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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 torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez\***

### *Summary*

In the present report, the Special Rapporteur gives an overview of his activities during the reporting cycle in relation to country visits, pending visit requests, presentations, consultations, communications and press statements.

The thematic focus of the report, commissions of inquiry, was selected by the Special Rapporteur to help deepen the international community's understanding on when such commissions should be created by States in response to patterns or practices of torture and other forms of ill-treatment. Furthermore, the purpose of the report is to generate further discussion of the standards that apply to the establishment and conduct of commissions of inquiry, and the relationship between such commissions and the fulfilment by States of their international legal obligations with regard to torture and other forms of ill-treatment.

The Special Rapporteur examines the scope and role of commissions of inquiry in the international human rights context and pays tribute to the earlier work on this subject, including the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol) and the updated set of principles for the protection and promotion of human rights through action to combat impunity. The Special Rapporteur evaluates the objectives of commissions of inquiry and the added value of such mechanisms.

In the report, the Special Rapporteur also provides an overview of the current practice of commissions of inquiry at the international, regional and national levels. He notes that, where possible, the possibility of national commissions of inquiry ought to be pursued before the establishment of an international commission. The Special Rapporteur analyses the complementary role that commissions may play, but stresses that the

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\* Late submission.

mechanism does not relieve States of their legal obligations to investigate and prosecute torture and other forms of ill-treatment, and to provide effective remedies to victims of past violations, including reparation for harm suffered and to prevent its reoccurrence. Commissions of inquiry should in fact be conceived of as a means to fulfil such obligations most effectively.

The Special Rapporteur identifies best practices and discusses standards as a way to determine when and how commissions of inquiry actually advance principles of international law and aid States and the international community in the fulfilment of their international legal obligations. He identifies a number of key factors in establishing a fair, effective and thorough commission of inquiry: resources; choice between international and national; composition; mandate, powers and attributions; methodology; evaluation of evidence; relationship with prosecutions; and the report.

The Special Rapporteur concludes that commissions of inquiry are strong and flexible mechanisms that can yield substantial benefits for Governments, victim communities and the wider public. He seeks to encourage the beneficial use of commissions of inquiry while highlighting the pitfalls to be avoided.

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## **I. Introduction**

1. The present report is submitted to the Human Rights Council in accordance with Council resolution 16/23.<sup>1</sup>

2. During the reporting cycle, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment conducted country visits to Tunisia (A/HRC/19/61/Add.1) and Kyrgyzstan (A/HRC/19/61/Add.2). A summary of the information provided by States and other stakeholders relating to follow-up measures to the recommendations made during the past 10 years of country visits has been prepared (A/HRC/19/61/Add.3). The observations made by the Special Rapporteur on some of the cases reflected in previous communication reports (A/HRC/18/51 and A/HRC/19/44) have also been submitted (A/HRC/19/61/Add.4).

## **II. Activities of the Special Rapporteur**

3. The Special Rapporteur draws the attention of the Human Rights Council to the interim report submitted to the General Assembly (A/65/273) in accordance with Assembly resolution 64/153, and covering the activities of the mandate holder from January to July 2011. The present report covers the key activities undertaken by the mandate holders since the submission of the interim report to the General Assembly (A/66/268).

### **A. Communications concerning human rights violations**

4. The communications sent by the Special Rapporteur between 1 December 2010 and 31 May 2011 and the replies received between 1 February and 31 July 2011 are reflected in the communications report submitted by special procedures mandate holders (A/HRC/18/51). The communications sent by the Special Rapporteur between 1 June and 31 November 2011 and the replies received between 1 August 2011 and 31 January 2012 are contained in the communications report (A/HRC/19/44).

### **B. Country visits**

5. In 2011, the Special Rapporteur undertook visits to Tunisia (A/HRC/19/61/Add.1) and Kyrgyzstan (A/HRC/19/61/Add.2). He had planned to visit Iraq from 6 to 15 October 2011, as provisionally agreed upon; only days before his scheduled travel, however, the Government still had not formally confirmed the dates or the agenda, and the mission was regrettably cancelled. The Special Rapporteur remains engaged with the Government of Iraq to try and find alternative dates in 2012. He notes with appreciation the Government's formal confirmation of his country visit to the Bahrain, which will be held in the first half of March 2012. The Special Rapporteur has also accepted an invitation to visit Tajikistan, a mission he hopes to undertake during the second half of 2012.

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<sup>1</sup> The Special Rapporteur wishes to acknowledge with appreciation the excellent research and support provided by Andrew W. Maki and Catherine Cone, J.D., candidates at the American University Washington College of Law.

### **C. Pending requests**

6. The Special Rapporteur has reiterated his interest in conducting a country visit to a number of States where there are pending requests for invitations, including Cyprus (2010), El Salvador (2010), Eritrea (2005), Ethiopia (2005), Ghana (2010), Guyana (2010), India (1993), Iran (Islamic Republic of) (2005), Kenya (2010), Pakistan (2010), the Russian Federation (2000), Saudi Arabia (2005), the Syrian Arab Republic (2005), Uzbekistan (2006) and Venezuela (Bolivarian Republic of) (2010). The Special Rapporteur has also reiterated requests to Cuba and Zimbabwe, the Governments of which had extended an invitation to the mandate to visit their respective countries; to date, however, there has been no further engagement by either of these States regarding the possibility of a visit. In 2011, the Special Rapporteur requested a country visit to Belarus, Guatemala and Morocco (including Western Sahara) and the United States of America.

### **D. Highlights of key presentations and consultations**

7. On 27 September 2011, the Special Rapporteur participated in a high-level panel of experts on the theme “Deconstructing the death penalty”, which examined the implications and the implementation of the death penalty in the United States of America, at Washington College of Law in Washington, D.C.

8. From 18 to 20 October 2011, the Special Rapporteur presented his interim report (A/66/268) to the General Assembly at Headquarters, where he also participated in two side events: one organized by the Permanent Mission of Denmark and the International Rehabilitation Council for Torture Victims on “Rehabilitation of torture survivors”, and the other organized jointly by Human Rights Watch and the American Civil Liberties Union on “The dangerous overuse of solitary confinement”. He also met with representatives of the permanent missions of Denmark and of Iraq. The Special Rapporteur met with representatives of non-governmental organizations advocating the end to torture in the health-care context.

9. On 21 October 2011, the Special Rapporteur and the other mandate holders involved in the secret detention study (A/HRC/13/42), including the Special Rapporteur on the promotion and protection of human rights while countering terrorism, the Working Group on Arbitrary Detention and the Working Group on Enforced or Involuntary Disappearance, addressed follow-up letters to 59 States requesting their respective Governments to provide an update on the implementation of the recommendations contained in the study.

