
Two Seas Apart: An Account of the Establishment, Operation and Impact of the Bahrain Independent Commission of Inquiry (BICI)

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Abstract

The Bahrain Independent Commission of Inquiry (BICI) was established to investigate the civil unrest that occurred in Bahrain during February and March 2011. This article employs qualitative empirical techniques to provide an account of the impact of the commission during three periods: (i) the period of the establishment of the commission; (ii) the five-month period of the commission's presence in Bahrain; and (iii) the period following the submission of the commission's report. The establishment of BICI was part of a government strategy to deflate domestic political tension and deflect international opprobrium in the aftermath of the crackdown on anti-government protestors in March 2011. Reformists within the government, especially Bahrain's King Hamad, also hoped to utilize the report as a catalyst for implementing political reforms. The establishment of the BICI contributed to reducing the severity of the criticism directed at Bahrain from foreign governments, international organizations and domestic opposition actors. This article also describes the intercessions undertaken by the BICI on behalf of the victims of human rights abuses during its presence and operation in Bahrain and identifies some of the reforms that were recommended by the commission and executed by the Government of Bahrain during that period. Finally, this article examines the impact of the BICI following the submission of its report. It argues that, despite undertaking some positive institutional and administrative reforms, the Government of Bahrain has failed to fully implement the commission's recommendations, especially those relating to holding those responsible for human rights abuses accountable. The article concludes that the failure

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of the BICI to make a substantial difference, especially in the area of accountability, is reflective of a general lack of political will to undertake the comprehensive reforms necessary to address the systemic sources of popular discontent that fuelled the 2011 protests.

1 Introduction

The Arab Spring arrived in Bahrain on 14 February 2011. Instead of celebrating the tenth anniversary of the National Action Charter,¹ Bahraini activists used social media to call for a Day of Rage on the island kingdom.² What began as dispersed demonstrations developed into mass protests, the epicentre of which was the Gulf Cooperation Council (GCC) Roundabout in the heart of the capital, Manama.³ In the ensuing month, a crisis unfolded that brought the political system in Bahrain to the precipice of collapse. Initially, the protestors called for relatively limited reforms that enjoyed cross-sectarian support, including greater popular participation in governance and an end to discriminatory practices that were causing socio-economic inequality. The government, however, responded with force. Police clashes with protestors resulted in a number of deaths, which heightened public anger and led to an escalation of the protestors' demands. Thousands began demonstrating against Bahrain's King Hamad and demanded the removal of the long-serving prime minister, and a fringe opposition group even called for overthrowing the monarchy and establishing a republic.

As the protests grew, Bahrain became increasingly divided along sectarian lines. Members of the royal family, which is of Sunni background, government officials and state-run media accused the protestors and the opposition parties – the largest of which is Al-Wefaq National Islamic Society (Al-Wefaq), whose leadership and membership is predominantly Shiite – of executing an Iranian plot to destabilize Bahrain.⁴ Government supporters and protestors exchanged vitriolic attacks on social media, and violence broke out between both sides in many areas of Bahrain. Finally, on 15 March 2011, after negotiations between Bahrain's Crown Prince Salman and the opposition failed to resolve the crisis, the government initiated a brutal crackdown against protestors, and military contingents from the neighbouring Gulf states were invited into Bahrain to assist in maintaining order.⁵

The result was almost 40 deaths, hundreds of detainees, many of whom were tortured, over 2,000 students and employees dismissed from their schools and jobs and

¹ The National Action Charter was a reform programme designed to transform Bahrain into a constitutional monarchy. It was adopted by an overwhelming majority in a referendum on 14 February 2001. See S. Wright, *Fixing the Kingdom: Political Evolution and Socio-Economic Challenges in Bahrain* (2008).

² S. Kerr, 'Police Crack Down on Bahrain Day of Rage', *Financial Times* (14 February 2011).

³ The Gulf Cooperation Council (GCC) Roundabout was popularly known as the Pearl Roundabout. See M. Slackman, 'Bahrain Police Use Force to Crack Down on Protesters', *New York Times* (16 February 2011).

⁴ R. Aslan, 'Bahrain's Fake Sectarian War', *Foreign Affairs* (30 June 2013).

⁵ See Zunes, 'Bahrain's Arrested Revolution', 35 *Arab Studies Quarterly* (2013) 149.

numerous Shiite religious structures demolished by the government. More enduringly, the crisis polarized Bahrain. It undercut proponents of moderation in government and in the opposition and empowered exponents of extremism on both sides, effectively ensuring that Bahrain – which in Arabic means ‘the Two Seas’ – remains a community that is two seas apart.

Seeking to overcome the domestic ramifications of the crisis, repair the damage sustained by Bahrain’s reputation and address the criticism directed at Bahrain by foreign governments and international organizations due to the repression of the protests, King Hamad established the Bahrain Independent Commission of Inquiry (BICI) on 29 June 2011. The commission was mandated to investigate the events of February and March 2011 and determine whether human rights violations were committed during the unrest.⁶ During the five months of investigations, the commission received 8,110 complaints and interviewed victims of human rights abuses, their families and the political leaders in government and the opposition. On 23 November 2011, the BICI submitted an over-500-page report that discussed the background and political context of the unrest, provided a detailed narrative of how the crisis unfolded and found that ‘grave violations of human rights, including the arbitrary deprivation of life, torture and arbitrary detention’ had been committed.⁷ The report also recommended conducting investigations to hold those responsible for these violations accountable and proposed reforms to avoid the recurrence of these abuses in the future.

As part of a symposium that aims to generate empirical data on the difference that specific commissions of inquiry have made, this article uses qualitative empirical techniques to examine the impact of the BICI. It argues that a comprehensive account of the difference made by the BICI requires examining its impact during three distinct periods: (i) the period of its establishment; (ii) the five-month period of the commission’s presence in Bahrain; and (iii) the period following the submission of its final report. In Part 2, which discusses the establishment of the BICI, this article argues that the creation of the commission contributed to mitigating the criticism directed at the Government of Bahrain (GoB) from domestic opposition parties and international actors, especially foreign governments. Part 3, which covers the duration of the commission’s presence in Bahrain, describes how interventions by the BICI caused an improvement in the treatment of detainees and led the GoB to undertake reforms that were intended to end certain human rights abuses and lessen public anger at the repression of the protests. Finally, Part 4 examines the impact of the BICI’s report. It discusses the extent to which the BICI’s recommendations were executed, especially those relating to accountability for human rights abuses, and reflects on the reasons why some of these recommendations were not fully implemented.

⁶ Kingdom of Bahrain, Royal Order no. 28/2011.

⁷ Report of the Bahrain Independent Commission of Inquiry (BICI Report) (2011), para. 1702, available at www.bici.org.bh/BICIREportEN.pdf.

2 Measuring the Impact of the BICI: A Methodological Note

This article is a ‘within-case analysis’ of a single commission.⁸ It does not offer general conclusions about commissions of inquiry or about the conditions conducive to their success or failure. Nor does this article, as the introduction to this symposium explains, opine on the normative desirability of establishing these bodies. Instead, it analyses a single case study – namely, the BICI. In addition to understanding the specificities of this particular case, the utility of this type of research is that, when combined with comparable cases such as those included in this symposium, it generates patterns of data from which generalizable observations about commissions of inquiry can be extrapolated.

