

Vehicles for accountability or cloaks of impunity?

How can national commissions of inquiry achieve accountability for violations of the right to life?

Thomas Probert

Summary

The establishment of national commissions of inquiry is a common governmental response in the aftermath of crisis, including allegations of major human rights violations. Proponents of such commissions suggest that they are a more flexible, participatory and open mechanism to determine, in the first instance, ‘What happened?’ and ‘Who was affected?’, than immediate criminal investigation. Their critics highlight that governments can set them up safe in the knowledge that their recommendations are non-binding, that they will likely take a lot of time to investigate and then to write their report, and that, by the time they do so, whatever public pressure was being exerted on behalf of those affected may well have dissipated.

This policy brief outlines the extent of the state’s obligations to investigate and to pursue accountability in the aftermath of a violation of human rights – particularly in the case of a potential violation of the right to life. Drawing on the recently revised Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016), as well as on a long-running research project on commissions of inquiry in Africa, the policy brief elaborates on some of the standards that could be used to establish whether a commission of inquiry is an appropriate mechanism for a particular context, and whether its

establishment contributes to government fulfilling its obligation to conduct a prompt, impartial, thorough and transparent investigation.

Introduction

One of the central premises of the international human rights system is the assumption that certain norms exist, and that there should be consequences for their violation – human rights standards are not merely preferences or aspirations. States’ actions to secure human rights have two broad components: a practical obligation – pre-emptive actions (before the fact) to respect or protect rights in order to avoid a violation taking place – and a responsive, procedural one – actions undertaken should there be a violation, or a suspicion of a violation. These procedural obligations often take the form of ‘accountability processes’, and can comprise continuous oversight, investigation, prosecution or other sanction, institutional reform, memorialisation, restitution or other redress.

A lack of accountability can in itself amount to a violation of the human right in question, or at least of the right to redress. Accountability plays a central role in affirming norms against arbitrary actions and, as such, also plays a vital preventative role. These

two components can thus create a self-reinforcing, virtuous circle. In the aftermath of a violation becoming public – the integrity of the norm in question having been challenged – the state is often confronted by the need (often in the form of political pressure) to restore the norm through some form of accountability process.

The various forms that these processes can take are in many cases mutually reinforcing. The state may, for example, rely on a routine police investigation, or an investigation by an oversight body or human rights commission, followed by appropriate criminal and civil law processes to sanction those found responsible and provide redress for those who have suffered. In certain instances, however, states may find it helpful (or expedient) to establish a national commission of inquiry to assess the situation, investigate what happened, and make recommendations on how the state should proceed in pursuit of accountability.

Commissions of inquiry have a long lineage in at least the common law system: across domestic, imperial and colonial contexts, the commission of inquiry has been deployed by governments at points of crisis.¹ Commissions have also been established to address routine matters requiring specific expertise, such as possible changes to a taxation system, but these are not the primary focus here. Sometimes, a specific scandal can lead to the establishment of an inquiry with a far broader mandate – such as the Leveson Inquiry into the culture, practices and ethics of the press in the United Kingdom, which emerged out of a phone-hacking scandal in 2011.

In highly contested or combustible moments, commissions of inquiry – normally ad hoc, independent institutions appointed by the state with a carefully framed mandate to investigate certain questions – are sometimes portrayed as possessing a unique capacity to provide impartial assessment, and to bring certainty or closure in situations of doubt and conflict. They can, it is sometimes argued, play an important role in the aftermath of crisis, by serving as instruments of accountability and policy learning.² However, around the world, it is also commonly alleged that commissions of inquiry are established to offer only the *form* of an accountability process – the impression that the government is responding – without the meaningful substance, and can thus potentially function to whitewash violations.

Commissions of inquiry have proved to be a relatively frequent feature of the legal landscape globally. It is worth noting that similar mechanisms are increasingly established at the international (global or regional) level, which essentially fulfil the same function. These are not

the focus here, but guidance has recently been produced regarding their conduct, which can also inform commissions at a national level.³

Recognising the role they often play in investigating suspected violations of the right to life (or unlawful killings), in 2008 the then United Nations (UN) Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, presented a report to the Human Rights Council on commissions of inquiry. He noted that, while, by definition, they are established at the initiative of government authorities, they often result from concerted pressure exerted by civil society, sometimes bolstered by the international community. He pointed out that ‘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’.⁴

The thrust of Alston’s analysis was that merely setting up a commission of inquiry – indeed even its formal completion – will often be insufficient to satisfy the state’s duty to investigate. He noted that ‘such inquiries are frequently used primarily as a way of avoiding meaningful accountability’ and suggested that such initiatives should be far more carefully scrutinised in the future so as to monitor and evaluate their impact in stemming impunity.⁵

Partly with a view to supplying the empirical basis for such evaluation, specifically in the African context, a team of researchers from the University of Pretoria and elsewhere, including the Institute for Justice and Reconciliation, has been undertaking a review of national commissions of inquiry with a right to life focus that have been set up on the African continent in the last 25 years. With respect to violations of the right to life alone (far from the only subject of commissions of inquiry), a survey reveals more than 60 commissions in nearly 30 states.⁶

This policy brief builds upon this research by asking whether and how national commissions of inquiry can be effective accountability mechanisms, and in what circumstances they can play a role in a broader process that fulfils the state’s procedural obligations with regard to violations. The focus is on commissions considering right to life violations, but recommendations and significant features can generally be transferred to commissions aimed at addressing other issues. Likewise, while the research has focused on examples of commissions of inquiry in Africa, questions concerning the effectiveness of investigations can be asked globally.