10. From 29 October to 2 November 2011, the Special Rapporteur participated in the annual meeting of the International Bar Association, in Dubai. He spoke on recent developments in North Africa and the Middle East and the related impact on human rights.

11. On 10 and 11 November 2011, the Special Rapporteur delivered in Geneva the key note speech at the Global Forum on the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment hosted by the Association for the Prevention of Torture, on the theme “Preventing torture, upholding dignity: from pledges to action”. He also delivered a speech on “Achieving a more inclusive strategy on torture prevention”. The Special Rapporteur also met with representative of the Permanent Mission of Kyrgyzstan in preparation for the country visit.

12. On 14 November 2011, the Special Rapporteur participated in a series of thematic and geographic meetings organized by the International Secretariat of Amnesty International in London.

13. On 21 and 22 November 2011, the Special Rapporteur participated in a meeting in Buenos Aires hosted by the Human Rights Institute of the Common Market of the South (MERCOSUR) with Argentine federal and provincial authorities and non-governmental organizations regarding prevention of torture. He also met with the Chairperson of the Senate Committee on Constitutional Rights to enquire on the status of a bill to create a national preventive mechanism. In addition, the Special Rapporteur participated in a briefing for foreign correspondents about the state of prosecutions in Latin America for gross human rights violations, including torture.

14. On 29 and 30 November 2011, the Special Rapporteur was a panellist in the regional consultation for the Americas on enhancing cooperation between United Nations and regional human rights mechanisms on the prevention of torture and protection of victims, especially persons deprived of their liberty, held at the secretariat of the Inter-American Commission on Human Rights in Washington, D.C.

15. On 15 and 16 December 2011, the Special Rapporteur was a panellist in the regional consultations for Europe on enhancing cooperation between United Nations and regional human rights mechanisms on the prevention of torture and protection of victims of torture, especially persons deprived of their liberty, held in Geneva. The Special Rapporteur also met with the Ambassador of Bahrain.

#### **E. Key press statements**

16. On 22 August and 2 December 2011, a joint statement by all special procedures mandate holders was presented to the Human Rights Council at its seventeenth and eighteenth special sessions, on the situation of human rights in the Syrian Arab Republic. The experts called for action, including an end to violence and repression, access to media facilities, an independent, thorough and prompt investigation into the alleged violations, the holding to account of perpetrators of gross human rights violations, and that victims and their families should obtain redress and appropriate compensation.

17. On 22 September 2011, the Special Rapporteur, together with the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran and the Special Rapporteur on the independence of judges and lawyers condemned the public execution by hanging of a 17-year-old juvenile and the ongoing practice by the Iranian authorities of executing people charged with drug-related offences. The experts called for an immediate moratorium on the death penalty, particularly in drug-related and juvenile cases.

18. On 18 October 2011, the Special Rapporteur called for the prohibition of indefinite solitary confinement and prolonged solitary confinement, which he defined as for any period in excess of 15 days. The Special Rapporteur also called for an end to the practice of solitary confinement in pretrial detention based solely on the seriousness of the offence alleged, and a complete ban on its use for juveniles and persons with mental disabilities.

### **III. Commissions of inquiry into torture and other forms of ill-treatment**

#### **A. Understanding the use and limits of commissions of inquiry, and how to strengthen them**

19. In the international human rights context, commissions of inquiry are independent investigative commissions created in response to human rights violations including, but not

limited to, torture, genocide, extrajudicial killings, disappearances and incidents involving multiple or high-profile killings (A/HRC/8/3, para. 12). Most commissions of inquiry are established at the initiative of national Government authorities. International experts may be part of their composition. In the present report, commissions of inquiry are defined as national commissions of inquiry and truth commissions, as well as investigations undertaken by national human rights institutions. The quest for accountability and victims' rights are common denominators for commissions of inquiry and truth commissions. While a commission of inquiry is likely to be established at the height of violence, a truth commission may only be established once a conflict is over. Both national and international commissions of inquiry often result from concerted demands by civil society or the international community. International commissions of inquiry tend, however, to have comparatively briefer temporal mandates which seek to identify patterns of violations during a protracted period of armed conflict.

20. Generally speaking, the scope of a commission's investigation is limited temporally and/or geographically, and is often restricted to the investigation of a particular event or series of events. In an effort by the State to prevent future violations or to strengthen the criminal justice system, a commission of inquiry may also be given a broader mandate to report on the causes of the violation and to propose recommendations for institutional reform<sup>2</sup> and recommend reparations to victims.

21. Today, commissions of inquiry have taken on a central role in the effort to address patterns and practices of torture and other cruel, inhuman or degrading treatment or punishment around the world.

22. The Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol) provides comprehensive guidance on the relevant international legal standards and ethical obligations for investigative procedures, interviews and collection of both physical and psychological evidence of torture, including a section on commissions of inquiry into torture and other forms of ill-treatment. In addition, the updated set of principles for the protection and promotion of human rights through action to combat impunity<sup>3</sup> contains eight principles specific to commissions of inquiry. However, the circumstances under which commissions of inquiry are appropriate, and the ways in which they may provide unique benefits, remain little discussed.

23. The purpose of the present report is to deepen the international community's dialogue on commissions of inquiry and to offer guidance on when such commissions should be created by States in response to patterns or practices of torture and other forms of ill-treatment. When used correctly, a commission of inquiry may be a powerful tool in uncovering and bringing an end to patterns of violations; taking first steps in addressing victims' right to know the truth and identifying reparation measures in consultation with victims; ensuring accountability of State institutions and compliance with international human rights law; and promoting democratic, citizen-driven participation in human rights monitoring. Additionally, commissions of inquiry can play an integral role in facilitating the formal investigation of current systems or legacies of torture and other forms of ill-treatment, and pave the way to effective and fair prosecutions. A wealth of experience has been acquired from commissions of inquiry established within national jurisdictions as well as by the international community in situations in which the discovery and disclosure of the truth is deemed essential to the preservation or restoration of peace and security of nations. Lessons can be drawn from these experiences on what factors lead to successful or unsuccessful commissions of inquiry.

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<sup>2</sup> A/HRC/8/3, para. 18.

<sup>3</sup> E.CN.4/2005/102/Add.1.

