inquiry. Empirical inquiry, based on the many examples that have come to the attention of the Special Rapporteur and his predecessors, indicates that such inquiries are frequently used primarily as a way of avoiding meaningful accountability. The international human rights community needs to scrutinize such initiatives far more carefully in the future and to develop a mechanism for monitoring and evaluating their adequacy.

1. Reasons to establish inquiries

15. Whenever an arbitrary deprivation of life occurs, States are obligated to undertake a thorough, prompt and impartial investigation, to prosecute and punish the perpetrators and to ensure that adequate compensation is provided to the relatives of victims.[4] This would normally be assured through the regular functioning of the criminal justice system, including police, public prosecutors, courts and oversight mechanisms, such as ombudsmen. All too often, however, and especially in the case of large-scale or politically-charged killings, the system in place is unable to function effectively and extraordinary measures are needed in order to bring justice.

16. Such failings can occur in a variety of situations. First, the police may lack the necessary investigative capacities. The investigation required may be complex, far-reaching or require scientific and forensic resources that may not be available. Second, those charged with investigating the events might themselves be suspected, or closely connected to suspects. Relations between the police and the military or paramilitary groups are of particular relevance in this regard. Third, victims, relatives and witnesses might lack confidence in the police or other investigating authorities and be unprepared to cooperate with them. Fourth, political interference at the local, State or federal levels might be hindering an effective investigation. Fifth, the killings might be part of a broader phenomenon which needs to be investigated more broadly and not confined to a criminal investigation. Sixth, a solution to the problem, including the punishment of those responsible, might require the mobilization of a degree of public pressure and political will which require more than a regular investigation.

17. Whatever the reason for the shortcomings of the established system for carrying out investigations and prosecutions, States are obliged to take positive steps to ensure that their administrative and judicial institutions do in fact operate effectively, and to take measures to avoid the recurrence of violations. This may require the State to make changes to its institutions, laws or practices.[5]

18. National commissions of inquiry are a common response in such situations. The inquiry will often be set up to address the victim-specific violation by being tasked to investigate the alleged abuses, give a detailed account of a particular incident or series of abuses, or recommend individuals for prosecution. In an effort by the State to prevent future violations or to strengthen the criminal justice system, a commission may also be given a broader mandate to report on the causes of the violation and to propose recommendations for institutional reform. Use of this technique is by no means confined to any particular group or type of countries, but takes place in a great many countries regardless of their level of development or their legal system.

19. Paradoxically, the circumstances that lead to the creation of such inquiries very often carry with them the seeds of the initiative's subsequent failure. In other words, Governments are pressured by the momentum of events, diplomatic pressures or for other reasons to do something which they perceive to be contrary to their own interests. Thus the initiative may, from the outset, be pursued in ways designed to minimize its ultimate impact.

20. The procedures and results of these inquiries have been a recurring concern throughout the 26 years of the Special Rapporteur's mandate. Governments have frequently replied to a communication from the Special Rapporteur in relation to an alleged extrajudicial execution by indicating that a special commission of inquiry has been set up to investigate the matter.[6] The Special Rapporteur has frequently welcomed this measure,[7] and in many cases where a State has not yet signalled its intention to create a commission, the Special Rapporteur has called on the State to do so.[8] Specific national commissions have also been studied in depth in a great many of the country reports of the Special Rapporteurs following in situ visits.[9] All too often, however, the commissions of inquiry are found wanting, and successive Special Rapporteurs have expressed the concern that commissions are frequently designed to deflect criticism by international actors of the Government rather than to address impunity.[10] Once the establishment of a commission has been announced, the State, in response to criticisms from the international community, often uses the special inquiry as evidence that it is currently taking action to address impunity. This often succeeds in defusing domestic or international criticism and preventing strong advocacy by international actors to promote accountability within the State; however, given that commissions of inquiry are often deficient and that attempts to use commissions to avoid rather than advance accountability often succeed, the international community must find more effective ways of engaging with them.

21. Thus, in my 2006 report to the Commission on Human Rights,[11] I signalled my intention to report to the Human Rights Council on the principal problems that had been experienced in relation to commissions of inquiry and to make recommendations in that regard. [12] To that end, the present analysis: (a) discusses the positive role that commissions of inquiry can play; (b) outlines the established guiding principles for a national commission of inquiry; (c) examines the principal problems that have been encountered in this regard in the work of the Special Rapporteur; and (d) proposes conclusions and recommendations based on lessons learned.

