



AI Index: AMR 38/003/2013

Monday 17 June 2013

## JAMAICA

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### **Open Letter from Amnesty International for the Discussion Draft of the Terms of Reference for the Commission of Enquiry into the May 2010 Events in West Kingston**

Senator the Hon. Mark Golding  
Minister of Justice

17 June 2013

Dear Minister,

I am writing in relation to the Discussion Draft of the Terms of Reference for the Commission of Enquiry into the May 2010 Events in West Kingston.

First of all, we would like to welcome the acceptance of the recommendation formulated by our organisation and by several Jamaican civil society organisations that the Terms of Reference (ToR) for the Commission of Enquiry should be drawn in consultation with civil society.

Second, we would like to formulate a few recommendations based on Jamaica's obligations under international law, as elaborated upon by United Nations and regional standards, as well as best practices. Some of these recommendations are mentioned below, while further recommendations are contained in the guidelines enclosed to this letter.

As a general comment, we would like to underline that Jamaica has the obligation to conduct a thorough, prompt, independent and impartial investigation into allegations of human rights violations, including extra-judicial executions, unlawful killings, arbitrary arrests and detention and enforced disappearance, as well as where there are reasons to believe that such violations have occurred. The Commission of Enquiry should therefore be mandated to investigate all the deaths which occurred during the law enforcement operations conducted during the state of emergency and aimed at

arresting Christopher Coke. It should also be mandated to investigate the arrests and detention which occurred in relation to these operations.

The inquiry should not be confined to looking at incidents in isolation. It should look into the facts of individual cases and specific incidents, seeking to identify any systematic patterns, and analysing underlying reasons and contributory factors to the events which are the subject of the inquiry. Point (a) only partly addresses this aspect.

It is crucial that the Terms of Reference are framed in a neutral manner, i.e. in a way which does not suggest a predetermined outcome or limit investigations in areas that might uncover official responsibility. Under the current formulation, there seems to be an assumption that state officials and law enforcement officers came under gunfire attack during the law enforcement operations aimed at arresting Christopher Coke (point e) and that “embattlements and barricades were unlawfully set up (point f), while there is no mention of the allegations of serious human rights violations, including extra-judicial executions, unlawful killings, enforced disappearances and arbitrary arrests and detention. Even if point (m) of the draft gives mandate to the commission to inquire into “whether the rights of any person or persons were violated”, it does not specify the concrete and serious allegations that have been widely reported, including by the interim report of the Office of the Public Defender.

It is also important that the Terms of Reference should be framed in a way that will require the Commission to assess the operations carried out by security forces against international human rights law, including standards on the use of force and firearms. However, in the current draft this is not clearly spelt out, as it is only generically mentioned that the Commission will enquire into “the conduct of operations by the security forces”. Crucial aspects that would enable the conduct of the security forces to be assessed against international human rights law (such as planning, training, equipping and oversight of the security forces concerned) are not specified.

According to international standards, the inquiry should seek to identify those directly responsible for possible human rights abuses, including individuals who acquiesced or were complicit in such abuses, and should also look into chain of command responsibilities. This aspect seems to be totally missing from the current document. It also fails to incorporate the necessity for the Commission of Enquiry to inform the relevant judicial bodies should it obtain information indicating that identified individuals may have been responsible for committing, ordering, encouraging or permitting human rights abuses, or complicity in such abuse. Such information should be passed to these bodies for investigation with a view to bringing the persons allegedly responsible to justice. The Terms of Reference should in this regard make clear that in carrying out its inquiry, the Commission shall bear in mind the rules and conditions for the admissibility of evidence in the criminal process and shall ensure that it produces admissible evidence for later criminal proceedings. A Commission of Enquiry is no substitute for an independent, impartial and properly resourced criminal justice process.

Finally, we believe that the current version of the Terms of Reference is not specific enough on the recommendations that the Commission should produce. In particular, there is no mandate for the Commission to formulate recommendations on how the security forces should operate in future. It also fails to include a mandate for the Commission to identify all Jamaican laws and practices relating to state of emergency that are inconsistent with Jamaica’s international human rights obligations, and to

recommend reforms to address these inconsistencies. The Terms of Reference should also mandate the Commission to make recommendations on reparations to victims of the human rights violations identified.