After examining the obligations of the state with respect to accountability for violations of the right to life, including its duty to investigate, this policy brief will examine certain common features of commissions, before making a series of recommendations on how states and other actors can ensure that they are more effective.

Accountability for violations of the right to life: The duty to investigate

The right to life is sometimes referred to as the supreme human right. It is protected in all major human rights conventions and its core elements are considered to be *jus cogens*, or peremptory norms of international law. Its protections continue to apply during armed conflict (though it is interpreted in the context of the conduct of hostilities with reference to the rules of international humanitarian law).⁷ States' responsibilities with respect to the right to life have been elaborated in a number of significant soft-law instruments,⁸ and individual criminal and civil responsibility for unlawful deprivations of life is well established in international and domestic legal systems.

The African Commission on Human and Peoples' Rights, in its recent General Comment on the right to life, noted:

*The failure of the State transparently to take all necessary measures to investigate suspicious deaths and all killings by State agents and to identify and hold accountable individuals or groups responsible for violations of the right to life constitutes in itself a violation by the State of that right. This is even more the case where there is tolerance of a culture of impunity. All investigations must be prompt, impartial, thorough and transparent.*⁹

The Commission reminds states that '[a]ccountability, in this sense, requires investigation and, where appropriate [,] criminal prosecution', but the General Comment also notes: 'In certain circumstances, independent, impartial and properly constituted commissions of inquiry or truth commissions can play a role, as long as they do not grant or result in impunity for international crimes.'¹⁰ The Commission presented a very broad vision of accountability, encompassing measures such as reparation, ensuring non-repetition, disciplinary action, making the truth known, institutional review and, where applicable, reform. It underlined that '[s]tates must ensure that victims have access to effective remedies for such violations'.¹¹

Commissions of inquiry related to violations of the right to life are typically ad hoc, often quasi-judicial, fact-

finding bodies established by state authorities, in many instances in the wake of major incidents that allegedly involve state agents through acts or omissions, and that are either large-scale in impact and/or politically motivated. They may also address situations that are systemically violent or other threats to the right to life posed by non-state actors. Commissions of inquiry are usually established in circumstances in which routine justice or other investigative mechanisms are for some reason inappropriate or not possible. They typically perform an investigatory and/or advisory function, are usually mandated with a specific object of inquiry, and are given certain investigatory powers. They are often established for the purpose of providing an account of a single event or events over certain periods, and usually furnish a report with recommendations to state authorities. While the focus here is on national mechanisms, such bodies often include international components, either directly, by having international commissioners or investigators, or indirectly, by adopting or drawing upon the methodologies or resources of international organisations.

The recently revised *Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)* (the updated version of the UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions) has made it clear that with respect to loss of life – broadly – the duty of the state to investigate is triggered where the state knows, or should have known, of any potentially unlawful death, including where reasonable allegations of a potentially unlawful death are made.¹² Both the European and Inter-American human rights mechanisms had previously established that the duty to investigate does not apply only where the state is in receipt of a formal complaint.¹³

The duty to investigate any potentially unlawful death includes all cases where the state has caused a death, either by act or omission (for example, where law enforcement officers used force that may have contributed to the death), or where it is alleged or suspected that it did so.¹⁴ In peacetime situations and cases during an armed conflict that fall outside the conduct of hostilities, this duty exists regardless of whether it is suspected or alleged that the death was unlawful.¹⁵ Certain situations, such as armed conflict, may pose practical challenges for investigations. Where context-specific constraints prevent a full investigation, the constraints should be recorded and explained.¹⁶

Investigations of any potentially unlawful death must be effective and thorough. Investigators should, to the extent possible, collect and confirm all testimonial, documentary and physical evidence. At a minimum, all reasonable steps should be taken during investigations

to identify the victim(s); recover and preserve all material relevant to the cause of death, the identity of the perpetrator(s), and the circumstances surrounding the death; and identify potential witnesses and obtain their evidence regarding the circumstances of the death.¹⁷

The investigation must seek to determine whether or not there was a breach of the right to life. It should aim to identify not only direct perpetrators, but also any others who were responsible for the death, including, for example, officials in the chain of command who were complicit in the act. The investigation should further seek to identify any failure to take reasonably available measures which could have had a real prospect of preventing the death, as well as policies and systemic failures that may have contributed to a death, identifying patterns where they exist.¹⁸

The uses of commissions of inquiry

The state can fulfil its duty to investigate by using a range of different mechanisms. As a general rule, commissions of inquiry are only appointed and used as fact-finding bodies when a situation is unusual and requires a special mechanism of accountability. This might be on account of the scale of the incident, or of credible allegations implicating political power in the event. It is important, therefore, that commissions of inquiry be envisioned only as part of a broader process and not as a stand-alone solution.