2. Positive role of commissions of inquiry in addressing impunity

22. In principle, commissions of inquiry can play an important role in combating impunity. First, the commission may be tasked with carrying out of some of the functions normally performed by criminal justice institutions. A commission will often be established to provide an independent investigation where the criminal justice institutions are seen to be biased or incompetent. This is often the case where key government agents, such as the police or military, are themselves involved in abuses and where there is no reliable system of police or military oversight.[13] It is also the case where there is long history of repeated abuses that police fail to investigate, public prosecutors fail to prosecute, or courts fail to punish due to incompetence, bias, or lack of expertise.[14] A commission may also be seen as desirable where one incident is particularly complex and significant, requiring sustained and focused investigation in order to be understood.[15] In such cases, a commission can help to explain or analyse a complex situation, and thus perform important functions normally beyond the scope of police investigations or judicial procedures.

23. Second, a commission can provide informed advice to the Government on the institutional reforms necessary to prevent similar incidents from occurring in the future. It can perform an essential function that is generally unsuitable to police, prosecutors or courts, and explain the underlying causes for serious human rights abuses or the causes of impunity for those abuses. In addressing the causes of the abuses, a commission can be the first step in a Government's effort to take measures to prevent the recurrence of violations and to ensure that its institutions, policies, and practices ensure the right to life as effectively as possible.[16] Importantly, where it appears that the regular institutions are incapable of combating impunity, a commission can propose structural or long-term reforms to address criminal justice institutional deficiencies. When used in this way, and when the commission's recommendations are followed up by the Government, a commission can be an effective way for the State to reform its criminal justice institutions so that it will meet its obligation to investigate, prosecute and punish violations of human rights in the future.[17]

3. Guiding principles for a national commission of inquiry

24. The basic question that must guide an assessment of a commission is whether it can, in fact, address impunity. In Special Rapporteur Wako's first report in 1983 for the extrajudicial executions mandate, he recommended that "[m]inimum standards of investigation need to be laid down to show whether a Government has genuinely investigated a case reported to it and that those responsible are fully accountable".[18] Since then, and due in part to the work of successive Special Rapporteurs, the general standards which govern how a commission of inquiry should be conducted are now clear and well established.[19] I will not detail in full those standards again here, except to highlight the following.

25. In order for a commission to address impunity, it must be independent, impartial and competent. The commission's mandate should give the necessary power to the commission to obtain all information necessary to the inquiry but it should not suggest a predetermined outcome. Commission members must have the requisite expertise and competence to effectively investigate the matter and be independent from suspected perpetrators and from institutions with an interest in the outcome of the inquiry. Commissions should be provided transparent funding and sufficient resources to carry out their mandate. Effective protection from intimidation and violence needs to be provided to witnesses and commission members. When it establishes the commission, the Government should undertake to give due consideration to the commission's recommendations; when the report is completed, the Government should reply publicly to the commission's report or indicate what it intends to do in response to the report. The commission's report should be made public in full and disseminated widely.

26. As the examination below of the problems encountered in relation to commissions indicates, these standards are more than just desirable best practice. Experience shows that conformity with them is essential if a commission is to be effective.

4. Problems encountered in relation to commissions of inquiry

27. A comprehensive review of the work of the Special Rapporteur since 1982 indicates that many commissions have achieved very little. They are often set up to show domestic constituents and the international community that the Government has the will and capability to address impunity. Subsequent assessments undertaken by the Special Rapporteurs, however, indicate that many of them have in fact done little other than deflect criticism. A review of the specific commissions reported on by the Special Rapporteurs indicates that they have consistently failed to meet the basic standards set out above. In order to understand more fully where commissions commonly fail and how international actors should engage with them, this section details the main problems encountered in relation to the conduct or outcomes of commissions of inquiry.

(a) Inquiry fails to take place

28. Sometimes, commissions are announced with great fanfare, but an inquiry never actually begins its work.[20] Self evidently, in such cases, a commission is simply put forward to appease Government critics, but there is no actual Government will to use the institution to address impunity.