24. For the above reason, another purpose of the present report is to generate further conversation about the standards that apply to the establishment and conduct of commissions of inquiry, and the relationship between commissions of inquiry and the fulfilment by a State of its international legal obligations with regard to torture. Such obligations include the obligation to investigate and prosecute torture and other forms of ill-treatment, and to provide effective remedies to victims of past violations, including reparation for the harm suffered and to prevent its reoccurrence.<sup>4</sup>

## B. Objectives

25. The principal objective generally pursued by commissions of inquiry is to discover, clarify and formally acknowledge the causes and consequences of past violations in order to establish accountability. In this capacity, commissions of inquiry are fact-finding mechanisms that aim to establish an accurate record of the past by clarifying and deepening the public understanding of certain events or a particular period of time. This objective is met by means of numerous interviews and/or providing a venue for the public testimony of a broad array of actors, including victims, witnesses and Government officials. The resulting bolstered historical record allows for a more detailed account of patterns of violence, identifies where safeguards are lacking against torture and other forms of ill-treatment, opens space for public dialogue that may not have previously existed and corrects public misperceptions about certain events or a particular time period. Effective commissions of inquiry may aid in the establishment of accountability by paving the way for an effective strategy to prosecute perpetrators.

26. Commissions of inquiry may also be designed to address other objectives, including:

- (a) To contribute to accountability for perpetrators;
- (b) To respond to the needs of victims;
- (c) To identify institutional responsibility and propose institutional, legal and personnel reforms;<sup>5</sup>
- (d) To promote reconciliation.

Indeed, the process of achieving accountability can be aided by the work of a commission of inquiry where the information and names collected by the commission are shared with prosecuting authorities. While evidence collected by a commission of inquiry is often inadmissible in a court of law owing to the lower standards of evidence used by commissions to encourage broad participation, such information may be used as background information and provide further evidentiary leads.<sup>6</sup>

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<sup>4</sup> In its resolution 18/7, the Human Rights Council established the mandate of Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence. The Council will appoint a mandate holder at its nineteenth session.

<sup>5</sup> For example, the report from the National Commission for Truth and Justice in Haiti (1995) was subsequently used to vet new applicants to the civilian police force.

<sup>6</sup> See for example Inter-American Commission on Human Rights, *Application to the Inter-American Court of Human Rights in the case of Florencio Chitay Nech et al. (Case 12.599) against the Republic of Guatemala*, (April 2009); Inter-American Court of Human Rights, *Plan de Sánchez Massacre v. Guatemala*, judgement of 29 April 2004 (Merits), Series C No.105; Inter-American Court of Human Rights, *Maritza Urrutia v. Guatemala*, judgement of 27 November 2003 (Merits, Reparation and Costs), Series C No. 103; and Inter-American Court of Human Rights, *Myrna Mack-Chang v. Guatemala*, judgement of 25 November 2003 (Merits, Reparations and Costs), Series C No.101.



### C. Added value

27. When used by States, a commission of inquiry can serve as a valuable tool in addressing the State's duty under international human rights law to investigate and hold an independent inquiry into torture, deaths (for example, in the case of extrajudicial executions) and other atrocities (A/HRC/8/3, para. 12).

28. Although commissions of inquiry can vary in their origin and mandate, there are three characteristics that make them an effective and unique tool: they are generally ad hoc, autonomous and independent, as well as being victim-centred, therefore allowing greater and active participation of victims in the process of establishing facts and identifying the priority elements that comprise reparations.

29. For some victims and others, the importance of public truth-telling is not only that it reveals new information, but also provides a forum that officially acknowledges facts already known. Scholars in the field of transitional justice have emphasized that the importance of official acknowledgement of the facts is proportional to the extent to which the facts were previously hidden or disputed; the more facts are hidden or disputed, the greater the importance and significance of a correct and more complete official statement of the historical record.

30. Commissions of inquiry may satisfy some of the needs of victims for adequate healing and remedy by providing them with a public venue to tell their stories. In this context, commissions of inquiry may also aid in providing closure for family members of victims. Generally speaking, commissions of inquiry also deliver their findings in a timely manner, enhancing the victim-centred approach of this mechanism, especially when compared with judicial proceedings that ordinarily take much longer.

31. Commissions of inquiry may be established in the aftermath of major incidents where there are concerns about the ability of investigative bodies to uncover promptly, thoroughly and impartially the root causes of certain large-scale or politically motivated crimes or systemic violations. In these situations. As pointed out by a previous mandate holder, State authorities that would normally be relied upon to investigate and prosecute are reluctant or unlikely to do so adequately.<sup>7</sup>

32. The independent structure and mandate of commissions of inquiry may also make them well suited for identifying institutional responsibility and proposing reforms. Due to the numerous sources of evidence and facts submitted to commissions of inquiry, they are often able to pinpoint the failure of particular policies and detect systemic shortcomings or practices of certain Government agencies. Lastly, commissions of inquiry can aid in identifying measures to promote reconciliation within divided societies by directly confronting past violations.

33. Commissions of inquiry are particularly useful where there is a lack of public information about a specific event or issue, such as when, for reasons of national security or intelligence, certain information is secret or classified. Under these circumstances, in order to respect the principles of constructive and meaningful participation of victims in establishing the facts, truth-seeking and holding perpetrators accountable, it is essential to ensure that a victim's right to effective investigation and redress is secured. In this respect, commissions of inquiry can help to maximize the disclosure of relevant information into the public domain. Where information is received in camera, a commission of inquiry may submit an excerpt or summary of that information to the appropriate judicial authority to ensure that a State's assertion that certain information is privileged is subject to the highest level of scrutiny.

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<sup>7</sup> A/HRC/8/3, para.12.

## D. History and current practice

34. Commissions of inquiry into torture and other forms of ill-treatment may be traced back at least to the practice of ad hoc public inquiries or royal inquiries into a defined issue in the United Kingdom in the eleventh century, and subsequently in other Commonwealth countries. In the nineteenth and twentieth centuries, public inquiries became prolific in Australia, Canada, New Zealand and the United Kingdom of Great Britain and Northern Ireland. The inquiries were appointed to advise the Government on a wide range of public policy issues, allegations of wrongdoing by Government officials and investigation into the causes of major disasters. Many other States, including Argentina, Brazil, Chile, Kenya, Morocco, Sierra Leone, South Africa, Sweden and the United States of America, have also historically or recently established commissions of inquiry with prescribed membership or given national human rights institutions the mandate to undertake inquiries more systematically in order to investigate specific crimes or events.

35. In general, it should be seen as a positive development if States undertake to establish a commission of inquiry in response to alleged violations, since States are accountable to the international community for their solemnly acquired obligations. Some States may, however, establish a commission to give the impression that there is a serious inquiry under way so that the international community is less likely to take action. It is appropriate to presume good faith on the part of the State that establishes a commission of inquiry, but ultimately that good faith should be tested in the results of the exercise.