As a consequence of the above, we would like to formulate the following recommendations:

- To clearly indicate in the ToR that the Commission is mandated to enquire into allegations of serious human rights violations, including extra-judicial executions, unlawful killings, enforced disappearances and arbitrary arrests and detention;
- To explicitly mention in the ToR that the Commission should also seek to identify any systematic patterns and analyse underlying reasons and contributory factors to the events which are the subject of the inquiry;
- To avoid suggesting a predetermined outcome or limiting investigations in areas that might uncover official responsibility, including by amending point (e) of the draft ToR and by deleting the term “unlawful” from point (f);
- To mandate the commission to assess the operations carried out by security forces, including the actions and omissions, planning, training, equipping and oversight of the security forces concerned, against international human rights law and standards, including as set out by the International Covenant on Civil and Political Rights, the American Convention on Human Rights, the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and the UN Code of Conduct for Law Enforcement Officials;
- To indicate that, where information indicates that human rights abuses have occurred, the Commission will have to identify those directly responsible, including individuals who acquiesced or were complicit in such abuses, and will also look into chain of command responsibilities;
- To specify that the Commission, should it obtain information indicating that identified individuals may have been responsible for committing, ordering, encouraging or permitting human rights abuses, or complicity in such abuses, will have the obligation to pass such information to judicial bodies for investigation with a view to bringing the persons allegedly responsible to justice;
- To specify that the Commission shall, when carrying out its inquiry, bear in mind the rules and conditions for the admissibility of evidence in the criminal process and shall ensure that it produces admissible evidence for later criminal proceedings;
- To include a mandate for the Commission to formulate recommendations on how the security forces should operate in future;
- To include a mandate on the Commission to identify all Jamaican laws and practices relating to the state of emergency that are inconsistent with Jamaica’s international human rights obligations, and to recommend reforms to address these inconsistencies;
- To include a mandate for the Commission to formulate recommendations on reparations to victims of the human rights violations identified.

In addition, we would like to remind you that several additional principles and safeguards should be mentioned in the Terms of Reference or in any additional document subject to the scrutiny of civil society. These are related to the composition, powers and authority, and the resources of the Commission, as well as to the involvement of victims and other parties, the protection of victims and witnesses, the openness to public scrutiny, the relationship with other legal processes and the Commission’s report and the Government’s response. These essential elements can be

found in the attached guidelines, which we had previously sent to you with a correspondence dated 20 May 2013.

We hope that our recommendations will be taken into account as we believe that they will enable the Commission of Enquiry to be truly effective in establishing the truth about what happened during the law enforcement operations conducted during the state of emergency and ensure that victims of human rights violations have access to justice and reparations.

In line with the recommendation accepted by your government that the Terms of Reference for the Commission of Enquiry should be drawn in consultation with civil society, we are sharing this letter with concerned organisations.

Yours sincerely,

Javier Zúñiga Mejía Borja  
Special Advisor to Regional Programmes

Encl.: Guidelines for an effective commission of inquiry



## GUIDELINES FOR AN EFFECTIVE COMMISSION OF INQUIRY

### TERMS OF REFERENCE

- The ToR should be drawn up in consultation with civil society
- The ToR should be framed in a neutral manner, i.e. in a way which does not suggest a predetermined outcome or limit investigations in areas that might uncover official responsibility
- The ToR should be framed in a way that will require the commission to assess the operations carried out by security forces against international human rights law, including standards on the use of force and firearms
- The inquiry should seek to identify those directly responsible for possible human rights abuses, including individuals who acquiesced or were complicit in such abuses, and should also look into chain of command responsibilities
- The inquiry should not be confined to looking at incidents in isolation. It should look into the facts of individual cases and specific incidents, seeking to identify any systematic patterns, and analysing underlying reasons and contributory factors to the events which are the subject of the inquiry.
- The ToR should include an obligation on the commission to formulate recommendations on how the security forces should operate in future
- The ToR should include an obligation on the commission to identify all Jamaican laws and practises relating to state of emergency that are inconsistent with Jamaica's international human rights obligations, and to recommend reforms to address the gap

### COMPOSITION

- There should be no less than 3 members, in order to ensure the objectivity of the investigation
- Members should be appointed on the basis of their recognised impartiality, independence, competence and integrity. They should not be closely associated with any individual, government, political party, or any party implicated in the inquiry
- Competence should include proven skills in examining witnesses and evaluating evidence
- Proposals for potential members should be solicited from Jamaican human rights organisations, and civil society should be consulted about appointments

- Members should be irremovable from their offices for the duration of the inquiry, except on the grounds of incapacity or behaviour rendering them unfit to discharge their duties. They should enjoy immunity in respect of any civil or criminal actions brought against them on grounds relating to the investigation.