This article uses qualitative empirical tools to detect and describe the difference made by the BICI. To determine the impact of the establishment of the BICI, Part 2 engages in process tracing, using primary information principally drawn from targeted interviews conducted with individuals who were involved in establishing the BICI. These individuals include the commission’s chairperson, Cherif Bassiouni, and senior GoB employees.⁹ Other primary materials include statements, interviews and press releases from GoB officials, opposition parties, foreign governments and international organizations. Part 3 is primarily based on the BICI’s report, which documented the reforms undertaken by the GoB during the period of the BICI’s operation in Bahrain. Many of these reforms were proposed by the BICI’s chairperson and its chief investigator, both of whom were interviewed and provided valuable insights into the impact of the commission during its presence in Bahrain. Part 4 focuses on the impact of the BICI after the submission of its report. It engages in a documentary analysis of the GoB’s reports published to catalogue its implementation of the BICI’s recommendations. To assess the veracity of these official reports, this part engages in triangulation by employing reports from sources including the Bahrain National Institute for Human Rights, local and international non-governmental organizations (NGOs) and the media. This part also uses information acquired from targeted interviews conducted with GoB employees involved in the implementation of the BICI’s recommendations.

A final cautionary note is necessary; many of the claims made in this article are informed by my own observations as the BICI’s legal officer and as a member of a team led by Cherif Bassiouni that travelled to Bahrain in February 2012 to assess the initial implementation of the BICI’s recommendations. While this provides a unique perspective from which to reflect on the BICI, I am also conscious of the biases it generates. It is hard to entirely separate oneself from, and objectively evaluate, an experience that one was deeply involved in, especially since, as a member of its staff, I am committed to the BICI’s success and legacy and dedicated to contributing, even if only in a

⁸ Paterson, ‘Within-Case Analysis’, in A.J. Mills *et al.* (eds), *Encyclopedia of Case Study Research* (2010) 971.

⁹ All individuals interviewed by the author who are currently employed by the government of Bahrain (GoB) or who were previously employed by the GoB have not been identified by name in this article.

small way, to advancing reform and human rights in Bahrain. Therefore, throughout this article, primary and secondary materials from multiple sources are used to guard against my own biases and of those individuals interviewed for this article.

3 The Establishment of the BICI and Its Impact

A The BICI's Mandate and the Background of Its Establishment

By April 2011, the popular tsunami that had overtaken Bahrain had subsided. Despite restoring relative calm, the GoB realized that the country's stability was still precarious. Relations with the opposition remained strained, and clashes continued between the police and protestors.¹⁰ Bahrain was also subjected to international criticism for its repression of the protestors, including from Western governments, international organizations and civil society. The GoB, therefore, took steps to defuse popular anger, deflate domestic political tension and deflect international opprobrium. It ended the state of National Safety,¹¹ during which law enforcement agencies exercised exceptional powers of arrest and detention and special courts prosecuted opposition leaders and protestors.¹² It also lifted the ban on a leading opposition party – the National Democratic Action Society (Waad)¹³ – and announced that the GCC forces that had entered Bahrain during the unrest would leave.¹⁴ In addition, the GoB announced two significant steps: the convening of the National Dialogue and the establishment of the BICI.¹⁵

King Hamad established the BICI on 29 June 2011 to 'investigate and report on the events occurring in Bahrain in February/March 2011'.¹⁶ Its mandate specified that the commission's report should contain a narrative of the events that occurred during the unrest; a determination of whether human rights violations occurred, including police brutality, disappearances and torture; an examination of the appropriateness of the arrests;¹⁷ a description of the events that occurred at the GCC Roundabout and the Salmaneyya Hospital where major clashes occurred between security forces and protestors; a determination of whether there was media harassment of protestors; an

¹⁰ 'Police Brutality Turns Bahrain into "Island of Fear"', *British Broadcasting Corporation (BBC)* (7 April 2011).

¹¹ Pursuant to the Constitution of Bahrain, national safety is one of two forms of emergency powers that the GoB may exercise during periods of national crises – the second being martial law.

¹² 'King Hamad Orders End to Emergency in Bahrain', *Alarabiya* (8 May 2011).

¹³ 'Bahrain to Lift Ban on Major Opposition Party', *Aljazeera* (18 June 2011).

¹⁴ 'Initiatives Preceding the Bahrain Dialogue', *Aljazeera* (30 June 2011).

¹⁵ The National Dialogue, which convened on 2 July 2011, was a forum for political and social leaders to discuss the causes of the unrest and the necessary reforms to prevent its recurrence. See L. Louer, *Bahrain's National Dialogue and the Ever-Deepening Sectarian Divide*, 29 June 2011.

¹⁶ Kingdom of Bahrain, Royal Order no. 28/2011, Art. 1.

¹⁷ To determine whether human rights abuses were committed, the BICI Report applied both domestic law and the rules of international human rights law to which Bahrain is bound. See BICI Report, *supra* note 7, ch. 3.

evaluation of the legality of the demolition of religious structures; and an examination of the role of foreign forces in the unrest.¹⁸ The BICI was also instructed to make ‘any recommendations, in particular recommendations for further official investigations or prosecution of any person, including public officials or employees’.¹⁹ The BICI was granted broad powers and a budget of over US\$1.3 million to execute its mandate. The BICI’s commissioners and investigators were guaranteed access to government employees, documents and facilities and allowed to meet opposition leaders, detainees and victims of human rights violations. Bassiouni also selected four renowned experts to serve on the commission and hired investigators, forensic experts and staff members without any governmental interference.²⁰

According to one interviewee employed by the Royal Court of Bahrain who was involved in the establishment of the BICI, King Hamad decided to form a commission of foreign experts because opposition parties and many in the public distrusted the national judiciary and would not view a commission of domestic officials as being impartial. To be credible and to be received as a conciliatory gesture by the opposition, the commission had to be perceived as impartial and independent, which was only possible if its members were renowned foreign experts who were granted broad investigatory powers. Furthermore, this interviewee noted that King Hamad was confident that there had been no systematic policy of abuse against protestors. He understood that abuses must have occurred during the unrest, but he viewed these as ‘individual mistakes’ and not representative of a pattern of abuse. The king believed that, if a domestic investigation reached these conclusions, it would be written off as a whitewash and would inflame tensions.²¹ This interviewee added that, if the commission found that human rights violations were committed, it could be politically convenient. To King Hamad, the BICI was a tool of reconciliation, which required debunking the polarizing narratives that were being propagated about the events that had occurred during the unrest by extremists in the opposition and among the government’s supporters on the Sunni side of the political spectrum. Therefore, if the commission showed that the ‘police were not angels’ and that abuses were indeed committed, it would not only help placate the opposition but would also ‘embarrass certain domestic actors’ and highlight the necessity of reform.²²

These comments confirm a reality that the BICI’s members quickly recognized, which is the inaccuracy of viewing the unrest in Bahrain through a binary lens that pits the population’s Shiite majority against a Sunni ruling family and its supporters. Although Al-Wefaq is the largest and most influential opposition party, a number of leftist, secular and nationalist parties, which included Sunni members, participated in the protests and adopted a variety of demands ranging from socio-economic reforms

¹⁸ *Ibid.*, Art. 9.

¹⁹ *Ibid.*, Art. 10.

²⁰ Press conference by Cherif Bassiouni, 30 June 2011. The members of the commission were Phillippe Kirsch, Sir Nigel Rodley, Mahnoush Arsanjani and Badria Al-Awadhi.

²¹ Interview conducted on 6 February 2017.