36. There are also examples of commissions of inquiry that have had limited success owing to other factors. In 2009, the Government of Sri Lanka dissolved the Presidential Commission of Inquiry, established to look into serious violations of human rights committed since 2006. The Commission was unable to complete its mandate as no extensions were granted owing to a lack of resources and political will.<sup>8</sup> The final report of the truth and reconciliation commission in Liberia received criticism that it was poorly drafted, lacked transparent explanation of the evidence on which it was based and contained inconsistent policy recommendations.<sup>9</sup> The law that established the truth and reconciliation commission in Indonesia in 2005 was struck down by the Constitutional Court on the grounds that the prerequisite of granting amnesties to perpetrators violated victims' rights as protected by the Constitution of Indonesia.<sup>10</sup> The truth and reconciliation commission established in the Democratic Republic of the Congo in 2003 suffered from a number of critical flaws in its structure, including, most prominently, a lack of transparency in the selection of the commissioners, who included individuals with ties to those implicated in the crimes to be investigated.<sup>11</sup>

### 1. International commissions of inquiry

37. In recent years, the United Nations has appointed non-judicial commissions of inquiry that have taken a variety of forms. Such commissions were established by the

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<sup>8</sup> See Amnesty International, "Twenty Years of Make-Believe: Sri Lanka's Commissions of Inquiry", ASA 37/005/2009.

<sup>9</sup> See "Beyond the Truth and Reconciliation Commission: Transitional Justice Options in Liberia", International Center for Transitional Justice, May 2010.

<sup>10</sup> See "Derailed: Transitional Justice in Indonesia Since the Fall of Soeharto", International Center for Transitional Justice and Commission for the Disappeared and Victims of Violence, March 2011. Available from [http://ictj.org/sites/default/files/ICTJ-Kontras-Indonesia-Derailed-Report-2011-English\\_0.pdf](http://ictj.org/sites/default/files/ICTJ-Kontras-Indonesia-Derailed-Report-2011-English_0.pdf).

<sup>11</sup> See "Difficult Peace, Limited Justice: Ten Years of Peacemaking in the DRC", International Center for Transitional Justice, March 2009.

Security Council in the case of, for example, Darfur (resolution 1564 (2004))<sup>12</sup> and Lebanon (resolutions 1595 (2005), 1636 (2005) and 1644 (2005)); and by the Secretary-General in the case of, for instance, Côte d'Ivoire,<sup>13</sup> Timor-Leste (resolution 1690 (2006)), Guinea<sup>14</sup> and Pakistan.<sup>15</sup> The commissions of inquiry had prescribed terms of reference that focused on violations of human rights and humanitarian law.<sup>16</sup>

38. The “Arab spring” uprisings and the violent repression that followed have also been the subject of several recent commissions of inquiry established by the Human Rights Council. For example, in its resolution S-15/1, the Council established an independent commission of inquiry, to investigate alleged violations of international human rights law in the Libyan Arab Jamahiriya, establish facts and identify those responsible, make recommendations on accountability measures.<sup>17</sup> The Council, in its resolution S-16/1, established an independent international commission of inquiry to investigate alleged violations of international human rights law in the Syrian Arab Republic since March 2011.<sup>18</sup>

39. The Human Rights Council also mandated a fact-finding mission on the Gaza conflict, in 2009,<sup>19</sup> and a fact-finding mission for the Syrian Arab Republic, in 2012.<sup>20</sup>

## 2. Regional commissions of inquiry

40. The Council of Europe has set up commissions of inquiry with a variety of mandates, under the authority of various bodies.<sup>21</sup> In 2006, a 46-member European Parliament inquiry was established to investigate the alleged use of European countries by the Central Intelligence Agency of the United States for the transportation and illegal detention of prisoners.<sup>22</sup> In a speech before the European Parliament in 2009, the international law expert Antonio Cassese called for the establishment of a permanent commission of inquiry within Europe to facilitate expeditious investigations into whether torture or other international crimes had been perpetrated.

## 3. National commissions of inquiry

41. Several contemporary national commissions of inquiry have been established to examine issues concerning State secrets and complicity in torture in the aftermath of the terrorist attacks of 11 September 2001.<sup>23</sup> Two such commissions of inquiry are the Detainee Inquiry in the United Kingdom (commonly known as the Gibson Inquiry) and the

<sup>12</sup> The commission recommended that the Security Council should refer the situation in Darfur to the International Criminal Court in The Hague.

<sup>13</sup> S/2004/384.

<sup>14</sup> S/2009/693.

<sup>15</sup> S/2010/191.

<sup>16</sup> The United Nations has also supported truth commissions; see for example the Historical Clarification Commission in Guatemala, which published its findings in 1999, and the commission on the truth for El Salvador, mandated by the peace agreements of 16 January 1992 that ended the war.

<sup>17</sup> The commission issued a report (A/HRC/17/44) and will issue its final report in March 2012.

<sup>18</sup> The commission issued a report (A/HRC/S-17/2/Add.1) and will submit a written update to the current report to the Human Rights Council at its nineteenth session.

<sup>19</sup> A/HRC/12/48.

<sup>20</sup> A/HRC/18/53.

<sup>21</sup> See Council of Europe Parliamentary Assembly, “Setting up an independent European commission of inquiry into serious allegations of grave human rights violations”, 7 April 2011.

<sup>22</sup> The findings of the inquiry and other national and international inquiries were examined by four special procedures mandate holders (A/HRC/13/42).

<sup>23</sup> Many other contemporary national commissions of inquiry address other subjects; for example, in Guatemala, a commission, which published its final report in 1999, addressed the characteristics and causes of the civil war in the early 1980s.

Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, in Canada (also referred to as the Arar Commission).

42. The Gibson Inquiry was established to examine whether and to what extent State security and intelligence agencies were involved or otherwise complicit in the improper treatment or rendition of detainees held by other States in counter-terrorism operations in the aftermath of the attacks of 11 September 2001. Some non-governmental organizations have criticized the inquiry for its lack of transparency and lack of opportunities for the participation of victims and other third parties.<sup>24</sup>

43. The Arar Commission was established to investigate the detention in 2002 of Maher Arar while in transit through New York and his subsequent rendition to the Syrian Arab Republic, where he was subjected to torture. In its report, the Commission acknowledged the wrongs perpetrated against Mr. Arar and recommended possible remedies; it also reviewed the policies and activities of the Royal Canadian Mounted Police and made recommendations on information-sharing and oversight mechanisms for national security agencies, including specific directives aimed at ensuring accountability and preventing any possible future complicity in torture.