(b) Limited mandate

29. A commission may be limited in its effectiveness by the terms of its mandate. The mandate may be unduly narrow or restricted in a way that undermines its credibility or usefulness. This is particularly the case where the mandate preempts the outcome of the inquiry or where a mandate restricts who a commission may investigate (for example, by prohibiting it from investigating Government actors).[21]

(c) Insufficient funding or resources

30. In some cases, the lack of funding or provision of basic resources to a commission have been extremely detrimental to the ability of the commission to function, even where its members have the will to conduct investigations. This is more than simply a technical matter; the adequacy of resources provided to a commission upon its establishment can be a useful indicator of the good faith of the Government and perhaps also of its potential effectiveness.

31. In his 1987 report, for example, Special Rapporteur Amos Wako reported on his visit to Uganda.[22] In 1984 and 1985, the Special Rapporteur had sent allegation letters to Uganda, and in March 1986, Uganda promised the Commission on Human Rights that it would establish a commission to investigate violations of human rights. In August 1986, the Special Rapporteur visited Uganda to follow up the allegations he had received and to report on the work of the commission.[23] He reported that the commission was urgently in need of (a) basic human rights materials; (b) logistical support (vehicles and transport); and (c) stationery and office machinery.[24] He noted that strengthening United Nations support to the commission could "minimize its logistical problems and enhance its efficiency".[25]

(d) Lack of expertise

32. A commission needs the appropriate expertise to carry out the mandated investigations. For instance, in his mission report on Indonesia and East Timor, Special Rapporteur Bacre Waly Ndiaye observed that "[n]one of the members of the [commission] had the necessary technical expertise to correct the shortcomings found in the investigations carried out by the police".[26] Similarly, in his report on Uganda, Rapporteur Wako noted that the commission "needed expert advice on several aspects of its work, particularly in regard to the definition of offences against human rights". [27]

(e) Lack of independence

33. Where a commission is not independent from the parties to a conflict or from any institution or person with an interest in the outcome of the inquiry, its inquiry is unlikely to be capable of providing an unbiased assessment of the incident. Just as importantly, where the commission is not perceived to be independent, its work will lack credibility and its conclusions are unlikely to be trusted. Independence has often been a central concern of assessments of commissions made by special rapporteurs. It has three important aspects.

34. First, independence must be structurally guaranteed so that the commission is set up as a separate institution from the Government. This formal independence can often be assessed by examining the terms of the mandate before the commission begins its work, or through an examination of the early investigatory practices of the commission. For instance, a major Sri Lankan commission, established in November 2006, the progress of which I have followed closely, [28] has been criticized for its failure to secure formal independence. The commission was appointed by the President of Sri Lanka to, inter alia, investigate incidents of human rights abuses committed since August 2005, to report on the prior investigations into the abuses and to recommend measures to prevent abuses in the future.[29] Sri Lanka also invited the formation of an International Independent Group of Eminent Persons to monitor the work of the national commission and to report on its conformity with international standards.[30] But following a year of public statements by the Group expressing concern about the functioning of the commission, [31] on 6 March 2008, the Group announced that it was terminating its functions because of the serious shortcomings in the work of the national inquiry and because of the lack of institutional support for the commission's work. [32] The Group stated that the national inquiry had "fallen far short of the transparency and compliance with basic international norms and standards pertaining to investigations and inquiries". [33] It noted that one of the many flaws in the commission was that there were structural conflicts of interest which seriously compromised the independence of the commission. The State Attorney-General's Department provided legal counsel to the commission, playing a leading role in the panel of counsel to the commission. Given that the Attorney-General's Department is also the chief legal adviser to the Government of Sri Lanka and had been involved in the original investigations into some of the cases being investigated by the commission, the Department was potentially going to be investigating itself. [34] In addition, Department members could be potential witnesses to the commission. As the Group noted, this is a serious conflict of interest. [35] A later assessment by the Group indicated that the formal conflict did in fact have a serious negative impact on the quality of the commission's investigations. [36]

35. In some cases, it will be virtually impossible for the State to assure its citizens and the international community that a government-established commission can ever be truly independent. This may be the case where a commission is set up to investigate human rights abuses in the context of an internal armed conflict. [37] In such cases, it has been the experience of the Special Rapporteur that an international commission of inquiry may be necessary.

