COMMISSIONS OF INQUIRY INTO ARMED CONFLICT, BREACHES OF THE LAWS OF WAR, AND HUMAN RIGHTS ABUSES: PROCESS, STANDARDS, AND LESSONS LEARNED

This panel was convened at 11:15 a.m., Thursday, March 24, by its moderator, Philip Alston of New York University School of Law, who introduced the panelists: Agnieszka Jachec Neale of the University of Essex; and Heidi Tagliavini of the Swiss Ministry of Foreign Affairs.

INTRODUCTION: COMMISSIONS OF INQUIRY AS HUMAN RIGHTS FACT-FINDING TOOLS

By Philip Alston[*]

Unfortunately, Luc Côté, who was going to provide an overview of the topic, is unable to be with us today. In his absence, I will take it upon myself to undertake that task.

While commissions of inquiry are established for a great many purposes and in response to a wide range of human rights violations, I will focus on unlawful killings, referred to by lawyers as extrajudicial executions, in order to illustrate the problems associated with such commissions and the challenges that must be confronted if they are to be rendered more effective in the future.

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

In historical terms, the technique of creating inquiries can be traced back to nineteenth-century England, and a great many examples can be cited of their usage outside the United Kingdom in the early part of the twentieth century, including in colonial and immediately post-colonial contexts. More recently, the number and range of inquiries undertaken around the world has been expanded significantly through the establishment of many internationally mandated inquiries, whether called for by the United Nations Security Council or the United Nations Human Rights Council, or initiated under her own authority by the United Nations High Commissioner for Human Rights.

There is no shortage of international standards designed to ensure that national-level inquiries are effective. They have been adopted by United Nations bodies, spelled out in the judgments of the European Court of Human Rights, and distilled into principles by Amnesty International. In brief, the challenge is to ensure that a commission is independent, impartial,

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

The problem is that a careful review of experience with national-level commissions inquiring into alleged extrajudicial executions reveals that their performance is plagued by a range of shortcomings. Two contemporaneous examples serve to illustrate some of the problems. The first example comes from Syria where, in response to the killing of a significant number of protesters demanding democratic governance, the government of Syria announced that it would establish a commission of inquiry to investigate allegations that these deaths resulted from the illegal use of lethal forces by the government's security forces.[1] On the one hand, international groups such as Human Rights Watch (HRW) emphasized the need for the government to "[c]arry out an independent and transparent investigation."[2] At the same time, most international actors, including HRW, also insisted that an international investigation was required, on the assumption that a domestic effort would inevitably be deeply flawed.

A short while earlier, Israel had announced the findings of a major commission it had established. It inquired into the circumstances of the targeted killing in July 2002 of Salah Shehadeh, the head of the Operational Branch of Hamas in Gaza, who was alleged by Israel to have killed large numbers of Israeli military personnel and civilians. A one-ton bomb was dropped on his house in Gaza City, killing him, his wife, his assistant, his child, and a total of 13 civilians, of whom eight were children, as well as injuring another 150 civilians. An uproar in Israel and beyond, followed by the intervention of the Supreme Court in response to a petition, led the Israeli government to appoint a special investigatory commission. In its report it found that the strike was disproportionate in the circumstances, largely resulting from an intelligence failure due to "incorrect assessments and mistaken judgments." The report nonetheless exonerated all of those involved. I am not concerned here with the justness of the result, which I am in no position to evaluate. But what is of interest is the functioning of the commission:

- It was not set up under the Israeli law governing commissions of inquiry.
- It had no powers of subpoena.
- It made its report almost nine years after the incident occurred.
- Two of the original three members were ex-Israeli military personnel.
- Its deliberations were in private, and none of the evidence or submissions presented to it are available.

[1] Abeer Tayel & Sara Ghasemilee, *Syria Insists It Needs No Help in Probe of Killings of Anti-Regime Protesters*, AL ARABIYA NEWS, Apr. 26, 2011, http://english.alarabiya.net/articles/2011/04/26/146839.html.

[2] Human Rights Watch, *"We've Never Seen Such Horror": Crimes Against Humanity by Syrian Security Forces*, June 2011, at 51, *available at* http://www.hrw.org/sites/default/files/reports/syria0611webwcover.pdf.