There can be several factors influencing the decision to establish a commission: there might be considerable public anxiety about the matter; a major lapse in government performance may appear to be involved, meaning that traditional government institutions are not widely trusted to investigate the issue impartially; or circumstances giving rise to the inquiry may appear so unusual that an ad hoc body will be better able to address them.

Commissions of inquiry can have a broader capacity than courts for fact-finding purposes. Criminal courts may not be able to document the full spectrum of crimes that have taken place during a prolonged period of abuses, partly because they may convict only on proof beyond reasonable doubt, and may only consider evidence relevant to the alleged perpetrator who stands accused. Commissions, on the other hand, can investigate and document a broader range of information that might be revealed about the perpetration of human rights violations. While courts are not well designed to determine the underlying causes of an event (beyond, in some cases, the individual motives of the perpetrators) or to explore complex institutional

relationships, commissions of inquiry can explore historical, systemic, institutional and personal drivers of events without having to focus on strict proof of culpability.

In many instances, the more specific findings and recommendations of a commission of inquiry will require action on the part of the courts to pursue prosecutions of those implicated by the commission. But the range of potential recommendations of a commission is far broader than just prosecutions: it could encompass institutional or legal reform, memorialisation, large-scale reparation or other forms of remedy. In this regard, commission and court should in certain circumstances fulfil an inherently complementary function, but they should not be confused as two mechanisms that are capable of achieving the same outcome. In light of the broad range of redress-related needs and preferences, it is important to include survivors in determining redress processes so as to ensure mechanisms are tailored to the specific requirements of a given context.

Pressure for the establishment of a commission of inquiry

As noted above, commissions of inquiry are established where a routine investigation would for some reason be inappropriate. One compelling measure of the appropriateness of those mechanisms is the level of public trust in them. Governments usually establish commissions of inquiry because there is a public demand for justice, expressed in the form of distrust for whatever state institution would normally be charged with investigating.

However, it is important to underline that commissions should be used sparingly. Commissions (which are costly and disruptive) should respond to unusual and extreme concerns that cannot be adequately addressed with existing mechanisms because of scale or gravity. If this bar is set too low, then the normal oversight or accountability mechanisms are made redundant. Moreover, if commissions are set up as routine, knee-jerk reactions to pressure being exerted on the government to respond to allegations of a violation, then it is likely that many states will find themselves flooded with separate, potentially conflicting, and competing recommendations that they must try to implement. In these circumstances, another new commission can be, or be perceived to be, merely a procedural smokescreen. In certain countries — for example in Nigeria or Kenya — commissions of inquiry are established so frequently that many potential parties, including individuals who are asked to become commissioners, have lost confidence in the potential of commissions to achieve anything.

If events are regularly occurring that appear to require investigation by a commission of inquiry on account of the scale of the event or the lack of trust in other mechanisms, then it is quite likely that previous recommendations (probably around strengthening accountability and oversight mechanisms) have not been implemented. The proper implementation of a previous commission's recommendations should usually precede the establishment of a new commission to investigate a similar or related issue.

Public pressure can play a constructive role at various stages of the inquiry process, for example with respect to the framing of the mandate and the appointment of commissioners. From the perspective of accountability, once the commission has been set up, public pressure can perhaps most usefully be mobilised around the implementation of its recommendations. The suspicion that commissions of inquiry are established merely to 'buy time' for the government while the public pressure dissipates can be actively resisted both by the commission and by the public through sensitive and continued communication and engagement between the two.

However, even if implemented effectively, a commission of inquiry often cannot quench a 'thirst for justice' among the people broadly or, if applicable, among the victim group. Commissions are often established because of lack of confidence in other mechanisms (the trustworthiness of commissions can more readily be achieved than wholesale root-and-branch reform of the judiciary), but the problem is that, with respect to violations of the right to life, commissions are likely to result in a finding that relies on exactly the same (still unreformed) justice mechanisms.

Ensuring the independence and impartiality of a commission of inquiry

Probably the foremost criterion for the credibility of a commission of inquiry as an investigative body is that it be independent and impartial. Regardless of the question before the commission, investigators and investigative mechanisms must be, and must be seen to be, independent of undue influence. They must be independent of any suspected perpetrators and the units, institutions or agencies to which they belong.