36. Second, where formal independence has been established, actual independence may still be lacking. It is essential to look beyond the formal independence of the commission from the Government, and to assess whether the commission is capable in practice of carrying out its work independently. This may require the work of the commission to be monitored for the entire period of its operation. As Special Rapporteur Amos Wako noted in 1987, "in a number of countries, the investigating body, which was given an independent or quasi-independent status … did not, in reality, secure its independence". [38]

37. An extreme example of Government interference is that of a commission established by Ethiopia in 2006 to investigate excessive force by Government forces in 2005 during anti-government demonstrations. It reportedly found initially that excessive force had in fact been used. [39] Another is provided in the report of Special Rapporteur Wako's mission to Zaire in May 1991. Following allegations of a massacre between 8 and 12 May 1991, the Shaba Regional Assembly established a commission. It operated for one month, but "as its report was about to be presented, it was seized, reportedly on orders of the central authorities, and quashed". [40]

38. Third, a commission's members must also be judged to be individually independent and not be seen to have a vested interest in the outcome. [41] Where members are not in fact or are not perceived to be independent, the commission lacks legitimacy in the eyes of the public and its findings are unlikely to be accepted. [42] In addition, witnesses may be too afraid to come forward to the Commission for fear of bias by commission members. [43]

(f) Inadequate provision of witness protection

39. Inadequate protection provided to commission members or to witnesses appearing before the commission has severely hampered the work of some commissions. [44] The Sri Lankan national commission, ongoing at the time of the present report, has been strongly criticized by the International Independent Group of Eminent Persons for failing to have an effective witness-protection programme. [45] Witness protection within the commission was so poor that the possible whereabouts of witnesses was reported in a news article, which cited a commission member as the source of the confidential information. [46] The international independent group noted that this, together with the lack of a comprehensive witness-protection programme, would discourage critical witnesses coming forward which would inhibit "any effective future pursuit of the filing of indictments, convictions, and appropriate accountability for the alleged grave human rights violations under review".

40. In some circumstances, it will be necessary to provide security to all members of the commission for it to function independently, or for it to function at all. An extreme example was provided in Special Rapporteur Wako's report on his visit to Colombia in October 1989, in which he detailed the massacre of 12 of the 15 members of a commission on 18 January 1989. [47] The commission was said to have succeeded in identifying those responsible for a massacre in October 1987. Even after the massacre of most of the commission members, proper protection was not provided to the three surviving members or to the witnesses to the attacks. [48] The Special Rapporteur noted that this "[c]ontributes to the phenomena known as impunity. Witnesses cannot come forward to give evidence and even if

they make statements, they are later retracted because of intimidation and fear of being killed. Proper investigations cannot be carried out and, therefore, many files are closed for lack of evidence". [49]

(g) Lack of power to have access to important evidence

41. Some commissions have been refused access to evidence necessary for the inquiry. [50] A commission needs to have the authority to obtain all information necessary to form fully informed conclusions, and this will often mean that a commission needs the power to compel the production of documents and witness testimony. [51] In my country report on Nigeria, for example, a commission was established to investigate alleged killings by the army, but the army did not acknowledge or reply to the commission's correspondence. [52] A similar problem was experienced with the Sri Lankan commission, in which State authorities refused to fully cooperate with investigations. [53]

(h) Failure to make public, respond to or follow up on commission findings

42. One of the most common problems encountered with a commission of inquiry is that, even where it has carried out its work effectively and submitted a timely report to the Government, the findings of the commission are simply never made public. [54] This has, for example, been the trend in Nigeria. [55] In a report on my visit to that country, I noted that there was a consistent pattern: violations are alleged; a commission is established; the reports are never published or are ignored. [56] After my visit, I reported that the "Apo 6" inquiry, set up to investigate killings by police, appeared to be exemplary. At the time of reporting in 2005, it was only slightly delayed, and I called for it to be made public immediately. [57] Unfortunately, nearly three years later, it has reportedly still yet to be made officially public.