²² *Ibid.*

to overthrowing the monarchy. The pro-government camp was similarly varied in its composition and orientation. While some among Bahrain's ruling elite, most prominently Crown Prince Salman, sought a peaceful solution to the unrest and advocated significant political and economic reforms, others within the ruling family and the Sunni community, especially religiously conservative elements, resisted attempts to undertake political and economic reforms that would have addressed popular grievances. Therefore, a commission that provided an impartial account of the unrest could challenge the opposition's claims that egregious and systematic human rights violations were committed, while simultaneously furnishing a political opening for reform. Indeed, as Bassiouni noted, 'the moderates on the reform side [of the Royal Family] want to have their hand gently pushed ... a report of the commission that gives them the appearance of being gently pushed as opposed to being hit on the head with a hammer'.²³

The positions of hardline Sunni conservatives were shared by some of the GoB officials. This meant that the establishment of the BICI by royal decree did not automatically guarantee the full cooperation of the relevant GoB agencies. Indeed, an interviewee who was involved in the creation of the commission revealed that the idea of establishing the BICI was met with 'big time' resistance from some members of the GoB.²⁴ This is reflected in the BICI's report, which notes that 'reports received from the GoB tended at the beginning ... to be limited and fragmentary'.²⁵ Eventually, however, the government cooperated fully with the commission. This was due primarily to the commitment of King Hamad and his senior advisors to supporting the commission and enabling it to execute its mandate as well as to the positive working relationship that developed between the BICI and the GoB. This was facilitated by the fact that most of the commission's staff, including its chairperson, chief investigator and legal officer, spoke Arabic, were of Arab background and understood the sensitivities of engaging with Arab security agents, for whom being subjected to a systematic and intrusive investigation by independent foreign experts was unprecedented. This contributed to cultivating trust between the BICI and the GoB, which was essential to the commission's investigations.

The establishment of the BICI, therefore, was not without political risk for King Hamad. On the one side, the opposition led by Al-Wefaq had rejected the far-reaching reforms proposed by the crown prince during the unrest, while, on the other side, some elements within the GoB and the conservative wing of the royal family, which was supported by an energized and religiously conservative Sunni base, were averse to reconciliation or power sharing with the opposition. This meant that there was no guarantee that inviting a commission to investigate human rights violations committed by the security services would succeed in pacifying the opposition, while it risked angering conservative Sunni political actors. The BICI must also be placed in its regional

²³ A. Shadid, 'Bahrain Is Nervously Awaiting Report on Its Forgotten Revolt', *New York Times*, 21 November 2011.

²⁴ Interview conducted on 6 February 2017.

²⁵ BICI Report, *supra* note 7, para. 10.

context. No Arab state had ever taken the initiative to investigate allegations of human rights abuses committed by their own security agencies by establishing a commission entirely composed of international experts. These factors, including the risks involved, indicated that the BICI represented a genuine attempt by a reform-minded king to promote accountability and reconciliation in the aftermath of a national crisis.

To some scholars and activists, the fact that the BICI was established by King Hamad cast doubts over the commission's impartiality. Micaela Frulli, for instance, argued that 'a conflict of interest [characterized] the very establishment of the BICI' and that 'suspicion about [the] BICI's collusion with the King and the Government were widespread and surfaced along the whole period during which the BICI was working'.²⁶ These concerns, however, did not prevent numerous human rights NGOs from cooperating with the commission, and nor did they deter thousands of Bahrainis from submitting complaints about abuses committed during the unrest. The reaction of the opposition to the establishment of the BICI was also significantly more positive than their reaction to the creation in February 2011 of a commission headed by the deputy prime minister to investigate the deaths that had resulted from clashes between police and protestors. Al-Wefaq denounced that earlier commission as a ploy for 'media consumption' and stated that it would not pacify public anger caused by these deaths.²⁷ Moreover, concerns regarding the BICI's impartiality appear to have been dispelled upon the publication of its report, which was described as a 'scathing critique of the authority's behavior' by leading Bahraini human rights defenders.²⁸

The BICI was also intended to mollify international criticism of Bahrain. Foreign governments, including Bahrain's Western allies, censured it for its heavy-handed response to the protests. Due to strategic considerations, US criticism of Bahrain was muted in the first weeks of the unrest.²⁹ The USA encouraged the GoB to negotiate with the opposition and advised against forcefully dispersing the protestors in the GCC Roundabout.³⁰ However, after the crackdown on the protestors in mid-March, Washington used harsher language to criticize Bahrain. The State Department called for the release of detained opposition leaders and for ending the violence against protestors.³¹ President Barack Obama renewed his call for dialogue with the opposition and insisted that 'mass arrests and brute force are at odds with the universal rights of Bahrain's citizens – such steps will not make legitimate calls for reform go away'.³² Britain was similarly restrained in its criticism until the crackdown against the

²⁶ Frulli, 'The Bahrain Independent Commission of Inquiry: Is the Glass Half-full or Half-Empty?', in Jens Meierhenrich (ed.), *The Law and Practice of International Commissions of Inquiry* (2019) 112.

²⁷ *Al-wasat News*, available at www.alwasatnews.com/news/527797.html.

²⁸ Bahrain Center for Human Rights, *The BICI Report: Promises of Progress, a Worsening Reality*, 19 November 2012.

²⁹ Atlas, 'US Foreign Policy and the Arab Spring: Balancing Values and Interests', 21 *Digest of Middle East Studies* (2012) 353.

³⁰ M. Landler and H. Cooper, 'Obama Seeks a Course of Pragmatism in the Middle East', *New York Times*, 10 March 2011.

³¹ 'U.S. Condemns Arrest of Opposition Figures in Bahrain', *CNN*, 18 March 2011.

³² B. Obama, The White House, 'Remarks on the Middle East and North Africa', 19 May 2011.

protestors, which led to a number of statements criticizing the use of force against civilians and the arrest of activists.³³ Furthermore, during and after the crisis, Western states, including the USA, Britain and France, either cancelled or suspended arms sales to Bahrain.³⁴

The international human rights community was more critical of Bahrain. Navi Pillay, the United Nations (UN) High Commissioner for Human Rights, issued several scathing rebukes of Bahrain,³⁵ and five UN special rapporteurs issued a statement condemning the use of force against protestors.³⁶ International human rights NGOs, including Human Rights Watch and Amnesty International, issued numerous statements condemning the GoB's repressive measures.³⁷ Establishing the BICI was part of an attempt to address these criticisms and to repair the damage to Bahrain's reputation. As Bahrain's foreign minister explained, 'Bahrain has, for decades, had a positive reputation worldwide, but this reputation was tarnished. ... King Hamad wanted to clarify the facts about what happened through a mechanism that the international community would understand and accept'.³⁸ That mechanism was the BICI.

B The Impact of Establishing the BICI

The establishment of the BICI and the other conciliatory actions taken in the months after the crackdown on the protestors had a politically palliative effect, albeit more so internationally than domestically. At the domestic level, Al-Wefaq decided to participate in the National Dialogue, 'welcomed the creation by the King of a commission of inquiry that includes international experts' and declared its intention to cooperate with the commission.³⁹ Indeed, Al-Wefaq as well as other political parties, human rights NGOs and professional associations cooperated extensively with the BICI. They provided testimonies about the unrest, assisted the commission in reaching out to victims of human rights abuses, compiled complaints of mistreatment by government agents that were forwarded to the commission and shared their perspective on the negotiations that were conducted with the GoB during the crisis.⁴⁰

³³ J. Kirkup, 'Saudi Troops Sent to Crush Bahrain Protests', *The Telegraph*, 25 May 2011.

³⁴ A. Dawber, 'Crackdown on Arms Exports to Bahrain', *The Independent*, 19 February 2011; 'US Suspends Bahrain Arms Deal Ahead of Probe', *Aljazeera*, 20 October 2011.

³⁵ United Nations, UN Human Rights Chief Alarmed by Military Takeover of Hospitals in Bahrain, 17 March 2011, available at <http://newsarchive.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10855&LangID=E>.