Commissions should be free from undue external influence, such as the interests of political parties or powerful social groups, but they must also – for example when investigating the actions of security agencies – be capable of operating without undue influence that may arise from institutional hierarchies or chains of command.¹⁹

The public will often expect some form of representation on the commission, representation that is independent of the government. This may entail independent lawyers, scholars or members of prominent civil society groups. However, it is also important that commissions are not so skewed towards civil society that they can later be portrayed as a civil society investigation – the official status of the commission's members and its report is often its most valuable asset. Judges or magistrates, who fulfil an official role but are at least supposed to be independent of the executive, can play an important part in this regard. Independence may also entail the involvement of international members, at least in a certain number of roles.

It is important that commissioners are viewed as 'credible' as well as independent. This can mean that they are well qualified in some technical capacity (for example, it might be appropriate that at least one member of the commission has a background in either international human rights law or international humanitarian law, as applicable), but it could also encompass more social or cultural determinants of their standing within the affected community.

In addition to any particular technical capabilities that may be required of an investigator, members of a commission of inquiry (and other associated lawyers or investigators) need to be able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference, and must be able to operate free from the threat of prosecution or other sanctions for any action taken in accordance with the investigation.²⁰

Independence requires more than merely not acting on the instructions of an actor seeking to influence an investigation inappropriately. It means that the investigation's structure or decisions not be unduly altered by the presumed or known wishes of any party, or that the outcome of the inquiry not appear to have been predetermined.

In this respect, both a commission's terms of reference and its members must also be impartial. This can impact the appointment of commissioners as well as the framing and announcement of the mandate and/or terms of reference of the commission.

Investigators must be impartial and act at all times without bias, analysing all evidence objectively. They must consider and appropriately pursue exculpatory as well as inculpatory evidence.²¹ Allegations raised regarding the partiality of members of the commission,

or its terms of reference, especially if raised near the beginning of the commission's work, ought to be taken very seriously by the governing authority.

The way in which the mandate and terms of reference is framed should not pre-judge the outcome, nor pre-emptively apportion blame. Commissions should not be proscribed from pursuing certain lines of inquiry, but, at the same time, it is also important that the questions posed to a commission are narrow enough so as to be realistically answerable.

Financing

In addition to what might be characterised as the 'orientation' of the commission, the independence and impartiality of which are, to a large extent, within the control of the commissioners, there can also be what may be termed 'functional' limitations to the extent to which a commission can perform its duties without becoming subject to undue or inappropriate influence. One of the most common limits to the functional independence of a commission of inquiry is its financing.

Inquiries cost money. And where – for whatever reason – it has been decided that the established mechanisms of investigation or inquiry are inappropriate, and that a specialist, ad hoc mechanism needs to be established, these costs are likely to be greater. By limiting the available funds of an inquiry, the state can easily exert an influence preventing the commission from undertaking certain investigative activities.

Commissions should, as early as possible, prepare a budget setting out the likely costs of an investigation and determine whether the funds already approved are adequate. A commission that is established without adequate funding to complete the inquiry in the manner the commission deems necessary cannot be capable of fulfilling the state's duty to investigate.²²

This said, commissioners also have a duty to conduct the inquiry in a cost-effective manner, avoiding duplicating work unnecessarily or taking on functions that properly belong to other parallel mechanisms where they exist. This might be the case with respect to forensic testing for example, or to other forms of expert investigation or evaluation. It may also be the case that a commission can draw on inter-governmental or non-governmental organisations to render technical assistance to an investigation.

Where possible, commissions should quickly be given authority and practical control over their own expenditure, as reliance on another government

department can limit both their independence and their practical efficiency.

Investigatory powers

Along with adequate financing, the proper provision of investigatory powers is an essential component of a robust commission of inquiry. In order effectively to establish the extent of a violation and the relevant actors, it is important that commissioners have the capability to subpoena any relevant evidence, compel appearance of witnesses, and have them testify under oath, and at risk of perjury (or a similar offence).

Commissions should be strategic about using these powers: compelling vast amounts of unnecessary evidence will flood an investigative staff and dilute their study of the probative material; likewise, omitting to subpoena vital physical evidence (especially if leaving it in the custody of the body being investigated) allows ample opportunity for perpetrators to fabricate evidence that will similarly delay or impede the commission's work.

It will almost always be the case that the aims of a right to life investigation will be materially assisted by the performance of an autopsy. However, often another mechanism or authority may be better placed to carry this out. This is principally a consequence of timing (that, by the time the commission has been established, the appropriate time to conduct an autopsy has passed). A decision not to undertake an autopsy, by whatever authority was best placed at the time, should certainly be a decision reviewed within the scope of the commission's investigation.

In certain circumstances – for example should a mass grave be discovered as part of the commission's investigation – a need may arise for the commission to undertake forensic investigation. Forensic inquiries must always be conducted by appropriately qualified experts, whose contributions to the commission's work should be treated as expert testimony. Where this is not done, a commission can ultimately impede a subsequent investigation by having contaminated evidence.