44. During country visits undertaken by the mandate holder, reports of torture from national sources, such as official commission of inquiry, have been analysed in an effort to corroborate allegations of torture and other forms of ill-treatment.<sup>25</sup> In May 2011, the Special Rapporteur conducted a visit to Tunisia to engage with the interim Government to examine the violations committed by the previous regime, assess the violations committed in the interim period under the transitional Government and identify measures to be implemented to prevent torture and other forms of ill-treatment in the future. In his report thereon (A/HRC/19/61/Add.1), the Special Rapporteur refers to the “national commission to establish the facts of abuses and violations from 17 December until the elimination of the cause”, and recommends improvement of the fact-finding commission’s methodology, particularly with regard to measures that could be taken to best preserve evidence gathered.

45. In response to international pressure, the President of Kyrgyzstan, after consultations with the European Union, the Organization for Security and Cooperation in Europe and the Office of the United Nations High Commissioner for Human Rights, established a commission of inquiry into the events in southern Kyrgyzstan. The Special Rapporteur will take note of these findings in his forthcoming report on Kyrgyzstan, following his visit in December 2011. He will also take note of the Government’s response when formulating his own recommendations, which will include an examination of the events of June 2010 in Osh and surrounding provinces, in addition to other issues within the scope of his mandate.

46. In Bahrain, a commission of inquiry was established pursuant to Royal Order No. 28 in response to the events of February and March 2011 and thereafter, to investigate alleged international human rights violations and propose recommendations. In response to the Commission’s report, published in November 2011, the Government engaged in a consultation process with relevant actors in order to implement the recommendations, including an examination of all complaints of torture and other forms of ill-treatment. The Special Rapporteur welcomes the opportunity to follow up on the Commission’s report, within the scope of his mandate, and to contribute further to the reform process during his official visit to Bahrain in March 2012.

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<sup>24</sup> See for example the joint letter addressed to the Detainee Inquiry, 3 August 2011. Available from [www.amnesty.org/en/library/asset/EUR45/010/2011/en/daf5cd13-dea8-47d2-99d2-6628b963f511/eur450102011en.pdf](http://www.amnesty.org/en/library/asset/EUR45/010/2011/en/daf5cd13-dea8-47d2-99d2-6628b963f511/eur450102011en.pdf).

<sup>25</sup> See E/CN.4/1997/7, annex.

## E. Commissions of inquiry do not relieve States of their legal obligations

47. Although a commission of inquiry may aid States in the fulfilment of their international legal obligations with regard to torture and other forms of ill-treatment, establishing a commission of inquiry does not diminish such legal obligations. The international legal framework must therefore be considered at all stages of the development and implementation of commissions of inquiry into torture and other forms of ill-treatment. International law recognizes wide ranging obligations on States and corresponding rights of victims of torture and other forms of ill-treatment. The International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and constitutive documents of the regional human rights systems<sup>26</sup> identify six interrelated obligations of States. Generally, these obligations are (a) the duty to protect from ill-treatment by public and private actors; (b) the duty to investigate; (c) the duty to enact and enforce legislation criminalizing torture; (d) the duty to exclude statements obtained by torture and other forms of ill-treatment from evidence against the accused in a criminal trial; (e) the duty to train personnel and provide procedural safeguards; and (f) the duty to grant redress and reparation for victims. An effective commission of inquiry will assist a State in meeting each of these obligations, which all remain in effect regardless of the breadth of the mandate or terms of reference of the commission.

48. The affirmative obligation of States to investigate gross violations of human rights law and serious violations of international humanitarian law<sup>27</sup> is inextricably linked to the obligation to prosecute, and also to the right to truth.<sup>28</sup> In its jurisprudence, the Human Rights Committee regularly invokes the obligation of States parties to the International Covenant on Civil and Political Rights to investigate and punish human rights violations.<sup>29</sup> In the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, the General Assembly asserted that the obligation to implement international human rights law and international humanitarian law includes the duty to investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, to take action against those allegedly responsible in accordance with domestic and international law. Moreover, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish him or her.<sup>30</sup>

49. Article 12 of the Convention against Torture expressly obligates States parties to investigate all allegations of torture, asserting that each State party should ensure that its competent authorities proceed to a prompt and impartial investigation wherever there is reasonable ground to believe that an act of torture has been committed in any territory

<sup>26</sup> The European Convention for the Protection of Human Rights and Fundamental Freedoms asserts that States have an obligation to investigate both in the context of giving effect to the rights and freedoms contained within the convention and where effective remedy entails an effective investigation. The African Charter on Human and Peoples' Rights establishes the obligation of States to give effect to the rights, duties, and freedoms enshrined in the Charter, which requires investigation of allegations of human rights violations. The American Convention on Human Rights asserts that the full enjoyment of rights and freedoms recognized by the Convention creates a positive duty on States to investigate violations.

<sup>27</sup> See A/HRC/18/25.

<sup>28</sup> See E/CN.4/2006/9.

<sup>29</sup> *Abubakar Amirov v. Russian Federation*, communication No. 1447/2005, views adopted on 2 April 2009, para. 11.2; *Orly Marcellana and Daniel Gumanoy v. The Philippines*, Communication No. 1560/2007, views adopted on 30 October 2008, para. 7.2.

<sup>30</sup> General Assembly resolution 60/147, annex, paras. 3 (b) and 4.

under its jurisdiction. In its general comment No. 20, the Human Rights Committee stated that an effective remedy for allegations of torture and other forms of ill-treatment constituting a violation of article 7 required prompt and impartial investigation by competent authorities. Additionally, the right to an effective remedy established by article 2 of the International Covenant on Civil and Political Rights is widely understood to include the obligation to investigate.

50. The Human Rights Committee, in its general comment No. 31, noted that, in addition to the State establishing appropriate judicial mechanisms, administrative mechanisms were particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through impartial bodies. Failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.

51. According to the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the main purposes of effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment are:

(a) Clarification of the facts and establishment and acknowledgement of individual and State responsibility for victims and their families;

(b) Identification of measures needed to prevent recurrence;

(c) Facilitation of prosecution and/or, as appropriate, disciplinary sanctions for those indicated by the investigation as being responsible and demonstration of the need for full reparation and redress from the State, including fair and adequate financial compensation and provision of the means for medical care and rehabilitation.<sup>31</sup> The characteristics of an effective investigation include the establishment of a mechanism that can receive and investigate complaints,<sup>32</sup> competent and impartial investigators, careful documentation of crimes perpetrated,<sup>33</sup> and adequate protection of victims, witnesses and those conducting investigations.<sup>34</sup> Only when an allegation is manifestly ill-founded should a public official implicated be allowed to retain office pending the outcome of an investigation and any subsequent legal or disciplinary proceedings.<sup>35</sup>

52. The scope and type of information uncovered by commissions of inquiry are often different from the information that is disclosed through formal criminal investigation and prosecution. Whereas prosecutions are intended to fulfil a State's duty to achieve individual accountability, they may only bring to light a limited amount and type of information. Once an allegation of torture and other forms of ill-treatment is referred to competent authorities for the purpose of prosecution, the complete results of the ensuing investigation are not always disclosed for public record.<sup>36</sup> While focused on accountability, commissions of inquiry also delve more deeply and broadly into the relevant facts and circumstances that led to the violations than a prosecutorial investigative authority would. In this way, a commission of inquiry can help to establish a more complete picture of how and why torture occurred by analysing not just the human, legal and political consequences of a State policy of torture but also by revealing insights into wider patterns of violations, institutional involvement and responsibility, and command responsibility, as well as provide valuable background information and leads to witnesses (see for example the Gibson Inquiry).