## **POWERS AND AUTHORITY**

- The Commission should have the authority to obtain all the information and evidence necessary, including the power to compel testimony under threat of legal sanction, to order the production of documents, including government and medical records
- The Commission should have the authority to conduct on-site visits, and to receive evidence from witnesses and organisations located outside the country, including foreign governments if relevant
- The Commission should have the authority to produce interim public reports and be required to produce a full final report for publication

## **RESOURCES**

- The commission should have the necessary technical and administrative resources to effectively fulfil its tasks
- It should have control of its own budget which should be adequate for its needs and to enable it to be practically independent of government
- It should have impartial, expert legal counsel and its own investigators, and should be able to obtain advice from independent expert advisers.

## **INVOLVEMENT OF VICTIMS AND OTHER PARTIES**

- All surviving victims, families and their legal representatives should be informed of the hearings and receive all information relevant to the investigation
- Victims and their legal representatives should be able to present evidence
- Opportunity for effective questioning of witnesses by the commission should be provided, and for parties to the inquiry (including victims) either to have an opportunity to question all witnesses directly, or to submit written questions to the commission for the commission to put to witnesses (or both)
- Provide other interested parties with the opportunity to be heard and submit evidence

## **SECURITY AND PROTECTION OF WITNESSES AND VICTIMS**

- The Commission should have the authority to ensure provision of adequate security measures to protect witnesses, victims, staff and others associated with the inquiry
- If there is reasonable fear of persecution, harassment or harm of any party, and subject to the procedural and substantive rights of victims, the Commission should have the power decide to hear evidence in private, to keep the identity of the informant or witness confidential or anonymous, or to take any other appropriate measures to ensure the privacy and safety of witnesses.
- All witness should be allowed to have legal counsel if they are likely to be harmed by the inquiry

### **OPENESS TO PUBLIC SCRUTINY**

- All proceedings of the commission, and the evidence collected by it, should be open to public scrutiny
- Hearings should be open to the public (including the press), unless compelling and demonstrably justifiable reasons exist for the closure of a particular part of the proceedings to the general public, in which circumstances the commission should be required to find some other means of making public the substance of the information received during the closed part of the hearings
- Any claims by government officials that information must be withheld, whether from the commission, from victims, of their lawyers, or from the general public, on grounds such as “state secrets” or “public security” should be subject to challenges and ultimate determination by a court or other institution independent of the government
- In no case should it be permitted to invoke “state secrets” or other similar grounds for non-disclosure or evidence in a manner that would prevent an independent, impartial and thorough investigation into allegations of serious violations of human rights; prevent accountability where such violations are established; prevent the truth emerging about serious human rights violations, or prevent those who have suffered human rights violations from obtaining effective remedy and reparation

### **RELATIONSHIP WITH OTHER LEGAL PROCESSES**

- A commission of inquiry is complementary to the normal legal system. It should not become a substitute for an independent, impartial and properly resourced judiciary whose ruling are enforced
- A commission of inquiry should not be precluded on the grounds that a criminal investigation is pending or in progress. Nor should it preclude or prejudice ongoing or future criminal trials, private criminal and civil actions or otherwise limit rights to compensation. Evidence obtained by an inquiry should not be thereby inadmissible in other proceedings

- Despite indication to the contrary in the interim report of the Public Defender, victims' claims for compensation, including in relation to extrajudicial executions, as a matter of the responsibility of the Jamaican state should not be made to depend upon or await the outcome of criminal proceedings against alleged perpetrators
- If the inquiry obtains information indicating that identified individuals may have been responsible for committing, ordering, encouraging or permitting human rights abuses, or complicity in such abuses, that information should be passed to the relevant judicial or law enforcement bodies for investigation with a view to bringing them to justice. In carrying out its inquiry, the commission should bear in mind the rules and conditions for the admissibility of evidence in the criminal process and should ensure that it produces admissible evidence for later criminal proceedings

### **COMMISSION REPORT AND GOVERNMENT RESPONSE**

- A public report should be release within reasonable period of time. This should include a description of the method(s) by which evidence was gathered and evaluated; an analysis of the applicable law and policy frameworks, including international human rights standards; conclusions and findings or fact, including attribution of responsibility where possible; and recommendations for policy and other reforms
- Where findings are not unanimous, commissioners should be permitted to file a public dissenting opinion
- The government should reply publicly to the report and indicate the steps it intends to take to implement its recommendations