More broadly, relative to investigatory powers, attention should always be paid to how a commission should or should not interact with other investigative accountability mechanisms that may be working alongside or subsequent to it. Forensic investigations should, for example, be conducted to the standard necessary for a subsequent criminal investigation, and where possible, witness testimonies should be collected rigorously enough so that a prosecutor can

avoid the possibility of re-traumatising witnesses or duplicating work.

Security (including witness protection)

Protecting the physical safety of individuals involved in the commission's work is clearly an important contributor to their independence. However, it is also important that security concerns do not unduly limit the commission's scope of work. Those involved in providing security should understand the purpose of the investigation and endeavour to provide necessary support. Moreover, those providing security (or advice about security) should be functionally independent of any agency under investigation by the commission.

With respect to security and protection, it should be noted that successfully achieving accountability for unlawful killings, by whatever mechanism, is extremely difficult in the absence of effective witness-protection programmes. Philip Alston dedicated a report as Special Rapporteur to this subject, noting:

*If witnesses can be easily intimidated, if they and their families remain vulnerable, or if they sense that the protections offered to them cannot be relied upon, they are unlikely to testify. As a result, it is often the case that the only people willing to take the risk of testifying are the victims' family members. Usually, however, they are poorly placed to provide the most compelling evidence against the perpetrators. Ending impunity for killings thus requires institutionalizing measures to reduce the risks faced by witnesses who testify.*²³

Transparency

Aside from the needs of confidentiality for the protection of victims or witnesses, a commission's investigation should be as transparent as possible. This means that it should be open to the scrutiny of the general public, as well as to the survivors, victims, and families of victims. Transparency promotes the rule of law and public accountability, and enables external monitoring of the efficacy of investigations. It also enables the participation of the victims and others in the investigation.

Any limitations on transparency must be strictly necessary for a legitimate purpose, such as protecting the privacy and safety of affected individuals, ensuring the integrity of ongoing investigations, or securing sensitive information about intelligence sources or military or police operations. But, provided that it does not endanger any victim or survivor, transparency must

not be restricted in a way that would conceal the fate or whereabouts of any victim of an enforced disappearance or unlawful killing, or result in impunity for those responsible.²⁴

This said, particularly given its responsibility to ensure witness protection, and its objective to investigate potentially publicly sensitive questions, a commission may find it helpful or necessary to conduct certain parts of its investigation in confidential session, and, if necessary, to keep parts of its report restricted. One notable example of such a decision was that made by the Waki Commission into post-election violence in Kenya, which, alongside public hearings, held a number of informal in camera sessions with key witnesses, and famously presented a confidential 'envelope' alongside its report.

Commissions should also guard against 'playing to the gallery' and prevent interested parties from using the official transparency of a commission of inquiry as a means of popularising a particular narrative of events before it is able to publish its report. It is partly for this reason that commissions must have carefully and impartially designed terms of reference, as discussed above.

Timing

Both the right to life and the right to an effective remedy are violated when investigations into potentially unlawful deaths are not conducted promptly.²⁵ Authorities must conduct an investigation as soon as possible and proceed without unreasonable delays.²⁶ Regional bodies have ruled that officials with knowledge of a potentially unlawful death must report it to their superiors or the proper authorities without delay.²⁷

The timing of a commission of inquiry can be a delicate balancing act. An effective commission will likely have been set up quite quickly after the events in question, though it is possible for commissions to be valuable investigative mechanisms regarding historical events as well.

However, the duty of promptness does not justify a rushed or unduly hurried investigation.²⁸ Once established, it is important that a commission be given sufficient time to complete its work. Since the full extent of the necessary work may not be apparent at the time a commission is established, it is important that reasonable extensions to the initial timeframe be allowed. This said, it should also be borne in mind that one of the advantages of a commission can be to conduct an initial investigation quickly to determine the best course of action.

While unnecessary delays in their work should be avoided, commissions should also avoid rushing into high-profile or public work, and instead allow time for the commissioners and staff of a commission to familiarise themselves with the available evidence and formulate a suitable strategy.

The failure of the state promptly to investigate does not relieve it of its duty to investigate at a later time. Even with the passing of a significant amount of time, the duty to investigate does not cease.

Participation

One feature of commissions of inquiry that is frequently discussed, perhaps most persuasively around their incarnation as truth commissions, is the extent to which they can be more participatory than, for example, judicial proceedings, which are burdened with their strict standards of proof, practices of cross-examination, and considerations of relevance.