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<sup>31</sup> General Assembly resolution 55/89, annex, para. 1.

<sup>32</sup> E/CN.4/2003/68.

<sup>33</sup> A/62/221, para. 52.

<sup>34</sup> General Assembly resolution 55/89, para. 3(b).

<sup>35</sup> E/CN.4/2003/68, para. 2.

<sup>36</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 7.

53. Commissions of inquiry are able to complement the prosecutorial function<sup>37</sup> as they may make use of information not admissible in a court of law because the evidentiary standards are less rigorous. For example, in commissions of inquiry, hearsay evidence is generally admissible owing to the lower evidentiary standards required. Similarly, often the required burden of proof is not as high as it would be in criminal trials; for example, a preponderance of the evidence may be sufficient, as opposed to proof beyond a reasonable doubt. Moreover, in the case of commissions of inquiry, individuals are typically invited voluntarily to testify or submit written statements, unlike the more formal deposition proceedings generally required in traditional courts of law.<sup>38</sup>

54. Commissions of inquiry can also directly assist prosecutions by providing information collected by the commission to the prosecuting authorities. Information derived from a commission's final report can serve as a useful, even if not entirely comprehensive, tool in the formal prosecution of a victim's case. For example, the commission's findings may provide insights into the role and extent of the complicity of State officials in torture. In all instances where a commission of inquiry receives allegations of torture and other forms of ill-treatment committed by State or non-State actors, the allegation and all relevant evidence must be submitted to relevant prosecutorial authorities for the initiation of a formal legal investigation and, if relevant, prosecution.

55. If a commission of inquiry precedes formal criminal prosecutions, or the two mechanisms exist simultaneously, care must be taken to ensure that the work of the commission does not inhibit prosecutions in any way.<sup>39</sup> In establishing an international commission of inquiry to investigate the assassination of former Prime Minister of Pakistan Mohtarma Benazir Bhutto, the Secretary-General agreed that the international commission should be fact-finding in nature and not be a criminal investigation; the duty of carrying out a criminal investigation, finding the perpetrators and bringing them to justice, remains with the competent Pakistani authorities.<sup>40</sup>

56. Additionally, a commission of inquiry cannot give effect to an amnesty law or decree, because amnesties that "prevent prosecution of individuals who may be legally responsible for war crimes, genocide, crimes against humanity and other gross violations of human rights are inconsistent with States' obligations under various sources of international law as well as with United Nations policy."<sup>41</sup>

#### **IV. Identifying best practices and establishing standards for commissions of inquiry**

57. The wealth of experience in national and international commissions of inquiry is a source of multiple lessons on both good and bad practices. The Istanbul Protocol and the Principles to Combat Impunity provide examples of standard-setting that apply to the institution, objectives, working methods and outcomes of commissions of inquiry. Given the wide variety of contexts and purposes for which commissions of inquiry are created,

<sup>37</sup> The Truth and Reconciliation Commission of Sierra Leone coexisted with the Special Court for Sierra Leone, set up jointly by the Government of Sierra Leone and the United Nations, which had a responsibility to try those with the greatest responsibility for international crimes during the conflict.

<sup>38</sup> See OHCHR, "Rule of Law Tools for Post-Conflict States: Prosecutorial Initiatives", New York and Geneva, 2006, p. 33.

<sup>39</sup> See E/CN.4/2003/68, para. 26 (k).

<sup>40</sup> See the report of the United Nations Commission of Inquiry into the facts and circumstances of the assassination of the former Prime Minister of Pakistan, Mohtarma Benazir Bhutto (available from [www.un.org/News/dh/infocus/Pakistan/UN\\_Bhutto\\_Report\\_15April2010.pdf](http://www.un.org/News/dh/infocus/Pakistan/UN_Bhutto_Report_15April2010.pdf)), p. v.

<sup>41</sup> See OHCHR, "Rule of Law Tools for Post-Conflict States: Amnesties", chap. V.

standards should be understood to be indicative and not fully binding as a matter of international law. Nevertheless, it is important to discuss standards as a way to determine when and how commissions of inquiry actually advance principles of international law and aid States, and the international community, in the fulfilment of their international legal obligations.

### **A. Resources**

58. A commission of inquiry should be given the means to conduct a serious and rigorous examination of facts, most of which will be hidden or difficult to ascertain. For that reason, it is imperative that a commission have at its disposal the financial resources to travel, to provide for witness protection, to commission reports from experts and to finance forensic investigations and examinations. A commission should be able to hire staff of confidence and with proven professional expertise, including legal counsel, who should be shielded from political influence. Technical expertise and investigatory experience should be part of the recruitment process.

### **B. International vs. national commissions of inquiry**

59. Where possible, national commissions of inquiry ought to be pursued before the establishment of an international commission of inquiry. Proximity to the affected population often adds to the legitimacy and potential impact of a commission of inquiry. States should, however, seek international assistance where they lack necessary resources and/or expertise. The international community has a duty to establish a commission of inquiry, using the various mechanisms available, when the State fails to break the cycle of impunity or is unwilling or unable to explore the truth and provide justice or where human rights violations threaten international peace and security. In addition, international commissions of inquiry can play a valuable role in promoting subsequent national investigations.

### **C. Composition**

60. The people selected to be members of a commission of inquiry should be chosen on the basis of criteria designed to ensure the independence and impartiality of the body.<sup>42</sup> The commissioners should enjoy a stature and recognition within the local community that will inspire confidence in the public. Importantly, commissioners should be persons of such high moral character and professional achievement that victims and witnesses should feel that they can approach the commission and participate in its proceedings without fear that their testimonies might be misused.