³⁶ United Nations, Bahrain/Libya: UN Experts Urge Authorities to Guarantee Right to Protest Without Fear of Being Injured or Killed, 18 February 2011, available at <http://newsarchive.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10737&LangID=E>.

³⁷ Human Rights Watch, Bahrain, available at www.hrw.org/middle-east/n-africa/bahrain; Amnesty International, Bahrain, available at www.amnesty.org/en/countries/middle-east-and-north-africa/bahrain/.

³⁸ 'Interview with the Foreign Minister of Bahrain', *Al-Arabiya*, 27 November 2011.

³⁹ 'Bahrain: Al-Wefaq Announces Its Participation in the National Dialogue', *Al-Watan*, 2 July 2011, available at www.alwatanvoice.com/arabic/content/print/180378.html.

⁴⁰ BICI Report, *supra* note 7, para. 11.

Bahrain's Western allies applauded the establishment of the BICI. The US State Department stated that it was part of the 'significant and positive steps to promote reconciliation, and to ease the path to political accommodation'.⁴¹ The positive US reaction to the establishment of the commission appears to have been based on the assurances it received that the BICI would operate impartially. As the US State Department's spokesperson said: '[F]rom our consultations with the Bahraini Government, we believe that this will have the type of broad authority necessary to be legitimate in the eyes of the Bahraini people'.⁴² Britain, France and other Western states also welcomed the creation of the BICI and the convening of the National Dialogue, which they considered to be a promising mechanism to restore stability in Bahrain.⁴³

Establishing the BICI also helped the GoB avoid the internationalization of the situation in Bahrain. Weeks before the establishment of the BICI, Navi Pillay proposed dispatching an 'assessment mission' to Bahrain.⁴⁴ The GoB initially accepted this proposal, which some foreign governments, including the USA, welcomed.⁴⁵ Shortly thereafter, however, a dispute broke out between the High Commissioner and the GoB. Bahrain's official news agency reported that, during a meeting with a Bahraini minister, Pillay 'recognized misinformation' about the unrest in Bahrain and admitted that 'certain information which we received about the developments in Bahrain are untrue'. The High Commissioner issued a press release denying the statements attributed to her and expressed discontent at the 'blatant distortion of her words'. The press release clarified that Pillay's meeting with the Bahraini minister discussed 'the proposed OHCHR [Office of the United Nations High Commissioner for Human Rights] mission to Bahrain, as well as a number of other issues relating to the recent protests, including the need for transparent independent investigations into the human rights violations'.⁴⁶ Days after this incident, the OHCHR's mission was postponed, and the BICI was established.⁴⁷

This is not to suggest that the establishment of the BICI was the proximate cause of the postponement of the OHCHR's mission; international politics rarely operates

⁴¹ US Department of State, Daily Press Briefing, 29 June 2011.

⁴² *Ibid.*

⁴³ See Human Rights First, *Bahrain: A Tortuous Process*, July 2011; Human Rights Watch, Bahrain's Human Rights Crisis, 5 July 2011; United Kingdom's House of Commons, The FCO's Human Rights Work 2011 (2012).

⁴⁴ Office of the United Nations High Commissioner for Human Rights (OHCHR), Press Briefing Note on Yemen, Syria, and Bahrain, 27 May 2011, available at <http://reliefweb.int/report/bahrain/press-briefing-note-yemen-syria-and-bahrain>.

⁴⁵ Statement by the US Delegation to the Human Rights Council, 15 June 2011, available at <https://geneva.usmission.gov/2011/06/15/item-4-general-debate-on-human-rights-situations-requiring-council-attention/>.

⁴⁶ OHCHR, Press Briefing Note on Bahrain, 7 June 2011, available at <http://newsarchive.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11116&LangID=E>.

⁴⁷ An OHCHR mission was dispatched to Bahrain on 13–17 December 2011. OHCHR, Pillay: Bahrain Government Must Take Immediate Confidence-Building Measures, Release Political Prisoners, 21 December 2011, available at <http://newsarchive.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11738&LangID=E>.

with such mechanical linearity. Bassiouni, who was well versed in the machinations of establishing UN commissions of inquiry, explained that, before an OHCHR mission is set up, the High Commissioner normally consults a number of stakeholders. These include the UN Secretary General, influential member states and the host government. In the case of Bahrain, by establishing the BICI, the GoB signalled to domestic and international audiences that it was committed to undertaking a credible investigation into the abuses that were committed during the unrest. This meant that calls to investigate human rights abuses were being addressed domestically and that a UN investigation of the unrest, even if only through a short visit by an OHCHR delegation, would have lacked the requisite member state support and would have been perceived as superfluous.⁴⁸

4 The Impact of the BICI during Its Presence in Bahrain

The BICI was present in Bahrain from 29 June 2011 to 23 November 2011. Although not stipulated in its mandate, during this period the BICI proposed reforms that were intended to contribute to reconciliation and intervened to end some human rights abuses that its investigations uncovered. These included interventions to protect detainees, to secure the release of high-profile individuals who were prosecuted for supporting anti-government protests and to reverse decisions taken by the GoB during the unrest that adversely affected large numbers of individuals, such as students and employees expelled from their schools or jobs. King Hamad and the GoB were receptive to these intercessions by the BICI and implemented many of the reforms that it proposed.⁴⁹ As the BICI's report noted, '[t]he establishment of the Commission resulted in a significant change in the policies and practices of several GoB agencies'.⁵⁰

The BICI employed various strategies to improve the treatment of detainees. For instance, in the first weeks of its investigations, the commission identified a pattern of mistreatment, often amounting to torture, in a number of detention facilities. This was reported to the relevant executive and judicial authorities, which led to a significant improvement in the treatment of detainees and to the launch of investigations into these findings.⁵¹ The BICI also sought to protect detainees by conducting unscheduled inspections of detention facilities. For example, during a visit to the Budaiya police station, detained teenagers were found with markings of abuse, including what appeared to be cigarette burns. The BICI's investigators took custody of these individuals, who were being held without charge, and removed them from the police station.⁵² Once news spread that the BICI was inspecting detention facilities, and that the minister of the interior was investigating abuses reported to him by

⁴⁸ Interview with M. Cherif Bassiouni, 7 May 2017.

⁴⁹ See BICI Report, *supra* note 7, ch. XI.

⁵⁰ *Ibid.*, para. 38.

⁵¹ *Ibid.*, para. 1245.

⁵² *Ibid.*, para. 1644.

the BICI and taking disciplinary measures against abusive officers, the treatment of detainees improved.⁵³

The BICI also interceded on behalf of high-profile detainees. One such case involved Jalila Al-Salman, the vice president of the Bahrain Teachers' Association, who had been detained for allegedly inciting teachers to participate in anti-government protests, and Rula Al-Saffar, the president of the Bahrain Nursing Society, who had been detained for providing medical assistance to injured protestors. During an audience with King Hamad, Cherif Bassiouni and the BICI's chief investigator Khaled Ahmed suggested releasing Al-Salman and Al-Saffar on the occasion of Eid Al-Fitr, which was two weeks away. This is the Islamic holiday celebrating the end of Ramadan, during which it is customary to pardon prisoners. Bassiouni and Ahmed told the King that this would be a positive gesture towards the opposition and would be welcomed by the international community. During this meeting, they also described their findings regarding the mass expulsion of students from schools and universities and warned that this would undermine future reconciliation efforts in Bahrain. The king was immediately receptive. He ordered that all students who were not charged with criminal offences be reinstated to their schools,⁵⁴ and a few days before the end of Ramadan, Al-Salman and Al-Saffar were released on bail to spend Eid Al-Fitr with their families.⁵⁵

Bassiouni also proposed creating mechanisms to compensate victims of abuses that were committed during the unrest. He first raised this idea with the minister of justice and then submitted the matter to King Hamad, who approved of the idea. Bassiouni, who had served as the UN Independent Expert on the Rights to Restitution, Compensation, and Rehabilitation, believed that this would help bring closure for the victims' families, advance reconciliation and rebuild trust between the government and the Shiite community.⁵⁶ This led to the establishment on 22 September 2011 (that is, two months before the submission of the BICI's report) of the National Fund for the Compensation of Victims.⁵⁷ The BICI's report commended this decision and further recommended that the GoB ensure that compensation would be provided to the families of the individuals killed during the unrest and to individuals mistreated during detention.