This can be particularly pertinent in terms of the involvement of victims or survivors, or other affected individuals or communities, in the process of accountability. As the UN *Basic Principles and Guidelines on the Right to a Remedy and Reparation* make clear, victims have a right to equal and effective access to justice, to adequate, effective and prompt reparation for harm done, and access to information concerning both the violations that have taken place and any reparation mechanisms. Moreover, the state has a responsibility to ensure that those who have suffered violence or trauma 'should benefit from special consideration and care to avoid [their] re-traumatisation in the course of legal and administrative procedures designed to provide justice and reparation'.²⁹

Commissions of inquiry can provide institutionalised pauses for review, or forums of potential change, or indeed of resistance to change. They can be places for contestation and debate over meaning, but they can sometimes break down partisan divides that prevent progress in conventional sites for political debate. For whatever reason they may have been set up, and whatever flaws there may be in their processes, commissions have the potential to enrich and well as to moderate public dialogue.

Many commissions, perhaps in addition to taking expert evidence, hold public hearings in which people are invited to participate in a very open way. It should, of course, be borne in mind that such sessions are never as genuinely democratic as they may appear or try to appear – certain 'gatekeepers' will almost always retain some kind of influence – but the broadened

participation can have an evidentiary benefit, as well as a powerful reconciliatory potential.

It is worth noting that, in certain countries, for example South Africa, commissions of inquiry tend to have a highly juridified procedure that requires parties to the issue at hand to be represented by professional counsel in order to participate properly. It is important that states guard against this amounting to a barrier threshold to participation by, for example, providing legal aid or other support.

Where the event that has taken place has had a widespread impact, or emanates from an underlying cause with broad roots, effective commissions will seek testimony or other evidence from as diverse a range of communities as possible. In many cases, this requires the commission to take the initiative in terms of making itself and its processes known to the wider public, through newspaper, radio or TV advertisements, as well as relying, where appropriate, on a network of local investigators.

Publication of a commission's report

One of the most tangible indicators of the success of a commission of inquiry as an accountability mechanism is whether or not its report is published. In some cases, reports are unpublished because they are unwritten – for some reason the commission never finished its work – but in other cases, a report has been submitted by the commission to the government, yet the government has not made it public.

Commissions are established by governments, either by the executive or by the legislature, and are often mandated to report directly to the entity establishing them, rather than to the public. It is true that the primary purpose of an ad hoc institution such as a commission of inquiry can be to advise the government on how to proceed with respect to an unusual challenge of accountability – either determining who was responsible or advising how to provide a remedy. However, as noted above with respect to transparency, accountability, of which a commission represents at least an initial step, must not only be achieved, but be *seen* to be achieved.

In most cases where a commission of inquiry is established, there is a public interest in a report of some kind. It is, after all, one advantage of a commission, compared to certain other investigative mechanisms, that it can sometimes produce a better account of the 'bigger picture'. This function is rendered less significant if it is not allowed to publish its findings.

There can sometimes be good reasons for certain parts of a report to remain confidential – for example those parts that might prejudice the fairness of a subsequent prosecution, or those parts that might identify particular witnesses or other individuals who might subsequently be targeted. Commissions should bear in mind this tension – between the public right to information and the necessities of confidentiality – during their drafting, and maybe consider a confidential annex to a broader public report.

Responsible use of a commission of inquiry's findings and recommendations

Importantly, where a commission recommends further investigation or prosecution, the state's duty to investigate has not been fulfilled unless these steps are taken.³⁰ This may take the form of establishing a second special mechanism or may involve passing cases to existing mechanisms (in all likelihood a national prosecutor or equivalent).

The duty to investigate gives practical effect to the duties to respect and protect the right to life, and promotes accountability and remedy where the substantive right may have been violated. Where an investigation reveals evidence that a death was caused unlawfully, the state must ensure that identified perpetrators are prosecuted and, where appropriate, punished through a judicial process.³¹ Impunity stemming from, for example, unreasonably short statutes of limitations or blanket amnesties (*de jure* impunity), or from prosecutorial inaction or political interference (*de facto* impunity), is incompatible with this duty.³² Investigations and prosecutions are essential to deter future violations, and to promote accountability, justice, the rights to remedy and to the truth, and the rule of law.³³

States must ensure that special mechanisms do not undermine accountability by, for example, unduly delaying or avoiding criminal prosecutions. Even an effective special investigative mechanism designed, for instance, to investigate systemic causes of rights violations or to secure historical memory, will not in itself satisfy a state's obligation to prosecute and punish those responsible for an unlawful death through judicial processes. Accordingly, while special mechanisms may play a valuable role in conducting investigations in certain circumstances, they are unlikely on their own to fulfil the state's duty to investigate, which may eventually require a combination of mechanisms.³⁴

It bears repeating that, as the African Commission has noted in its General Comment, accountability in this sense can have a very broad and rich meaning. It may

include, depending on the circumstances, the prosecution and punishment of those responsible, the restitution or reparation of those who suffered, the reform of institutions, and the reconciliation of affected communities or groups. Commissions of inquiry can make findings or recommendations about any or all of these component parts.