- The final report has not been made public.
- The newspaper *Haaretz* has questioned whether the six-page summary that was released was written by the commission itself or by the Prime Minister's office.[3]

These two examples, from one part of the world, serve to highlight some of the issues that arise when states announce that they will establish inquiries to examine alleged human rights violations by their own security forces. A more systematic survey of such inquiries,[4] undertaken in response to extrajudicial executions in various countries around the world revealed that the following problems are reasonably common in relation to national-level commissions of inquiry (COIs): (1) the COI is announced but is never actually established; (2) the COI is given a restrictive mandate, which impairs its ability to achieve accountability; (3) the COI is given insufficient funding or resources to enable it to be effective; (4) the commissioners lack the necessary expertise; (5) the COI lacks independence from the government, either in principle or in practice; (6) the COI is unable to provide adequate witness protection, as a result of which key individuals will avoid testifying; (7) the COI is not empowered to obtain access to important evidence; (8) the government fails to make public, respond to, or follow up on the COI's findings; (9) the government fails to initiate prosecutions recommended by the COI, or does so in a manner that ensures that they will not succeed; (10) the COI's report is methodologically flawed, unprofessional, or generally unconvincing; and (11) insufficient information is provided to enable a meaningful assessment of the adequacy of the COI procedure.

In brief, the problem is that commissions can be used very effectively by governments for the wrong purposes: to defuse a crisis, to purport to be upholding notions of accountability, and to promote impunity. The mere announcement by a government of a commission is often taken at face value to mean that the government is "doing something" to address impunity. Because a commission creates the appearance of government action, its announcement often prevents or delays international and civil society advocacy around the human rights abuses alleged. Moreover, an ineffective commission can be more than just a waste of time and resources; it can contribute to impunity by deterring other initiatives, monopolizing available resources, and making subsequent endeavors to prosecute difficult or impossible.

The paradox is that the circumstances that lead to the creation of such inquiries very often carry with them the seeds of an inquiry's subsequent failure. In other words, governments are pressured by the momentum of events, diplomatic considerations such as threatened sanctions, or urgings to do something which they perceive to be contrary to their own interests. Thus the initiative may, from the outset, be pursued in ways designed to minimize its ultimate impact.

One way to respond to these problems with national-level COIs is to try to ensure that the necessary procedural safeguards are followed, and to increase external monitoring of the arrangements made. The other response, which is increasingly common, is to insist that international fact-finding be undertaken, either in place of, or as a complement to, domestic initiatives.

[3] Barak Ravid, *Civilian Deaths in Shehadeh Hit Unintentional, Committee Says*, HAARETZ.COM, Mar. 1, 2011, http://www.haaretz.com/print-edition/news/civilian-deaths-in-shehadeh-hit-unintentional-committee-says-1.346338.

[4] *See Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. A/HRC/8/3 (May 2, 2008), paras. 12–58 (by Philip Alston).

Fact-finding is undertaken by a variety of actors and uses many different forms, including but not limited to international COIs. The goals of these missions are generally (1) to ascertain the facts about alleged human rights abuses, ideally through onsite visits; (2) to determine state responsibility and perhaps also individual responsibility for violations of human rights; and (3) to make recommendations as to reform and reparations. Some of this fact-finding activity has become relatively routine, such as the monitoring and reporting carried out by a large number of Special Rapporteurs in the name of the UN Human Rights Council, by the Council of Europe's Human Rights Commissioner, or by the Inter-American Commission on Human Rights. In addition, new fact-finding procedures are also now being activated under the auspices of various UN human rights treaty bodies. But a great deal of fact-finding is relatively ad hoc. It takes the form of diverse types of inquiries established by a range of inter-governmental bodies, both international and regional, and is often set up on a one-off basis in response to a particularly serious or politicized incident or pattern of abuses. These fact-finding bodies are differently composed, are given varying mandates, use widely differing methodologies, and tend to serve a broad range of objectives.

Unsurprisingly, and indeed perhaps appropriately, much of this fact-finding activity has proven to be very controversial, and there has been extensive criticism by governments of such activities. Two of the more prominent recent examples are the September 2009 report of the Goldstone Commission on alleged violations of human rights and international humanitarian law during the Gaza conflict in late 2008 and early 2009 (452 pages in length), and the August 2010 mapping exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003 (566 pages in length). In response to the latter the Rwandan government went so far as to threaten to withdraw all Rwandan peacekeepers from various missions in Africa in protest. It described the report as ahistorical and "dangerous and irresponsible," and condemned the methodology used as "deeply flawed and one-sided." It criticized the "overreliance on the use of anonymous sources, hearsay assertions, unnamed, un-vetted and unidentified investigators and witnesses, who lack credibility; and allegation of the existence of victims with uncertain identity."[5]