The decree establishing the National Fund stipulated that victims would be eligible for compensation only if a criminal court issued a final verdict convicting those responsible for the abuses suffered by the victim.⁵⁸ This meant that dispensing compensation through the National Fund would either face significant delays as criminal cases proceeded through successive judicial appeals or would not be

⁵³ Interview with Judge Khaled Ahmed, 18 May 2017; see also BICI Report, *supra* note 7, paras 39, 1683.

⁵⁴ Interview with Judge Khaled Ahmed, 18 May 2017; see also BICI Report, *supra* note 7, paras 1652–1658.

⁵⁵ I. Davidovic, 'One Woman's Story of the Terror Stalking Bahrain', *Women's Views on News*, 29 September 2011, available at www.womensviewsonnews.org/2011/09/one-womans-story-of-the-terror-stalking-bahrain/.

⁵⁶ Interview with M. Cherif Bassiouni, 7 May 2017.

⁵⁷ Kingdom of Bahrain, Royal Order no. 30/2011.

⁵⁸ *Ibid.*, Art. 3.

available because victims may not be able to identify a specific individual who had violated their rights. Therefore, to implement the BICI's recommendations relating to compensation that originated with Bassiouni's proposals, the Civil Settlement Initiative (CSI) was established by the Ministry of Justice.⁵⁹ Victims were allowed to directly submit applications for compensation to the CSI, which determined their eligibility and calculated the sum of compensation without awaiting the outcome of the judicial proceedings that the victims may have initiated. This provided a relatively expeditious non-judicial alternative to compensate victims.⁶⁰ By 2014, the CSI had paid US\$6.2 million to the families of 39 deceased individuals, which included the 35 deaths identified in the BICI's report and an additional four deaths that occurred after the unrest.⁶¹ The CSI also received 421 applications for compensation from victims of mistreatment that occurred during the unrest. The sum of compensation to which these individuals were eligible depended on the severity of the physical harm they suffered, which was determined through a medical examination.⁶²

The BICI's interventions during its presence in Bahrain were not undertaken pursuant to its mandate nor were they part of a predetermined strategy that was agreed upon by the commission. Rather, these were personal initiatives by Cherif Bassiouni and Khaled Ahmed, both of whom, at times, shared the commission's findings with the GoB's officials, including King Hamad, and proposed steps to address these abuses.⁶³ Nor did the BICI's mandate oblige the GoB to accept these intercessions. Nonetheless, the GoB was receptive to the BICI's interventions on behalf of the victims of human rights abuses and its proposed reforms. This reflected the rationale for creating the commission. The BICI was an instrument of reconciliation. Therefore, the GoB was open to taking conciliatory steps that were intended to mitigate public anger caused by the repression of the protests. The GoB's openness to implementing the commission's reform proposals was also facilitated by the positive personal relationship maintained between Bassiouni and Ahmed and the king, his ministers, especially the ministers of justice and the interior, and their senior advisers. These relationships and channels of communication, which never compromised the BICI's impartiality, as evidenced by the content of its report, were not only essential to the commission's ability to implement its mandate but also enabled the commission to have a positive impact during its presence in Bahrain.

⁵⁹ 'Minister of Justice: The Civil Settlement Initiative Does Not Negate Criminal Responsibility', *Bahrain News Agency*, 7 March 2012, available at <https://bna.bh/portal/news/497642>.

⁶⁰ The creation of this alternative compensation mechanism was proposed by the National Commission to Follow-Up the Recommendations of BICI. See 'Serious Government Measures to Provide Compensation for Victims of the Unfortunate Events of Last Year', *Bahrain News Agency*, 14 March 2012, available at www.bna.bh/portal/news/498695?date=2012-03-28.

⁶¹ BICI Follow-Up Unit, *Moving beyond 2011*, February 2014, at 16.

⁶² The GoB's reports, however, do not indicate whether any individuals actually received compensation for physical mistreatment during the unrest.

⁶³ Interview with M. Cherif Bassiouni, 7 May 2017.

5 The Difference Made by the BICI's Report

A The Findings and Recommendations of the BICI's Report

The BICI investigated a wide range of human rights abuses. Its principal findings included the identification of 35 deaths arising out of the unrest. The commission determined that these deaths did not reflect a purposeful policy of the use of lethal force against civilians⁶⁴ but that they resulted from the use of unnecessary and disproportionate force by police units.⁶⁵ The report also identified an additional five civilians who died due to torture while in the custody of either the National Security Agency (NSA) or the Ministry of Interior (MoI).⁶⁶ This was part of a 'systematic practice of physical and psychological mistreatment, which in many cases amounted to torture'.⁶⁷ These abuses were committed to extract confessions, to incriminate other individuals or as retribution for protesting against the government.⁶⁸ The commission also found a pattern of the use of excessive force and terror-inspiring tactics when arresting suspects and entering and searching their homes, which violated due process rights.⁶⁹

Overall, the commission detected a 'culture of impunity' among security agents that provided an enabling environment for these abuses.⁷⁰ There was a lack of oversight of law enforcement officials, and judicial and prosecutorial authorities failed to adequately investigate claims of mistreatment, which created an impression that 'there was no prospect of accountability'.⁷¹ The commission also determined that the destruction of Shiite religious structures was 'collective punishment' that heightened tensions between the government and the Shiite community.⁷² The mass dismissal of public and private sector employees was also found to have been retaliation for participating in anti-government protests.⁷³

The commission made two findings regarding the political context of the unrest. First, it commended the efforts of Crown Prince Salman to reach an agreement with the opposition and noted that his proposals 'could have paved the way for significant constitutional, political, and socio-economic reforms'.⁷⁴ Second, regarding Iran's alleged role in instigating the unrest, the commission concluded that the evidence presented to it by the GoB did not 'establish a discernable link between specific incidents that occurred in Bahrain during February and March 2011 and the Islamic Republic of Iran'.⁷⁵ The commission noted that it was unable 'to investigate or independently

⁶⁴ BICI Report, *supra* note 7, para. 1119.

⁶⁵ *Ibid.*, para. 884.

⁶⁶ *Ibid.*, para. 862.

⁶⁷ *Ibid.*, para. 1238.

⁶⁸ *Ibid.*, para. 1232.

⁶⁹ *Ibid.*, paras 1172–1178.

⁷⁰ *Ibid.*, para. 1240.

⁷¹ *Ibid.*, para. 1239.

⁷² *Ibid.*, para. 1334.

⁷³ *Ibid.*, paras 1446–1450.

⁷⁴ *Ibid.*, para. 673.