61. There are various models of what to look for in the profile of members of a commission of inquiry, and each model is valid within the particular circumstances and legal culture of each State. For example, States may wish to ensure representation of the entire political or ideological spectrum, while others may not. In all circumstances, however, it is necessary for States to appoint commission members who will rise above partisanship and be first and foremost dedicated to the truth. It is important to include individuals with experience in fact-finding methodologies and assessment of the quality of

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<sup>42</sup> The Istanbul Protocol recommends that no member of a commission of inquiry should be associated with an agency suspected of having practiced torture or with any individual, political party or State agency potentially implicated (para. 109). It also suggests that commissions of inquiry should be composed of at least three members.



evidence; for this reason, it is advisable to include at least some acting or retired magistrates or prosecutors. At the same time, it is important to reflect a wide range of expertise within the commission to ensure that the work benefits from diverse interpretations of the underlying problems. People of high moral standing from the sciences (especially medical, psychiatric and forensic sciences) and from social science and liberal arts backgrounds, including journalism, should also be included.

62. Where human rights violations have had a distinct ethnic, racial, or religious dimension, it is important to include people who fully understand the plight of affected communities. Under all circumstances careful attention should be paid to the inclusion of women in the composition of the commission. Of additional value is the inclusion of individuals with a gender perspective to better understand the specific ways in which vulnerable persons, including, women, children, lesbian, gay, bisexual and transgender persons, persons with disabilities and persons belonging to a minority or indigenous group suffer from gross violations, including torture and other forms of ill-treatment and how they affect their communities. Geographic and cross-cultural balance in a commission is also of the greatest importance, as long as the standards of expertise and professionalism are not diminished for the sake of political balance.

63. In the case of commissions appointed by the international community, the appointment of members should reflect first and foremost well-recognized expertise in international law. Previous experience with commissions of inquiry has been an important factor in the success of recent commissions.

#### **D. Mandate, powers and attributions**

64. A commission of inquiry should be created by way of the legal instrument that is most appropriate to its context and should reflect the high importance that States give to such investigative bodies. The legal instrument establishing a commission of inquiry may be an act of parliament, an executive order or decree, or a decision of the highest courts in exercise of their investigatory functions. In all circumstances, the legal instrument establishing a commission of inquiry should identify clearly the terms of reference of the commission's mandate, including a clear temporal and/or geographic framework that is appropriate for the issue being investigated. The mandate should not excessively broaden the universe of violations to be investigated. The text of the authorizing instrument should also set out clearly the scope of the inquiry, citing with precision the events and issues to be addressed. The terms of reference should be stated in neutral language to avoid the impression of a predetermined outcome. A commission should have flexibility to amend its terms of reference in exceptional circumstances, as long as newly found elements warrant the amendment and the commission's decision is publicly and transparently explained.<sup>43</sup>

65. The legal instrument should also clearly establish the powers and attributions of the commission. Regardless of whether the findings of the commission have legal force in the national jurisdiction or are guidelines for future action of State institutions, it is imperative that commissions be seen as "official" bodies whose work and outcome the State pledges to respect and abide by. A commission must have the ability to inspect all documents in public agencies and archives, including those classified as secret or of limited distribution. A commission of inquiry should have subpoena powers; alternatively, it should be empowered to obtain evidence by applying to courts in order to summon witnesses and compel testimony, subject to the right of a person to remain silent if testimony might tend to be self-incriminating. These powers should extend to obtaining warrants for the inspection of places and search and seizure of documents and material evidence. In

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<sup>43</sup> Istanbul Protocol, para. 107.

addition, a commission should have legally granted powers to protect witnesses, victims and their families from possible reprisal for their testimony.<sup>44</sup>

## **E. Methodology**

66. In discharging its duties, a commission must be careful to design a strategy for the effective discovery of every fact relevant to its mission, as set out in its terms of reference. To ensure inclusiveness and ownership of a commission's methodology, broad and genuine consultations with relevant international and national actors, including civil society, should be undertaken when drafting the commission's terms of reference. Moreover, it is important to disclose the terms of reference and working methods to the public as a means to ensure their confidence in the proceedings and ultimate findings of the commission.

67. Hearings that are open to the public, like those pioneered by the truth and reconciliation commissions created in South Africa and Peru, are strongly preferred.<sup>45</sup> Open hearings where victims and witnesses may speak directly to the public in their own voices are crucial to building understanding and trust in the public in the methodology used by the commission of inquiry. At the same time, it is important that open hearings be conducted in a manner that respects the dignity of each victim and witness, and protects the rights of alleged perpetrators, in the criminal law setting, from any breach in the presumption of innocence. The preference for open hearings should be without prejudice to some exceptions made for testimony to be received in camera, as required, for example, to ensure confidentiality and the security of victims or witnesses or when there are legitimate claims of national security interests.<sup>46</sup> Under no circumstances should "secrets of State" be invoked as a justification to conceal the commission of human rights violations. The members of the commission of inquiry should alone be the judges of whether confidential or closed proceedings are necessary. Only in exceptional circumstances should hearings be confidential; in such cases, the precise justification for the confidentiality must be transparent and disclosed to the public.

## **F. Evaluation of evidence**

68. The purposes of a commission of inquiry warrant a more flexible approach to rules of evidence, including the credibility of witness testimony.<sup>47</sup> In assessing the credibility of evidence, a commission of inquiry should give special weight to corroborated testimony and to testimony subjected to cross-examination. A commission should also apply general rules in their assessment of the credibility of witnesses, including demeanour, subject to cultural and gender sensitivities. A commission should always accept testimony that is not subject to cross-examination, and should also avail itself of testimony that, if rendered in court, would be excludable as hearsay.

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<sup>44</sup> *Ibid.*, para. 108.

<sup>45</sup> Perpetrators must not, however, be permitted to dominate or intimidate proceedings whereby victims are pressured into forgiving in the interest of national reconciliation.

<sup>46</sup> The Arar Commission heard the testimony of 85 witnesses in public sessions. The Order in Council establishing the inquiry set out directions for dealing with information that was subject to National Security Confidentiality. See the Report of the Events Relating to Maher Arar: Analysis and Recommendations, Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, 2006, sect. 3.2.

<sup>47</sup> Istanbul Protocol, para. 117.

## G. Relationship with prosecutions

69. By itself, a commission of inquiry is never sufficient to fully satisfy a State's obligations under international law with regard to torture and other forms of ill-treatment. This framework demands that States (and, in default, the international community) ensure truth, justice, reparations for victims and guarantees of non-repetition through deep institutional reform. A policy or practice designed to fulfil one of those objectives to the detriment of others would violate well-established legal obligations.

