

# **MODEL PROTOCOL FOR A LEGAL INVESTIGATION OF EXTRA-LEGAL, ARBITRARY AND SUMMARY EXECUTIONS ("MINNESOTA PROTOCOL")**

## **A. Introduction**

Suspected extra-legal, arbitrary and summary executions can be investigated under established national or local laws and can lead to criminal proceedings. In some cases, however, investigative procedures may be inadequate because of the lack of resources and expertise or because the agency assigned to conduct the investigation may be partial. Hence, such criminal proceedings are less likely to be brought to a successful outcome.

The following comments may enable those conducting investigations and other parties, as appropriate, to obtain some in-depth guidance for conducting investigations. Such guidance in a general way, has been set out in the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (see annex I, below, paragraphs 9-17). The guidelines set forth in this proposed model protocol for a legal investigation of extra-legal, arbitrary and summary executions are not binding. Instead, the model protocol is meant to be illustrative of methods for carrying out the standards enumerated in the Principles.

By definition, this model protocol cannot be exhaustive as the variety of legal and political arrangements escapes its application. Also, investigative techniques vary from country to country and these cannot be standardized in the form of internationally adopted principles. Consequently, additional comments may be relevant for the practical implementation of the Principles.

Sections B and C of this model protocol contain guidelines for the investigation of all violent, sudden, unexpected or suspicious deaths, including suspected extra-legal, arbitrary and summary executions. These guidelines apply to investigations conducted by law enforcement personnel and by members of an independent commission of inquiry.

Section D provides guidelines for establishing a special independent commission of inquiry. These guidelines are based on the experiences of several countries that have established independent commissions to investigate alleged arbitrary executions.

Several considerations should be taken into account when a Government decides to establish an independent commission of inquiry. First, persons subject to an inquiry should be guaranteed the minimum procedural safeguards protected by international law\* at all stages of the investigation. Secondly, investigators should have the support of adequate technical and administrative personnel, as well as access to objective, impartial legal advice to ensure that the investigation will produce admissible evidence for later criminal

proceedings. Thirdly, investigators should receive the full scope of the Government's resources and powers. Finally, investigators should have the power to seek help from the international community of experts in law, medicine and forensic sciences.

NOTE: In particular, all persons must be guaranteed the due process rights set forth in article 14 of the International Covenant on Civil and Political Rights.

The fundamental principles of any viable investigation into the causes of death are competence, thoroughness, promptness and impartiality of the investigation, which flow from paragraphs 9 and 11 of the Principles. These elements can be adapted to any legal system and should guide all investigations of alleged extra-legal, arbitrary and summary executions.

#### B. Purposes of an inquiry

As set out in paragraph 9 of the Principles, the broad purpose of an inquiry is to discover the truth about the events leading to the suspicious death of a victim. To fulfil this purpose, those conducting the inquiry shall, at a minimum, seek:

- (a) To identify the victim;
- (b) To recover and preserve evidentiary material related to the death to aid in any potential prosecution of those responsible;
- (c) To identify possible witnesses and obtain statements from them concerning the death;
- (d) To determine the cause, manner, location and time of death, as well as any pattern or practice that may have brought about the death;
- (e) To distinguish between natural death, accidental death, suicide and homicide;
- (f) To identify and apprehend the person(s) involved in the death;
- (g) To bring the suspected perpetrator(s) before a competent court established by law.

#### C. Procedures of an inquiry

One of the most important aspects of a thorough and impartial investigation of an extra-legal, arbitrary and summary execution is the collection and analysis of evidence. It is essential to recover and preserve physical evidence, and to interview potential witnesses so that the circumstances surrounding a suspicious death can be clarified.

## 1. Processing of the crime scene

Law enforcement personnel and other non-medical investigators should co-ordinate their efforts in processing the scene with those of medical personnel. Persons conducting an investigation should have access to the scene where the body was discovered and to the scene where the death may have occurred:

(a) The area around the body should be closed off. Only investigator and their staff should be allowed entry into the area;

(b) Colour photographs of the victim should be taken as these, in comparison with black and white photographs, may reveal in more detail the nature and circumstances of the victim's death;

(c) Photographs should be taken of the scene (interior and exterior) of any other physical evidence;

(d) A record should be made of the body position and condition of the clothing;

(e) The following factors may be helpful in estimating the time of death:

(i) Temperature of the body (warm, cool, cold);

(ii) Location and degree of fixation of lividity;

(iii) Rigidity of the body;

(iv) Stage of its decomposition;

(f) Examination of the scene for blood should take place. Any samples of blood, hair, fibres and threads should be collected and preserved;

(g) If the victim appears to have been sexually assaulted, this fact should be recorded;

(h) A record should be made of any vehicles found in the area;

(i) Castings should be made and preserved of pry marks, tyre or shoe impressions, or any other impressions of an evidentiary nature;

(j) Any evidence of weapons, such as guns, projectiles, bullets and cartridge cases, should be taken and preserved. When applicable, tests for gunshot residue and trace metal detection should be performed;

(k) Any fingerprints should be located, developed, lifted and preserved;

(1) A sketch of the crime scene to scale should be made showing all relevant details of the crime, such as the location of weapons, furniture, vehicles, surrounding terrain, including the position, height and width of items, and their relationship to each other;

(m) A record of the identity of all persons at the scene should be made, including complete names, addresses and telephone numbers;

(n) Information should be obtained from scene witnesses, including those who last saw the decedent alive, when, where and under what circumstances;

(o) Any relevant papers, records or documents should be saved for evidentiary use and handwriting analysis.

## 2. Processing of the evidence

(a) The body must be identified by reliable witnesses and other objective methods;

(b) A report should be made detailing any observations at the scene, actions of investigators and disposition of all evidence recovered;

(c) Property forms listing all evidence should be completed;

(d) Evidence must be properly collected, handled, packaged, labelled and placed in safekeeping to prevent contamination and loss of evidence.

## 3. Avenues to investigation

(a) What evidence is there, if any, that the death was premeditated and intentional, rather than accidental? Is there any evidence of torture?

(b) What weapon or means was used and in what manner?

(c) How many persons were involved in the death?

(d) What other crime, if any, and the exact details thereof, was committed during or associated with the death?

(e) What was the relationship between the suspected perpetrator(s) and the victim prior to the death?

(f) Was the victim a member of any political, religious, ethnic or social group(s), and could this have been a motive for the death?

## 4. Personal testimony

(a) Investigators should identify and interview all potential witnesses to the crime, including:

(i) Suspects;

(ii) Relatives and friends of the victim;

- (iii) Persons who knew the victim;
  - (iv) Individuals residing or located in the area of the crime;
  - (v) Persons who knew or had knowledge of the suspects;
  - (vi) Persons who may have observed either the crime, the scene, the victim or the suspects in the week prior to the execution;
  - (vii) Persons having knowledge of possible motives;
- (b) Interviews should take place as soon as possible and should be written and/or taped. All tapes should be transcribed and maintained;
- (c) Witnesses should be interviewed individually, and assurance should be given that any possible means of protecting their safety before, during and after the proceedings will be used, if necessary.

#### D. Commission of inquiry

In cases where government involvement is suspected, an objective and impartial investigation may not be possible unless a special commission of inquiry is established. A commission of inquiry may also be necessary where the expertise of the investigators is called into question. This section sets out factors that give rise to a presumption of government complicity, partiality or insufficient expertise on the part of those conducting the investigation. Any one of these presumptions should trigger the creation of a special commission of inquiry. It then sets out procedures that can be used as a model for the creation and function of commissions of inquiry. The procedures were derived from the experience of major inquiries that have been mounted to investigate executions or similarly grievous cases of human rights violations.

Establishing a commission of inquiry entails defining the scope of the inquiry, appointing commission members and staff, determining the type of proceedings to be followed and selecting procedures governing those proceedings, and authorizing the commission to report on its findings and make recommendations. Each of these areas will be covered separately.

##### 1. Factors triggering a special investigation

Factors that support a belief that the Government was involved in the execution, and that should trigger the creation of a special impartial investigation commission include:

- (a) Where the political views, religious or ethnic affiliation, or social status of the victim give rise to a suspicion of government involvement or complicity in the death because of any one or combination of the following factors:

- (i) Where the victim was last seen alive in police custody or detention;
  - (ii) Where the modus operandi is recognizably attributable to government-sponsored death squads;
  - (iii) Where persons in the Government or associated with the Government have attempted to obstruct or delay the investigation of the execution;
  - (iv) Where the physical or testimonial evidence essential to the investigation becomes unavailable.
- (b) As set out in paragraph 11 of the Principles, an independent commission of inquiry or similar procedure should also be established where a routine investigation is inadequate for the following reasons:
- (i) The lack of expertise; or
  - (ii) The lack of impartiality; or
  - (iii) The importance of the matter; or
  - (iv) The apparent existence of a pattern of abuse; or
  - (v) Complaints from the family of the victim about the above inadequacies or other substantial reasons.