43. Crucially, when a commission report is not made public, Government failure to officially respond to the report or to follow up on the commission's recommendations usually follows. Lack of Government follow-up to completed commission reports has been a notable feature of cases observed by the Special Rapporteur. [58] During my mission to Nigeria, for example, although a commission recommended in 2004 that compensation be paid to the victims of violence, at the time of my visit in mid-2005, none had been paid. [59]

(i) Inadequate prosecutions follow commission report

44. Frequently, one of the central purposes of establishing a commission is to investigate and report on the responsibility for alleged abuses. When a commission carries out an effective investigation, it will often be able to recommend directly the prosecution of individuals or to submit evidence to prosecutors for the same purpose. In some cases, arrests follow the submission of a commission report, but the suspects will later be released without being prosecuted. [60] Alternatively, prosecutions may follow the commission report, but the sentences handed down are grossly inadequate. [61] In other cases, those recommended for prosecution by the commission are never successfully prosecuted, or sometimes never even charged. [62] A State attorney-general in Nigeria, for example, told me during my country visit in 2005 that he could recall "no case of prosecutions" following an inquiry in that country, and that their main purpose was just to facilitate a "cooling of the political temperature". [63] In one case, although the Nigerian commission had reported in detail on the identities of those security personnel responsible for serious human rights abuses, not one soldier was subsequently charged or disciplined in any way. [64]

45. In such cases, all that the commission achieves is a delay, often of many years, of the prospect of adequate prosecution of human rights abuses. In practice, this means that the international community has been deterred from pushing for prosecutions or from calling for the strengthening of regular criminal justice institutions, while the results of the commission are awaited. Once the commission has reported, it will usually be too late for meaningful pressure to be brought and the impetus or incentive for doing so will have greatly diminished in the meantime.

(i) Inadequate prosecutions follow commission report

46. A related problem is that evidence is gathered by a commission in such a way as to compromise the possibility of successful subsequent prosecution. In a communication to Israel in September 2005, I wrote that there was no doubt that the Government commission had investigated at length whether the use of lethal force in question had been proportionate. The commission carried out its work for three years and produced an 800-page report, which concluded that, in some cases, the lethal force used had not been justified. During most of the period of the commission's investigations, those undertaken by the Police Investigations Department were halted by the State prosecutor so that witnesses could testify before the commission without fear of criminal investigation. However, after the commission's report was released, it was disavowed by the Department on the basis that it was no longer possible to "determine whether the use of lethal force was disproportionate and, if so, who is responsible for that disproportionate use of lethal force".[65] The Department did not issue indictments. As I noted in the communication, this "outcome - and particularly the way in which the interplay of the commission inquiry and Police Investigations Department investigation have produced it - would appear to fall short of the international standards". [66]

(j) The inquiry's final report fails to adequately justify its conclusions

47. Some commissions appear on their face to be appropriately established, but a close review of the substance of the final report reveals a failure to conduct a meaningful inquiry. [67] Its conclusions may be untenable in the face of the available evidence. The commission may simply accept the Government version of events without explanation or analysis. It may reach conclusions without any apparent investigation having taken place to support them.

48. During my visit to Nigeria, for example, I reviewed a commission report into a "sectarian crisis" in Kano state in 2004. Credible and detailed civil society reports put the number killed at between 200 and 250; the commission, however, without providing any evidence whatsoever that it had conducted independent investigations into the number killed, recommended that the police figure of 84 be taken as the "official position". [68] The commission, again without having undertaken any adequate investigation, also accepted the Government's assessment of the overall damage caused by the crisis. In recommending the compensation that should be paid, the commission arrived at figures without any explanation or argument. [69]

(k) Lack of information about the conduct of or response to the commission

49. One significant problem encountered in the work of the Special Rapporteur in seeking to address widespread impunity for extrajudicial executions is a dearth of information on the conduct of established commissions of inquiry and of the Government response to the final commission report. [70] Rarely is the progress of most national commissions carefully monitored by the international community. Commissions often take many months or years to produce their reports, and it can take as long again before the Government issues an official response to the inquiry's conclusions. Long-term monitoring is thus necessary in order to determine whether a particular commission was, at the end of the day, effective. But there is no centralized monitoring of commissions of inquiry worldwide accessible to view the progress of a commission or to judge its effectiveness.

5. Lessons learned from 26 years of reporting on commissions of inquiry

50. Experience demonstrates that, while commissions of inquiry tasked with examining alleged extrajudicial executions have much to recommend them in principle, in practice the balance sheet is often much less positive. Far too many of the commissions dealt with by the Special Rapporteur over the past 26 years have resulted in de facto impunity for all those implicated.