70. Commissions of inquiry should therefore be considered complementary to other mechanisms, including criminal investigations and prosecution of perpetrators, the provision of reparations to victims, and extensive reforms to institutions, including the vetting of public officials. When carried out simultaneously with prosecutions, commissions of inquiry play a very important role in establishing a more comprehensive and nuanced picture of policy decisions (whether adopted publicly or in secrecy) that have resulted in patterns of torture and other forms of ill-treatment. The first duty of a commission of inquiry is to explore and develop facts in a rigorous and comprehensive way so that the precise details of torture campaigns may be discovered, protected against tampering or destruction, and disclosed to the public. This process of truth-seeking requires strict adherence to the guidelines set forth in the Istanbul Protocol. The information gathered by a commission of inquiry can also orient the investigative and prosecutorial strategies without substituting them. Moreover, the findings of a commission of inquiry can inform policy decisions of the executive or legislative branches, which should not depend on the outcome of trials. In that manner, the findings and recommendations of commissions of inquiry can help to fill gaps in the protection of human rights in the future, without prejudice to the determination of individual guilt or innocence, which only courts can make.

71. In countries emerging from post-conflict situations or repressive regimes, there is a need to prioritize reform to the judicial system so that the courts may be considered independent, impartial and effective enough to meet the State's obligation to prosecute and to guarantee fair trials. In such circumstances, employing a commission of inquiry as a first step in the process of establishing truth and justice may be not only useful but necessary.

72. In all cases, however, certain steps must be taken to ensure that the activities of a commission of inquiry do not jeopardize criminal due process standards, including, importantly, the rights of potential criminal defendants. Commissions of inquiry should not identify individuals as being criminally responsible for acts described in the final report if doing so violates the rights of the identified individuals, who should be presumed to be innocent, and may inject additional bias into any subsequent official criminal investigation or prosecution. It may be possible to "name names" in a non-accusatory manner, without necessarily affirming criminal responsibility.<sup>48</sup> However, where a commission determines that evidence strongly indicates participation by one or more individuals in crimes within its mandate, it should submit the names and the underlying information or evidence to relevant judicial or prosecutorial bodies for the latter to proceed in accordance with procedural and substantive laws applying to criminal justice. Under no circumstances should a commission of inquiry delay or obstruct formal criminal investigation and prosecution of torture and other forms of ill-treatment.

73. In its recommendations, a commission of inquiry should identify clearly the ways in which the report is intended to be utilized by other mechanisms, including, but not limited to, investigation and prosecution of torture and other forms of ill-treatment, the provision of

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<sup>48</sup> As seen for example in the reports of the commission on the truth for El Salvador and of the United Nations Independent Special Commission of Inquiry for Timor-Leste.

remedy and reparations to victims, and the prevention of torture and other forms of ill-treatment.

## H. Reporting

74. The instrument of authorization must clearly empower a commission to issue a public report of its findings.<sup>49</sup> Such a report must be published as an official document and circulated widely without interference of any sort. The contents of the report should be determined exclusively by the commission members and not subject to any form of prior censorship by any governmental authority. If commission members do not agree on every aspect of the report, dissenting and concurring opinions by individual commissioners should be made a part of the record.<sup>50</sup> In addition, to ensure public confidence in the working methods and findings of a commission of inquiry, it is essential that the public be informed in advance of when to expect the publication of the commission's final report.

75. The final report of the commission of inquiry should be comprehensive and fulfil all aspects of its terms of reference as set forth in the legal instrument that created the body. Beyond a recitation of facts, the report of a commission of inquiry should attempt to provide an accurate picture of the social and political background against which the acts of torture and other international crimes took place. Crucially, the report should identify loopholes in the public and private institutional order that have allowed for the breakdown of legal and procedural protections and led to a culture of impunity for the crimes investigated by the commission. The report should make concrete and detailed recommendations on how to restore checks and balances or "horizontal accountability" between branches of Government and the effective functioning of institutions of control.

76. Evidence will often point to key actors responsible for the collapse of the rule of law, because institutions often break down when public officials in charge of them fail to live up to their duties. Nevertheless, the commission should resist the temptation to "name names". As stated above, officials must benefit from the presumption of innocence, and their conduct should be judged by the courts, not by a quasi-judicial investigatory body. This rule is also applicable to those individuals whose participation in the alleged criminal conduct was indirect. In all cases, the commission should submit the names and the preliminary evidence against each suspected individual to courts or prosecutors for appropriate legal action. If the commission decides to separate institutional failings from potential criminal activity and to name names of persons responsible for the former, it should still institute a measure of due process for those so identified; at the very least they must be able to appear before the commission, confront the allegations about their misconduct and offer their own version of events.

77. The report of the commission of inquiry should be published widely and in a manner that is accessible to the broadest audience possible, and should explain the commission's findings of fact and the legal analysis that supports its conclusions. The report should also contain detailed recommendations for all branches of Government (or to the international community, if applicable) on how to fulfil the State's obligations with regard to truth, justice, reparation to victims and guarantees of non-repetition. Through its highest authorities, the State should respond promptly to the publication of the commission's report, indicating its acceptance or rejection of each recommendation, with carefully reasoned explanations, and ideally a timetable for implementation of the recommendations.<sup>51</sup>

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<sup>49</sup> Istanbul Protocol, para. 108 (b).

<sup>50</sup> *Ibid.* para. 118.

<sup>51</sup> *Ibid.*, para. 119.

## V. Conclusions

78. Commissions of inquiry into torture and other forms of ill-treatment are strong and flexible mechanisms that can yield substantial benefits for Governments, victim communities and the wider public. Unlike other mechanisms commonly engaged in the aftermath of allegations of torture and other forms of ill-treatment, such as criminal investigations and prosecutions, commissions of inquiry provide unique opportunities for a deeper understanding of the underlying context in which violations were committed, review of governmental policies, practices and institutional shortcomings, truth-telling and contributing to the healing of victim communities, and independent expert recommendations on reparation and guarantees of non-repetition. Commissions of inquiry can also play an integral role in providing impetus and eventually facilitating the formal investigation of current systems or legacies of torture and other forms of ill-treatment, and pave the way to effective and fair prosecutions. In these ways, commissions of inquiry may aid States in the fulfilment of their international legal obligations when allegations of torture and other forms of ill-treatment arise. However, in the absence of judicial mechanisms, a commission of inquiry alone will not satisfy a State's obligations.

79. For States interested in establishing a commission of inquiry, the Istanbul Protocol and the updated set of principles for the protection and promotion of human rights through action to combat impunity<sup>52</sup> provide key guidance for the elaboration and implementation of international practice. The present report complements these highly regarded documents and previous work of the special procedures by identifying additional recommendations and best practices that are specific to the conduct of commissions of inquiry into torture and other forms of ill-treatment.

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<sup>52</sup> E.CN.4/2005/102/Add.1.