## 2. Defining the scope of the inquiry

Governments and organizations establishing commissions of inquiry need to define the scope of the inquiry by including terms of reference in their authorization. Defining the commission's terms of reference can greatly increase its success by giving legitimacy to the proceedings, assisting commission members in reaching a consensus on the scope of inquiry and providing a measure by which the commission's final report can be judged. Recommendations for defining terms of reference are as follows:

- (a) They should be neutrally framed so that they do not suggest a predetermined outcome. To be neutral, terms of reference must not limit investigations in areas that might uncover government responsibility for extra-legal, arbitrary and summary executions;
- (b) They should state precisely which events and issues are to be investigated and addressed in the commission's final report;
- (c) They should provide flexibility in the scope of inquiry to ensure that thorough investigation by the commission is not hampered by overly restrictive or overly broad terms of reference. The necessary flexibility may be accomplished, for example by permitting the commission to amend its terms of reference as necessary. It is important, however, that the commission keep the public informed of any amendments to its charge.

### 3. Power of the commission

The principles set out in a general manner the powers of the commission. More specifically such a commission would need the following:

(a) To have the authority to obtain all information necessary to the inquiry, for example, for determining the cause, manner and time of death, including the authority to compel testimony under legal sanction, to order the production of documents including government and medical records, and to protect witnesses, families of the victim and other sources;

(b) To have the authority to issue a public report;

(c) To have the authority to prevent the burial or other disposal of the body until an adequate postmortem examination has been performed;

(d) To have the authority to conduct on-site visits, both at the scene where the body was discovered and at the scene where the death may have occurred;

(e) To have the authority to receive evidence from witnesses and organizations located outside the country.

### 4. Membership qualifications

Commission members should be chosen for their recognized impartiality, competence and independence as individuals:

Impartiality. Commission members should not be closely associated with any individual, government entity, political party or other organization potentially implicated in the execution or disappearance, or an organization or group associated with the victim, as this may damage the commission's credibility.

Competence. Commission members must be capable of evaluating and weighing evidence, and exercising sound judgement. If possible, commissions of inquiry should include individuals with expertise in law, medicine, forensic science and other specialized fields, as appropriate.

Independence. Members of the commission should have a reputation in their community for honesty and fairness.

### 5. Number of commissioners

The Principles do not contain a provision on the number of members of the commission, but it would not be unreasonable to note that objectivity of the investigation and commission's findings may, among other things, depend on whether it has three or more

members rather than one or two. Investigations into extra-legal, arbitrary and summary executions should, in general, not be conducted by a single commissioner. A single, isolated commissioner will generally be limited in the depth of investigation he or she can conduct alone. In addition, a single commissioner will have to make controversial and important decisions without debate, and will be particularly vulnerable to governmental and other outside pressure.

#### 6. Choosing a commission counsel

Commissions of inquiry should have impartial, expert counsel. Where the commission is investigating allegations of governmental misconduct, it would be advisable to appoint counsel outside the Ministry of Justice. The chief counsel to the commission should be insulated from political influence, as through civil service tenure, or status as a wholly independent member of the bar.

#### 7. Choosing expert advisors

The investigation will often require expert advisors. Technical expertise in such areas as pathology, forensic science and ballistics should be available to the commission.

#### 8. Choosing investigators

To conduct a completely impartial and thorough investigation, the commission will almost always need its own investigators to pursue leads and to develop evidence. The credibility of an inquiry will be significantly enhanced to the extent that the commission can rely on its own investigators.

#### 9. Protection of witnesses

(a) The Government shall protect complainants, witnesses, those conducting the investigation, and their families from violence, threats of violence or any other form of intimidation;

(b) If the commission concludes that there is a reasonable fear of persecution, harassment, or harm to any witness or prospective witness, the commission may find it advisable:

(i) To hear the evidence in camera;

(ii) To keep the identity of the informant or witness confidential;

(iii) To use only such evidence as will not present a risk of identifying the witness;

(iv) To take any other appropriate measures.