51. In essence, the problem is that commissions can be used very effectively by Governments for the wrong purposes: to defuse a crisis, to purport to be upholding notions of accountability and to promote impunity. The mere announcement by a Government of a commission is often taken at face value to mean that the Government is "doing something" to address impunity. Because a commission creates the appearance of government action, its announcement often prevents or delays international and civil society advocacy around the human rights abuses alleged. Moreover, 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.

52. These conclusions raise an important issue for the international community. How should international actors respond to announcements that commissions of inquiry are to be established?

53. The principal answer is that the international community should not, solely because a commission of inquiry has been established, suspend its engagement with the relevant Government when serious violations of human rights are alleged. International actors should assess from the outset whether the commission has been given the tools it would need to be able to address impunity effectively. The commission's mandate, its membership, the process by which it was selected, its terms of appointment, the availability of effective witness-protection programmes and the provision of adequate staffing and funding should all be examined to ascertain whether the commission meets the relevant international standards. Experience demonstrates that the standards are more than just best practice guidelines: they are necessary preconditions for an investigation capable of addressing impunity. If they are not met in practice, a commission is highly unlikely to be effective.

54. If a commission is not established in accordance with international standards, the international community should not adopt a "wait and see" approach. Rather, it should promptly draw attention to the inadequacies and advocate implementation of necessary reforms. Where a Government appears to

have a genuine will to establish an effective commission, but lacks the necessary expertise, funding or resources, international assistance will be appropriate.

55. A commission is not a substitute for a criminal prosecution.[71] It does not have the powers of a court to declare the guilt or innocence of a person. It usually cannot order punishment for a wrongdoer. A commission's role in terms of the State's obligation to prosecute and punish is to gather evidence for a subsequent prosecution, identify perpetrators or recommend individuals for prosecution. If the commission's mandate overlaps significantly with that of the regular criminal justice institutions (for example, where it is tasked with investigating and identifying perpetrators, duties normally performed by police and public prosecutors), a sound rationale needs to be provided by the Government to justify the creation of the commission. Without such justification, the commission is likely to be a tool to delay prosecutions or deflect the international community's attention from advocating for prosecutions.

56. If there is no sound rationale for the commission or if the commission's mandate is inadequate to achieve its purpose, international actors should continue to focus on the need for prosecutions to progress through the regular criminal justice system and for reforms to that system to be made where necessary. Experience shows that, where the regular criminal justice institutions are biased, or lack expertise or competence, or are the subject of Government interference, it is unlikely that a commission of inquiry will be able to achieve the independence needed to address impunity effectively. Furthermore, even if the commission defies the odds and does its work effectively, there is no reason to expect the criminal justice system to do its part by way of follow-up. It might thus be better for the international community to insist from the outset that the system itself be reformed.

57. Where the international community determines that a commission of inquiry is an appropriate response, it should then track its progress closely. Failures to meet international standards in the functioning of the commission should be noted and appropriate steps taken in response. Inordinate delays and failures to publish reports should be matters of comment. Once a commission has reported, the Government should be pressed to respond formally and address the recommendations. Finally, the Government's actual follow-up to those recommendations should be carefully monitored.

58. In sum, the announcement or establishment of a commission should not take the pressure off a Government to address impunity, and it should not silence international actors. Instead, the international community should monitor commissions actively, push for their compliance with international standards, offer assistance where appropriate and insist that a commission does not distract from the need to maintain strong criminal justice institutions. Governments and international actors should never lose sight of the substance of what a commission of inquiry is supposed to achieve: accountability for serious human rights abuses and underlying reform to prevent the recurrence of violations.

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Notes

[1] The term "extrajudicial executions" is used in this report to refer to executions other than those carried out by the State in conformity with the law. As explained in my previous reports "[t]he terms of reference of this mandate are not best understood through efforts to define individually the terms 'extrajudicial', 'summary' or 'arbitrary', or to seek to categorize any given incident accordingly". Rather, "the most productive focus is on the mandate itself, as it has evolved over the years through the various resolutions of the General Assembly and the Commission" (E/CN.4/2005/7, para. 6; A/HRC/4/20, para. 1, fn. 1).