Conclusion

As the African Commission has noted, the failure of the state to pursue accountability for violations of the right to life, including through the effective investigation of suspicious deaths, is itself a violation of that fundamental human right. As part of a state's response to an alleged or suspected violation, a properly constituted national commission of inquiry can sometimes play a helpful role in fulfilling the state's duty to investigate. Like any other investigative mechanism, a commission of inquiry needs to meet various standards, including those of promptness, effectiveness, thoroughness, independence, impartiality, and transparency.

In certain jurisdictions, commissions of inquiry are established with reference to pre-existing legislation, making them less *ad hoc*. This could potentially prevent abuses with respect to the formal or operational independence of a commission, but only if the legislation is properly drafted. Moreover, a one-size-fits-all approach is not necessarily appropriate to a commission of inquiry, one advantage of which, as a mechanism, is the extent to which it can be tailored to the specifics of a situation.

The eventual impact of a commission of inquiry (beyond the participatory event and/or the reception of the report) will often ultimately depend on the implementation of its recommendations by the body that established it. In some jurisdictions where a commission of inquiry has been established pursuant to a formal Act, there may be a statutory requirement (such as that in Nigeria) for the government to table a White Paper or equivalent legislative instrument relating to the commission's findings.

However, it is very important to distinguish commissions of inquiry as a potential tool (or mechanism) of accountability from the entity which ultimately has the responsibility to drive a process of accountability, namely the state. Caution should be exercised before speaking of commissions as 'successes' or 'failures' when it comes to accountability – commissions can be part of successful or unsuccessful processes of accountability; they can helpfully advance or regrettably obstruct those

processes, but often the implementation of their recommendations lies outside their own powers.

Commissions are sometimes established as a response to unusually strong pressure for accountability, stemming from public outrage or from international condemnation. At their most effective, commissions should sustain the momentum of this pressure on the responsible party – the state – and at times even add to it with an official and reliable record of the facts. In the majority of cases, a commission of inquiry should be only the beginning of an accountability process: as a body that is usually only empowered to establish a record and to make recommendations, the pursuit of full accountability must then be taken up by others.

Recommendations:

- Policymakers at all levels should consider the potentially positive role that commissions of inquiry can play as part of a broader accountability process in response to a suspected large-scale human rights violation, as well as their structural limitations.
- At the level of intergovernmental or other relevant policy organs, work should be undertaken to

develop continental guidelines detailing good practice with respect to the establishment and support of commissions of inquiry.

- Commissions of inquiry should be used sparingly, but, where they are established, they should be adequately resourced, empowered and facilitated by the state.
- Commissions of inquiry should be mandated to publish their reports directly, and be in control of which other parts of their work are made public.
- Where commissions of inquiry are established, all stakeholders should hold them to high standards of thoroughness, transparency, independence, impartiality and functionality. Civil society organisations, as well as other observers, should be vocal in ensuring that inadequate mechanisms are not allowed to masquerade as the fulfilment of the state's duty to investigate.
- Drawing upon international standards, including those found in the recently revised Minnesota Protocol, training should be provided for judges, advocates, and other potential investigators and stakeholders, concerning emerging good practice in the conduct of investigations, including forensic investigations.