⁷⁵ *Ibid.*, para. 1548.

verify allegations of Iranian involvement' because the GoB's allegations of Iranian intervention were based on sources that were not publicly available.⁷⁶

The BICI made 27 recommendations, most of which related to accountability for human rights abuses. The commission recommended the establishment of a 'national independent and impartial mechanism to determine the accountability' of officials, 'including those in the chain of command', who committed 'unlawful or negligent acts' that led to human rights violations.⁷⁷ The commission also proposed legislative and administrative reforms to prevent the recurrence of these abuses and to ensure that investigations would be undertaken if allegations of such abuses were made in the future.⁷⁸ The report also made several recommendations regarding the reinstatement of dismissed employees and students, the rebuilding of religious structures and the prevention of incitement to hatred in the media. In addition, the report discussed the long-standing grievances that led to the unrest. Because the commission's mandate was limited to investigating the events of early 2011, the report did not include specific recommendations on these issues.⁷⁹ The report, however, did include a chapter that identified some of the claims of political disenfranchisement, economic disempowerment and systematic discrimination that many Bahrainis expressed in the years preceding the unrest of 2011. This chapter was included to signal to the GoB and to Bahrainis in general that ensuring the long-term stability of the country required comprehensive reforms to address these structural sources of discontent.

B The Impact of the BICI's Report

1 Shaping the Human Rights and Political Agenda in Bahrain

For several years after its submission, the BICI's report dominated discussions about human rights in Bahrain. Domestically, the report was frequently cited in discussions on national reconciliation and during negotiations between the GoB and the opposition. Internationally, foreign governments, international organizations and human rights NGOs also dealt with the BICI's recommendations as an essential element of the standard according to which Bahrain's human rights record and its efforts to institute political reforms were evaluated. Upon the submission of the report, King Hamad announced his acceptance of its findings and recommendations.⁸⁰ Shortly thereafter, a series of governmental bodies were established to oversee the implementation of the recommendations. The first of these was the National Commission to Follow-Up the Recommendations of the BICI,⁸¹ which the opposition, including Al-Wefaq, was

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*, para. 1716.

⁷⁸ *Ibid.*, paras 1717, 1718, 1719, 1722.

⁷⁹ The report recommended addressing 'the grievances of groups which are, or perceive themselves, to be deprived of equal political, social and economic rights and benefits across all segments of Bahrain's population'. *Ibid.*, para. 1725(b).

⁸⁰ Kingdom of Bahrain, 'Speech by HM King Hamad', 23 November 2011, available at www.bici.org.bh/index971.html?news=speech-of-hm-king-hamad-bin-isa-al-khalifa-on-23rd-november.

⁸¹ Royal Orders no. 45/2011 and no. 48/2011.

invited to join.⁸² This commission submitted a report on 20 March 2012 that documented the initial implementation of the recommendations.⁸³ Then, on 29 April, a BICI Follow-Up Unit was established to coordinate the government's continued execution of the BICI's recommendations. This unit produced four reports that tracked the implementation of the recommendations, including in the areas of accountability, administrative, legislative and security sector reform, financial compensation, reinstating dismissed students and employees, rebuilding religious structures and fostering national reconciliation.⁸⁴

This flurry of governmental activity, which continued for several years, was a direct result of the BICI's report. The implementation of the BICI's recommendations was part of the government's strategy to regain and maintain stability in the country. This strategy included conciliatory gestures towards the opposition and measures aimed at returning political life to a state of normalcy, such as convening further rounds of the National Dialogue, amending the Constitution⁸⁵ and holding parliamentary elections.⁸⁶ The GoB was keen to demonstrate that a comprehensive reform process – one element of which was the implementation of the BICI's recommendations – was underway with the participation of all stakeholders, including the opposition. The GoB wanted to show that the country was overcoming the 2011 crisis. As one interviewee explained, 'since the National Action Charter, the country had been on the path towards achieving greater reform and development. The events of 2011, however, derailed this reform project. [The] BICI was part of the project to put the country back on track and to relaunch the reform process'.⁸⁷ Indeed, the final report of the BICI Follow-Up Unit issued in February 2014, entitled 'Moving beyond 2011', concluded that 'Bahrain has turned the corner on the events of early 2011'.⁸⁸

The BICI's report, however, did not affect the GoB's position regarding Iran's role in the unrest.⁸⁹ Indeed, in the speech that he delivered at the ceremony during which the BICI's report was submitted, King Hamad reiterated that Iran had interfered in Bahrain's affairs through Iranian Arabic-language media outlets that incited violence

⁸² Al-Wefaq declined to join the National Commission. See 'Al-Wefaq's Non-Participation in the National Commission Is a Continuation of Its Negative Positions', *Al-Ayam*, 27 November 2011, available at www.alayam.com/online/local/121068/News.html.

⁸³ Report of the National Commission to Follow-Up Recommendations of the Bahrain Independent Commission of Inquiry (Report of the National Commission), available at www.moj.gov.bh/govactions/wps/themes/html/BICI/pdf/report/nc_report_en_1.pdf.

⁸⁴ BICI Follow-Up Unit Reports, available at www.biciunit.bh/en/reports.html.

⁸⁵ These constitutional amendments were intended to 'boost powers to question and remove ministers and withdraw confidence in the cabinet'. 'Bahrain King Ratifies Constitutional Reforms', *Reuters*, May 2012, available at www.reuters.com/article/us-bahrain-reforms-protests-idUSBRE8420WV20120503.

⁸⁶ The importance of holding parliamentary elections with high turnout in which the leading political parties compete is that it signals to domestic and international audiences that Bahrain has overcome the effects of the unrest. See J. Gengler, 'Electoral Rules (and Threats) Cure Bahrain's Sectarian Parliament', *Washington Post*, 1 December 2014.

⁸⁷ Interview conducted on 7 May 2017.

⁸⁸ BICI Follow-Up Unit, *supra* note 61 at 67.

⁸⁹ S. Mekhennet, 'In Bahrain, A Smoldering Insurgency Reveals the Resilience of Iran's Proxy War', *Washington Post*, 18 May 2018.

and enflamed sectarian tension. The king also added that the GoB was not in a position to present further evidence that proved Iran's intervention in Bahrain.⁹⁰ Bahrain's opposition parties, on the other hand, welcomed this aspect of the report and stated that it confirmed that the demonstrations were not instigated by Iran but, rather, were a genuine popular uprising fuelled by long-standing grievances.⁹¹

Generally, Bahrain's political parties, especially the opposition, welcomed the report, called for the implementation of its recommendations and noted that its findings confirmed the necessity of instituting significant reforms.⁹² In the years following the submission of the BICI's report, the opposition repeatedly contested the GoB's assertions that it had fully executed the commission's recommendations. Al-Wefaq and other opposition parties cited what they considered to be the GoB's failure to implement the recommendations as one of many reasons for boycotting both the 2014 elections and the later rounds of the National Dialogue.⁹³ Statements by opposition leaders show that their belief that the report's recommendations were not implemented contributed to reinforcing their pre-existing mistrust of the government and their lack of confidence in the prospects of substantial reform in Bahrain.⁹⁴ It is important, however, not to overestimate the impact of the BICI's report on the policies of these parties. The positions of the opposition are determined by numerous factors. These include the extent to which their popular base, which includes younger and more uncompromising activists, is receptive to the government's initiatives and the opposition's calculations regarding the political gains that they expect to achieve in negotiations with the government.⁹⁵

The Bahrain National Institute for Human Rights (NIHR), human rights NGOs and activists⁹⁶ and scholars⁹⁷ also regularly cited the BICI's report and continued to monitor the implementation of its recommendations. The BICI's report also featured prominently during the second and third cycles of Bahrain's periodic review at the Human

⁹⁰ Kingdom of Bahrain, *supra* note 80.