[2] The States are: Afghanistan, Algeria, Armenia, Bahrain, Bangladesh, Brazil, Chile, China, Colombia, Democratic People's Republic of Korea, Ecuador, Egypt, Ethiopia, Fiji, Honduras, India, Indonesia, Iran, Iraq, Israel, Jordan, Kenya, Kyrgyzstan, Liberia, Libyan Arab Jamahiriya, Maldives, Morocco, Myanmar, Nepal, Nigeria, Pakistan, Papua New Guinea, Philippines, Russian Federation, Saudi Arabia, Singapore, Somalia, Sri Lanka, Sudan, Syrian Arab Republic, Thailand, United Kingdom, United States of America, Viet Nam, Yemen, Zimbabwe.

[3] *McCann v. United Kingdom* (1995) 21 EHRR 97.

[4] Commission on Human Rights resolution 2005/34; Human Rights Committee, general comment No. 31, CCPR/C/21/Rev.1/Add.13 (2004).

[5] Ibid., para. 17.

[6] E.g. E/CN.4/2003/3/Add.1, paras. 301 and 331; E/CN.4/1997/60/Add.1, para. 225; E/CN.4/1995/61, paras. 135 and 164; E/CN.4/1996/4, paras. 188-91; E/CN.4/1994/7, para. 199; E/CN.4/1993/46, paras. 115-18; E/CN.4/1993/46, para. 348; E/CN.4/1991/36, para. 296; E/CN.4/1991/36, para. 124; E/CN.4/1992/30, paras. 502 and 543; E/CN.4/1991/36, paras. 290-96.

[7] E.g., E/CN.4/1992/30, para. 281.

[8] E.g. E/CN.4/2005/7/Add.1, p. 291; E/CN.4/1990/22, para. 378; E/CN.4/1991/36, para. 455.

[9] E/CN.4/2006/53/Add.5; E/CN.4/2006/53/Add.4; E/CN.4/2005/7/Add.2; E/CN.4/2004/7/Add.2; E/CN.4/2003/3/Add.3; E/CN.4/1996/4/Add.1; E/CN.4/1995/61/Add.1; E/CN.4/1994/7/Add.2; E/CN.4/1992/30/Add.1; E/CN.4/1990/22/Add.1; E/CN.4/1987/20.

[10] A/62/265, para. 11; E/CN.4/2006/53/Add.4, para. 103; E/CN.4/2003/3, para. 31; E/CN.4/1999/39, para. 67; E/CN.4/1998/68, para. 97; E/CN.4/1997/60, para. 97; A/51/457, para. 124; E/CN.4/1995/61, para. 402; E/CN.4/1994/7, para. 695.

[11] E/CN.4/2006/53, paras. 25 and 61-62.

[12] This report focuses on national, rather than international commissions of inquiry. For reporting on international commissions of inquiry, see E/CN.4/2006/89 examining the international commissions for East Timor (1999), Togo (2000), the Occupied Palestinian Territory (2001), Côte d'Ivoire (2004), and the Darfur region of the Sudan (2004).

[13] E/CN.4/2001/9/Add.2, para. 60; and E/CN.4/1990/22, para. 11.

[14] E/CN.4/1994/7, para. 148; E/CN.4/1990/22, para. 378; E/CN.4/1991/36, para. 448; E/CN.4/1994/7/Add.2, para. 108.

[15] E/CN.4/1993/46, para. 139; and E/CN.4/1994/7, para. 695.

[16] E/CN.4/2006/53, para. 41.

[17] E/CN.4/2006/53, para. 41; E/CN.4/1986/21, paras. 80-81.

[18] E/CN.4/1983/16, para. 230.4. See also E/CN.4/1985/17, paras. 59-60; E/CN.4/1988/22, para. 189.

[19] Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, E/1989/89 (1989), especially 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, especially Principle 5; Updated Set of principles for the protection and promotion of human rights through action to combat impunity, Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher, E/CN.4/2005/102/Add.1 (8 February 2005), especially Principles 6-13; United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, Model Protocol for a Legal Investigation of Extra-Legal Arbitrary and Summary Executions ("Minnesota Protocol"), E/ST/CSDHA/12 (1991); Report of the Secretary-General, E/CN.4/2006/89 (15 February 2006), para. 2.

[20] E/CN.4/1994/7, para. 202; E/CN.4/1996/4/Add.1, para. 38.

[21] E/CN.4/2005/7/Add.2, para. 43.

[22] E/CN.4/1987/20.

[23] E/CN.4/1987/20, paras. 62-65, and 226-234.