Endnotes

- 1 For an analysis of the use within colonial administrations, see Jennifer Balint, Julie Evans and Nesam McMillan 'Justice Claims in Colonial Contexts: Commissions of Inquiry in Historical Perspective' *Australian Feminist Law Journal*, 42:1 (2016).
- 2 Raanan Sulitzeanu-Kenan, 'Reflections in the Shadow of Blame: When Do Politicians Appoint Commissions of Inquiry?' *British Journal of Political Science*, 40:3, 2010, pp.613–34.
- 3 Office of the High Commissioner for Human Rights, *Commissions of Inquiry and Fact-Finding Missions on International Human Rights Law and International Humanitarian Law: Guidance and Practice* (2015).
- 4 Philip Alston, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions' (2 May 2008) [A/HRC/8/3] §12.
- 5 *Ibid.* §14.
- 6 A full list of these commissions of inquiry, along with much of the associated documentation, can be found at: <http://www.icla.up.ac.za/commissions-of-inquiries-in-africa-project/27-un/commission-of-inquires-in-africa/201-commissions-of-inquiries-in-africa-information> [accessed: March 2017].
- 7 For a general discussion of the scope and protection of the right to life, see Christof Heyns and Thomas Probert 'Casting Fresh Light on the Supreme Right: The African Commission's General Comment No. 3 on the Right to Life' in Tiyanjana Maluwa, Max du Plessis and Dire Tladi. *The Pursuit of a Brave New World in International Law: Essays in Honour of John Dugard* (Brill, 2017).
- 8 At the UN level, for example, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (1990), and the *Code of Conduct for Law Enforcement Officials* (1979). The UN Human Rights Committee is in the process of revising a General Comment on the right to life, to update General Comment No. 6 (1982). At the regional level, the African Commission on Human and Peoples' Rights (ACHPR) in 2015 adopted *General Comment No. 3 to the African Charter: the Right to Life (Article 4)*.
- 9 ACHPR, *General Comment No. 3* §15.
- 10 *Ibid.* §17.
- 11 *Ibid.*
- 12 See *The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016): The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* (Office of the UN High Commissioner for Human Rights, 2017). The author played a part in the coordination of the revision of this document while working as a Research Consultant to the UN Special Rapporteur on extrajudicial, summary or arbitrary executions.
- 13 European Court of Human Rights (ECtHR), *Ergi v. Turkey*, Judgment, 28 July 1998, §82; ECtHR, *Isayeva, Yusopva and Bazayeva v. Russia*, Judgment, 24 February 2005, §§208–09; Inter-American Court of Human Rights (IACtHR), *Montero-Aranguren et al. v. Venezuela*, Judgment, 5 July 2006, §79.
- 14 See, for example, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (1990) §§22–26.
- 15 See Christof Heyns 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions' (2 September 2016) [A/71/372] §114.
- 16 See *Minnesota Protocol on the Investigation of Potentially Unlawful Death* (2016), §16. See also, for example, ECtHR, *Jaloud v. The Netherlands*, Judgment (Grand Chamber), 20 November 2014, §164. For a discussion of the duty to investigate violations of international humanitarian law (IHL) see ICRC Customary IHL Study, Rule 158 (Prosecution of War Crimes). Also see the 1949 Geneva Conventions: Geneva I, Art. 49; Geneva II, Art. 50; Geneva III, Art. 129; Geneva IV, Art. 146; the 1977 Additional Protocol I, Art. 85.
- 17 See *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* (1989).
- 18 More broadly on the wide purpose of investigations, see UN Commission on Human Rights *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (2005) [E/CN.4/2005/102/Add.1].
- 19 *Minnesota Protocol on the Investigation of Potentially Unlawful Death* (2016) §28.
- 20 *Ibid.* §30.
- 21 *Ibid.* §31.
- 22 *Ibid.* §27.
- 23 Philip Alston, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions' (20 August 2008) [A/63/313] §12.
- 24 *Minnesota Protocol on the Investigation of Potentially Unlawful Death* (2016) §33.
- 25 IACtHR, *Garibaldi v. Brazil*, Judgment, 23 September 2009, §139. For the requirement during armed conflict, see, for example, the report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, UN doc. A/HRC/29/CRP.4, 24 June 2015, §625; Also see Public Commission to Examine the Maritime Incident of 31 May 2010, Second Report: Turkel Commission, (February 2013) ("Turkel II"), Recommendation 10, §66, p.399.
- 26 Turkel II, §§37, 63–66; pp.385, 397–99.
- 27 IACtHR, *Anzaldo Castro v. Peru*, Judgment, 22 September 2009, §134.
- 28 ECtHR, *Pomilyayko v. Ukraine*, Judgment, 11 February 2016, §53.
- 29 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (2005) [A/RES/60/147] §§10–11.
- 30 *Minnesota Protocol on the Investigation of Potentially Unlawful Death* (2016), §8(c).
- 31 *Ibid.* See also *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, Principle 1.
- 32 See, for example, UN Human Rights Committee, General Comment No. 31, §18.
- 33 Christof Heyns 'Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions', (7 August 2015) [A/70/304]; Preamble to the *UN Basic Principles and Guidelines on the Right to Remedy and Reparation*.
- 34 *Minnesota Protocol on the Investigation of Potentially Unlawful Death* (2016) §41.

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ABOUT THIS POLICY BRIEF

This policy brief arises from a larger research project on national commissions of inquiry in Africa, based at the Institute for International and Comparative Law in Africa (University of Pretoria). The project has surveyed the use of commissions of inquiry across the African continent over the last 25 years, particularly where they have been established in response to allegations of violations of the right to life. The International Justice Project at the Institute for Justice and Reconciliation has cooperated with the Institute for International and Comparative Law in Africa for parts of this project. For more information, please see <http://www.icla.up.ac.za/commissions-of-inquiries-in-africa-project>.



ABOUT THE AUTHOR

Dr Thomas Probert

Dr Thomas Probert is a Senior Researcher at the Institute for International and Comparative Law in Africa (University of Pretoria) and a Research Associate of the Centre of Governance and Human Rights (University of Cambridge). From 2013 to 2016, he acted as a Research Consultant to the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, based in the Office of the High Commissioner for Human Rights in Geneva. He is now the Head of Research of a new international collaboration, 'Freedom from Violence', which aims to bring together researchers focusing on public health- and human rights-based approaches to violence reduction in Africa.

CONTACT US

Tel: +27 21 202 4071
Email: info@ijr.org.za

Physical and Postal Address

105 Hatfield Street
Gardens
8001
Cape Town
South Africa



www.ijr.org.za

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