⁹¹ 'Al-Wefaq Welcomes Bassiouni Report: Proves the Patriotism of the Bahrain Revolution', *Akhbar Boom*, 24 November 2011, available at www.akhbarboom.com/archives/5753.

⁹² See 'The Bassiouni Report and the Positions of the Civil and Political Organizations in Bahrain', *Bahrain Human Rights Monitor*, available at www.bahrainmonitor.com/mojtamaa/m-034-01.html. An exception was the Gathering of National Unity, which rejected some of the commission's conclusions, especially its finding on Iran's role in the unrest. 'Gathering of National Unity: The Committee to Implement BICI Recommendations Must Be National', *Al-Wasat*, 24 November 2011, available at www.alwasatnews.com/news/610516.html.

⁹³ 'Bahrain: The Government and Its Supporters Accuse the Opposition', *Al-Talea*, 9 January 2014, available at <http://altaleea.com/?p=3952>.

⁹⁴ Al-Wefaq, National Democratic Parties Boycott the 2014 Parliamentary and Municipal Elections (2014), available at <http://alwefaq.net/cms/2014/10/11/32819/>.

⁹⁵ See Chatham House, *Bahrain after the Elections*, March 2015.

⁹⁶ See American for Democracy and Human Rights in Bahrain, *Dispatch: Fact vs. Myth – Bahrain Independent Commission of Inquiry (BICI)*, 1 August 2016; Amnesty International, *Bahrain: Critical Report Should Spur Human Rights 'Turning Point'*, 23 November 2011; Human Rights Watch, *Bahrain: Report Confirms Punitive Campaign against Protestors*, 23 November 2011.

⁹⁷ See, e.g., T. Matthiesen, *Sectarian Gulf* (2013); Mabon, 'The Battle for Bahrain: Iranian-Saudi Rivalry', 19 *Middle East Policy* (2012) 84.

Rights Council.⁹⁸ During the second cycle, which was held in May 2012, many delegations applauded Bahrain for establishing the BICI,⁹⁹ and 33 of the 66 participating delegations specifically called for the full implementation of the recommendations.¹⁰⁰

2 *Accountability for Deaths, Torture and Other Forms of Mistreatment*

As discussed above, the BICI recommended the establishment of an ‘independent and impartial mechanism’ to investigate the cases of deaths, torture and other forms of mistreatment documented in its report and to hold accountable the responsible individuals, including those ‘in the chain of command’ who were in military or civilian posts. The GoB formed a committee of foreign experts to provide guidance on the implementation of these recommendations.¹⁰¹ These experts proposed the establishment of a ‘distinct and independent investigative prosecutorial unit’ to examine individual allegations of abuse and ‘systemic and institutional’ patterns of abuse.¹⁰² Accordingly, the Special Investigation Unit (SIU) was established within the Public Prosecution. The SIU was charged with determining the accountability of government officials, including those in the chain of command, for crimes of killing or torture identified by the BICI.¹⁰³ The establishment of the SIU, therefore, is attributable to the BICI. The question, however, is whether this unit, and the other bodies established pursuant to the BICI’s recommendations, which are discussed below, made a difference in ensuring accountability for human rights abuses.

The decree establishing the SIU requires it to submit monthly reports on its investigations to the Attorney General, which shall be made public.¹⁰⁴ Even if such reports are being prepared, they are not publicly available. Instead, the SIU issues updates about its investigations through the local press and via its Twitter and Instagram accounts. Bahrain’s NIHR has found that this ‘statement-making methodology’ of the SIU does ‘not rise to the level of public reports which must include the minimum information’ about its investigations.¹⁰⁵ The limited information available from governmental and non-governmental sources does not provide sufficient evidence to conclude that the GoB has adequately implemented the BICI’s recommendations regarding accountability for the abuses committed during the unrest. According to the BICI Follow-Up Unit, the SIU investigated the 35 deaths and the cases of torture identified by the

⁹⁸ United Nations, Report of the Working Group on the Universal Periodic Review – Bahrain, UN Doc. A/HRC/21/6, 6 July 2012; OHCHR, Bahrain’s Human Rights Record to Be Reviewed by Universal Periodic Review, 26 April 2017, available at www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=21561&LangID=E.

⁹⁹ Report of the Working Group on the Universal Periodic Review, Doc. A/HRC/21/6, 6 July 2012.

¹⁰⁰ Summary of Stakeholders Submissions on Bahrain, Doc. A/HRC/WG.6/27/BHR/3, 20 February 2017, para. 8.

¹⁰¹ These experts were Sir Daniel Bethlehem, QC, Sir Jeffrey Jowell, QC, Adnan Amkhan, Sarah Cleveland and David Perry, QC. See Report of the National Commission, *supra* note 83, at 96.

¹⁰² *Ibid.*, at 98.

¹⁰³ Kingdom of Bahrain, Decision of the Public Prosecutor no. 8/2012 (2012).

¹⁰⁴ *Ibid.*, Art. 6.

¹⁰⁵ National Institute for Human Rights (NIHR), Annual Report 2013 (2013), at 42.

BICI, in addition to other complaints received by the SIU since its establishment. As of December 2013, the 'SIU referred 39 cases to courts of law including 95 defendants; 13 of them [have] been convicted while 15 have been acquitted. A total of 25 cases are still before the courts'.¹⁰⁶

The BICI Follow-Up Unit, however, did not identify the individuals investigated, charged or convicted in these cases, nor did it indicate their institutional affiliation or specify the crimes for which they were investigated, charged or convicted. Furthermore, these reports do not indicate the sentences that were rendered against the convicted persons. The only information included is that the highest-ranking officers indicted for human rights abuses included one lieutenant colonel¹⁰⁷ and one colonel.¹⁰⁸ There is no information on the crimes for which these officers were indicted or whether their indictments led to trials, convictions or appropriate sentences. Moreover, it is unclear whether, as recommended by the BICI, investigations were conducted into the role of the senior officials in the chain of command.

Similarly, data obtained by Amnesty International from the SIU does not provide sufficient evidence to demonstrate that the BICI's recommendations have been implemented. According to Amnesty International, as of January 2015, 15 officers, holding the ranks of lieutenant colonel, first lieutenant, second lieutenant and lower ranks, faced charges. It is unclear whether these charges related to abuses identified by the BICI or to complaints submitted to the SIU in later years. Furthermore, of all the cases referred by the SIU to the courts, 'only seven cases, involving 9 defendants resulted in convictions and sentences ranging from a fine of 50 Bahraini Dinars to three years in prison for unlawful killing or torture and other ill-treatment leading to death'.¹⁰⁹

Even in the few cases where law enforcement officers were convicted for committing human rights violations, their sentences were generally inadequate given the seriousness of their crimes. As Bahrain's NIHR has noted, 'there is discrepancy between the judgments awarded against the accused persons in security cases, such as enticement of violence, riots, or other similar acts, in which terms of imprisonment are usually long, and the judgments awarded against the accused persons in cases of torture and other forms of ill-treatment'.¹¹⁰ Furthermore, the available information indicates that the sentences rendered against law enforcement officials were often reduced upon appeal.¹¹¹ For instance, the officers who were found guilty of torturing two detainees to death initially received a sentence of 10 years imprisonment, which was reduced to two years upon appeal. The Appeals Court reasoned – rather preposterously – that this was appropriate because the defendants committed the crime 'during and because of

¹⁰⁶ BICI Follow-Up Unit, Follow-Up Report, December 2013, at 63.

¹⁰⁷ BICI Follow-Up Unit, Follow-Up Report, November 2012, at 10.

¹⁰⁸ BICI Follow-Up Unit, Follow-Up Report, June 2012, at 4.