[24] E/CN.4/1987/20, para. 8. He stated that "[N]o progress whatsoever could be achieved unless certain clearly essential requirements were met. For example, the investigative functions of the Commission of Inquiry were paralysed without transport and office supplies, including photographic equipment." (para. 13).

[25] Ibid., para. 16.

[26] E/CN.4/1995/61/Add.1, para. 54.

[27] E/CN.4/1987/20, para. 12.

[28] E/CN.4/2006/53/Add.5.

[29] The Presidential Commission of Inquiry to Investigate and Inquire into Alleged Serious Violations of Human Rights was established in a Presidential Warrant by his Excellency Mahinda Rajapaksa, President of the Democratic Socialist Republic of Sri Lanka, P.O. No: CSA/10/3/8.

[30] The IIGEP is composed of 11 international law and human rights experts from 11 different countries, and was formally established in February 2007.

[31] See International Independent Group of Eminent Persons, Public Statements dated 11 June 2007, 15 June 2007, 19 September 2007, and 19 December 2007.

[32] Ibid., Public Statement of 6 March 2008.

[33] Ibid.

[34] Ibid., Public Statement of 11 June 2007.

[35] Ibid.

[36] Ibid., Public Statement of 15 June 2007.

[37] E/CN.4/2005/7/Add.2, para. 60.

[38] E/CN.4/1987/20, para. 178.

[39] However, government officials reportedly requested commission members to change their votes. The final report found that excessive force had not been used. *Amnesty International Report 2007*, at http://thereport.amnesty.org/eng/Regions/Africa/Ethiopia.

[40] E/CN.4/1992/30/Add.1, para. 222.

[41] E/CN.4/1990/22, para. 11.

[42] E/CN.4/1995/61/Add.1, para. 54.

[43] Ibid.

[44] E/CN.4/2001/9/Add.1, para. 263; E/CN.4/1994/7/Add.2, para. 109; E/CN.4/1993/46, para. 527; E/CN.4/1990/22/Add.1, para. 37.

[45] International Independent Group of Eminent Persons, Public Statements of 6 March 2008 and 19 September 2007.

[46] Ibid., Public Statement of 6 March 2008.

[47] E/CN.4/1990/22/Add.1.
[48] E/CN.4/1990/22/Add.1, para. 37.
[49] E/CN.4/1990/22/Add.1, para. 68.
[50] E/CN.4/1994/7/Add.2, para. 44.
[51] E/CN.4/1990/22, para. 11; E/CN.4/1988/22, para. 194.
[52] E/CN.4/2006/53/Add.4, para. 67.
[53] The IIGEP noted that, "In fact, state officials have refused to render the required answers to relevant questions": International Independent Group of Eminent Persons, Public Statement of 19 December 2007.
[54] E/CN.4/2003/3/Add.1, para. 573; E/CN.4/1995/61, para. 402; E/CN.4/1995/61, para. 65; E/CN.4/1991/36, para. 26 (c).
[55] E/CN.4/2006/53/Add.4, para. 62.
[56] Ibid., para. 64.
[57] Ibid., para. 103.
[58] E/CN.4/1997/62/Add.1, para. 64; A/51/457, para. 124; E/CN.4/1996/4/Add.1, para. 41; E/CN.4/1994/7, para. 202; E/CN.4/1994/7/Add.2, para. 46; E/CN.4/1995/61, para. 402; E/CN.4/1984/29, para. 114; E/CN.4/1991/36, para. 437.
[59] E/CN.4/2006/53/Add.4, para. 66.
[60] E/CN.4/1996/4, para. 425.
[61] E/CN.4/2006/53/Add.1, para. 242; E/CN.4/1993/46, paras. 350-353.
[62] E/CN.4/2006/53/Add.1, pp. 223-224.
[63] E/CN.4/2006/53/Add.4, para. 103.
[64] Ibid., para. 67.
[65] E/CN.4/2006/53/Add.1, pp. 127-128.
[66] Ibid.
[67] E/CN.4/2003/3/Add.3, paras. 32 and 41; E/CN.4/2004/7/Add.2, paras. 43-44.
[68] E/CN.4/2006/53/Add.4, para. 65.
[69] Ibid., paras. 65-66.
[70] E/CN.4/1996/4/Add.1, para. 41.
[71] E/CN.4/2004/7/Add.2, para. 86.

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