#### 10. Proceedings

It follows from general principles of criminal procedure that hearings should be conducted in public, unless in camera proceedings are necessary to protect the safety of a witness. In camera proceedings should be recorded and the closed, unpublished record kept in a known location.

Occasionally, complete secrecy may be required to encourage testimony, and the commission will want to hear witnesses privately, informally and without recording testimony.

#### 11. Notice of inquiry

Wide notice of the establishment of a commission and the subject of the inquiry should be given. The notice should also include an invitation to submit relevant information and/or written statements to the commission, and instructions to persons wishing to testify. Notice can be disseminated through newspapers, magazines, radio, television, leaflets and posters.

#### 12. Receipt of evidence

Power to compel evidence. As emphasized in Principle 10 (see annex I), commissions of inquiry should have the power to compel testimony and production of documents: in this context, Principle 10 refers to "the authority to oblige officials" allegedly involved in extra-legal, arbitrary and summary executions. Practically, this authority may involve the power to impose fines or sentences if the Government or individuals refuse to comply.

Use of witness statements. Commissions of inquiry should invite persons to testify or submit written statements as a first step in gathering evidence. Written statements may become an important source of evidence if their author become afraid to testify, cannot travel to proceedings, or are otherwise unavailable.

Use of evidence from other proceedings. Commissions of inquiry should review other proceedings that could provide relevant information. For example the commission should obtain the findings from an inquest into cause of death conducted by a coroner or medical examiner. Such inquests generally rely on postmortem or autopsy examinations. A commission of inquiry should review the inquest and the results of the autopsy presented to the inquest to determine if they were conducted thoroughly and impartially. If the inquest and autopsy were so conducted, the coroner's findings are entitled to be given great weight.

### 13. Rights of parties

As mentioned in Principle 16, families of the deceased and their legal representatives shall be informed of, and have access to, any hearing and to all information relevant to the investigation, and shall be entitled to present evidence. This particular emphasis on the role of the family as a party to the proceedings implies the specially important role the family's interests play in the conduct of the investigation. However, all other interested parties should also have the opportunity at being heard. As mentioned in Principle 10, the investigative body shall be entitled to issue summons to witnesses, including the officials allegedly involved and to demand the production of evidence. All these witnesses should be permitted legal counsel if they are likely to be harmed by the inquiry, for example, when their testimony could expose them to criminal charges or civil liability. Witnesses may not be compelled to testify against themselves regarding matter unrelated to the scope of inquiry.

There should be an opportunity for the effective questioning of witnesses by the commission. Parties to the inquiry should be allowed to submit written questions to the commission.

### 14. Evaluation of evidence

The commission shall assess all information and evidence it receives to determine its relevance, veracity, reliability and probity. The commission should evaluate oral testimony based upon the demeanour and overall credibility of the witness. Corroboration of evidence from several sources will increase the probative value of such evidence. The reliability of hearsay evidence from several sources will increase the probative value of such evidence. The reliability of hearsay evidence must be considered carefully before the commission should accept it as fact. Testimony not tested by cross-examination must also be viewed with caution. In camera testimony preserved in a closed record or not recorded at all is often not subjected to cross-examination and therefore may be given less weight.

### 15. The report of the commission

As stated in Principle 17, the commission should issue a public report within a reasonable period of time. It may be added that where the commission is not unanimous in its findings, the minority commissioner(s) should file a dissenting opinion.

From the practical experience gathered, commission of inquiry reports should contain the following information:

- (a) The scope of inquiry and terms of reference;
- (b) The procedures and methods of evaluating evidence;
- (c) A list of all witnesses who have testified, except for those whose identities are withheld for protection and who have testified in camera, and exhibits received in evidence;

- (d) The time and place of each sitting (this might be annexed to the report);
- (e) The background to the inquiry such as relevant social, political and economic conditions;
- (f) The specific events that occurred and the evidence upon which such findings are based;
- (g) The law upon which the commission relied;
- (h) The commission's conclusions based upon applicable law and findings of fact;
- (i) Recommendations based upon the findings of the commission.

#### 16. Response of the Government

The Government should either reply publicly to the commission's report or should indicate what steps it intends to take in response to the report