This proliferation of major inquiries across a wide range of countries and situations calls into question the common wisdom which portrays the emergence of the various international and mixed criminal courts and tribunals over the past two decades as the most significant development in the human rights field. In contrast, it could reasonably be argued that the explosion in the number and variety of international fact-finding bodies has been a development of comparable significance. It is striking, however, that while the criminal courts and tribunals have generated a veritable industry and a vast literature, fact-finding has been largely neglected as an area for sustained exploration, critique, and refinement.

This is so despite the fact that fact-finding is comparatively cost-effective, is very flexible in design, can be mobilized rapidly, can transform public and governmental understanding of a situation, and has the potential to promote wide-ranging political or institutional reform. Fact-finding missions can also play a crucial role in attributing criminal responsibility and laying the groundwork for subsequent prosecutions at the domestic and/or international levels. Given their actual and potential importance, there is a strong need to develop a better understanding of the key challenges that confront such missions, and of the ingredients or

[5] *Official Gov't of Rwanda Comments on the Draft UN Mapping Report on the DRC* (Sept. 30, 2010), *available at* http://rwandinfo.com/eng/official-govt-of-rwanda-comments-on-the-un-mapping-report-on-the-human-rights-violations-in-dr-congo-1993-2003/.

approaches that are likely to enhance their prospects for success. Yet there have been few efforts to collect best practices, to provide resources to facilitate the creation of effective missions in the future, or to guide and assist those carrying out different functions within the context of such missions. This stands in contrast to the detailed studies undertaken of a great many dimensions of the activities of the international criminal courts and tribunals.

The time has come for a far more systematic and critical analysis of the theory and practice underlying both the use of national-level COIs as devices for responding to major human rights violations, and the use of international fact-finding techniques such as international COIs.

Human Rights Fact-Finding into Armed Conflict and Breaches of the Laws of War

By Agnieszka Jachec Neale[*]

Use of Inquiry by Human Rights Bodies

Fact-finding is the lifeblood of any legal practice, whether in the domestic or international sphere. It is a recognized form of international dispute settlement through the process of elucidating facts. The process, in theory, is primarily aimed at clarifying the disputed facts through impartial investigation, which may then facilitate the parties' objective of resolving the dispute. Among the parties it is often a difference of opinion about the facts that gives rise to the dispute in the first place.

Fact-finding is widely used in international and domestic law. In the international context, factual inquiries are used to prevent or peaceably settle conflicts (for the maintenance of international peace and security) in various areas, including international commercial arbitration; the law of the sea (as a way of resolving disputes concerning the interpretation or application of a treaty, the investigation of maritime incidents, and the delineation of maritime and land borders between the states); and human rights.

The mandates of the fact-finding commissions may vary. Investigative bodies could be tasked solely with determining the facts. Alternatively, and more commonly in the human rights sphere, they are asked to elucidate the factual situation *and* to provide a legal assessment or evaluation of their factual findings. In other words, the mandate often includes a putatively objective assessment of the facts relevant to the case, as well as assessing the factual findings against the relevant legal standards. It is absolutely crucial that the mandate be clear and specific, and that it be executed even-handedly. The importance of even-handedness can be seen from the criticisms of the clearly one-sided United Nations Human Rights Council resolution initiating the fact-finding mission in relation to Gaza (whose mandate was later amended by the president of the Council upon the appointment of the head of the commission).[1] Similarly, the Human Rights Council Expert Commission of Inquiry into the 2006 Israel-Hezbollah conflict suffered from a one-sided mandate authorizing an inquiry solely into the actions of Israeli forces.[2] In stark contrast, the 2004 Commission of Inquiry on Darfur was able to investigate the conduct of all parties to the conflict.[3]

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[1] H.R.C. Res. S-9/1 (Jan. 9, 2009). It is noteworthy that, unlike the bodies of general competence, the United Nations human-rights-specific bodies do not have the power to investigate violations of the laws of armed conflicts on their own. They can and should, however, conduct such inquiries in the context of alleged human rights violations, or when such potential breaches intersect.

[2] H.R.C. Res. S-2/1 (Aug. 11, 2006).

[3] S.C. Res. 1564, U.N. Doc. S/RES/1564 (Sept. 18, 2004).