¹⁰⁹ Amnesty International, Behind the Rhetoric: Human Rights Abuses in Bahrain Continue Unabated (2015), at 58.

¹¹⁰ NIHR, *supra* note 105, at 42.

¹¹¹ *Ibid.* (noting that 'the punishment in these cases is usually diluted').

their professional duty and while preserving the life of detainees, among them the victim, and the security of society as a whole'.¹¹² Similarly, the security agents found guilty for the death of Abdulkarim al-Fakhrawi, who co-founded the widely read *Al-Wasat* newspaper, had their sentences reduced from seven to three years of imprisonment.¹¹³ As the BICI member Sir Nigel Rodley lamented, 'the system as a whole finds dissent more dangerous than official criminality, and I see no sign that that [sic] they have moved away from that position'.¹¹⁴

While it is important to acknowledge that some measures – most notably, the establishment of the SIU – were undertaken to implement the BICI's recommendations and that some investigations into the BICI's findings were conducted, the available evidence demonstrates that the GoB has failed to adequately investigate the abuses documented in the report and to hold those responsible accountable. The overall lack of information about these investigations, the absence of evidence of investigations into the responsibility of senior officials, the relatively lenient sentences rendered against the few junior officials who were prosecuted and the reduction of sentences for those who were convicted shows that the BICI did not have its desired effect of ensuring that those responsible for the human rights abuses catalogued in the report have been held accountable. Indeed, Bahrain's own NIHR has concluded that these are policies and practices that promote impunity.¹¹⁵

Interviews conducted for this article indicate that the GoB did not have the political will to thoroughly investigate the BICI's findings and to hold accountable all those responsible for the human rights abuses, including senior members of the chain of command. One well-informed interviewee cited 'unconfirmed information' that 'senior members of the political leadership, perhaps the Prime Minister, made it clear that no prosecutions would be allowed of police officers or other law enforcement agents who were suspected of committing human rights abuses, including the cases of alleged death under torture'.¹¹⁶ Another well-placed interviewee doubted that the prime minister personally had ordered law enforcement officers to be shielded from prosecution. Instead, this source suggested that politically powerful actors within the Office of the Prime Minister, which is a 'labyrinthine institution composed of many departments that are staffed by hundreds of individuals [who] have a vested interest to prevent reform and accountability, could have hinted at the undesirability of pursuing wide-ranging investigations'.¹¹⁷ A third interviewee with intimate knowledge of the process of implementing the BICI's recommendations conceded that accountability

¹¹² Americans for Democracy and Human Rights in Bahrain, the Bahrain Institute for Rights and Democracy and the Bahrain Center for Human Rights, *Shattering the Façade: A Report on Bahrain's Implementation of the BICI Recommendations Four Years On* (2015), at 19.

¹¹³ 'Bahrain Slashes Terms for Policemen Jailed over "Torturing" Protesters to Death', *RT*, 27 October 2013, available at www.rt.com/news/bahrain-police-torture-protesters-817/.

¹¹⁴ 'Bahrain's Justice System under Scrutiny', *BBC*, 30 January 2013, available at www.bbc.com/news/world-middle-east-21188144.

¹¹⁵ NIHR, *supra* note 105, at 42.

¹¹⁶ Interview conducted on 17 January 2017.

¹¹⁷ Interview conducted on 6 February 2017.

for the abuses committed in 2011 was imperfect. This source explained, however, that ‘accountability had to be pursued with a policy of realism’. The BICI’s recommendations were intended ‘not to look to the past, but to build for the future’. The only realistic objective, this source believed, was for these recommendations to help the GoB develop its capacity to deal with these problems in the future as opposed to prosecuting the past.¹¹⁸

The domestic political context helps to further explain the failure to hold accountable those officials suspected of committing human rights abuses. Many in Bahrain, including some in the higher echelons of government, saw the unrest as an existential threat. The population’s Shiite majority had mobilized in unprecedented numbers, and the protests, at least initially, expressed a cross-sectarian consensus on reformist demands that threatened the privileges enjoyed by Bahrain’s political and economic elite. Therefore, for some within this elite, the crackdown on the opposition was perceived not as a wave of repression but, rather, as an act of survival. This made it unthinkable to punish the men in uniform who, in the minds of many in government and their supporters, saved Bahrain from an imminent takeover by an allegedly Iranian-sponsored Shiite opposition.

3 Preventing Future Human Rights Violations

(a) The law enforcement powers of the NSA

The BICI found that NSA agents had committed multiple human rights violations, including arbitrary arrests and torture that led to the death of at least one detainee.¹¹⁹ The commission, therefore, recommended revoking the agency’s law enforcement powers and limiting its mandate to intelligence gathering. Accordingly, King Hamad issued a decree that implemented this recommendation.¹²⁰ Also pursuant to the BICI’s recommendations, an Inspector General was appointed to the NSA to undertake the functions of an Ombudsman within the agency.¹²¹ On 5 January 2017, however, the law enforcement powers of the NSA were restored for terrorism-related crimes. For other crimes, the NSA is still required to refer the matter to the MoI for arresting or detaining suspects.¹²² The GoB announced that this was needed ‘in view of the high risk of terror crimes which necessitates prompt action to thwart plots, halt their impact, gather evidence, and arrest the culprits’.¹²³

It is difficult to determine the impact of the reinstatement of the NSA’s law enforcement powers given the limited information available about the agency’s work. Unlike the SIU and the MoI’s Ombudsman, which is discussed below, there is no information on whether the NSA Inspector General has investigated any complaints of

¹¹⁸ Interview conducted on 7 May 2017.

¹¹⁹ BICI Report, *supra* note 7, paras 1001, 1186, 1191, 1196.

¹²⁰ Kingdom of Bahrain, Decree Law no. 115/2011.

¹²¹ Kingdom of Bahrain, Royal Decree no. 28/2012.

¹²² Kingdom of Bahrain, Royal Order no. 1/2017.

¹²³ ‘NSA Officials’ Judicial Control Limited to Terror Crimes’, *Bahrain News Agency*, 1 January 2017.

mistreatment.¹²⁴ Nonetheless, there is little in the agency's previous practices, or in the track record of the other oversight and investigatory bodies that have been established pursuant to the BICI's recommendations, that instils confidence that the NSA will execute its powers in a manner that respects basic human rights. Moreover, while Bahrain is indeed facing significant security threats,¹²⁵ terrorism-related charges are being used to suppress opposition parties and leaders.¹²⁶ Even more disturbing is a constitutional amendment approved in early 2017 to enable military courts to try civilians accused of terrorism-related crimes.¹²⁷ These developments raise legitimate concerns about the potentially adverse effects of the reinstatement of the NSA's law enforcement powers, even if only for the purpose of combating terrorism.¹²⁸

(b) The MoI's Ombudsman

Pursuant to the BICI's recommendations, an Ombudsman was established at the MoI to receive and investigate complaints of abuses by police personnel.¹²⁹ Since its establishment, four annual reports have been issued documenting its work. As the following table shows, the Ombudsman has received a substantial number of complaints from detainees alleging a variety of abuses, including deaths and mistreatment. The Ombudsman's reports provide statistics on the actions that it has taken in response to these complaints, some of which were transferred to investigatory bodies (the SIU, the public prosecution and the MoI's internal investigations department). The reports also include summaries of selected examples of the Ombudsman's investigations into allegations of abuse (see [Table 1](#)).

This is one of the BICI's recommendations that appears to have made a relatively significant difference in the area of accountability. According to a GoB official interviewed for this article, the increasing number of complaints spanning a wide range of alleged abuses submitted by both female and male detainees indicates growing confidence in the Ombudsman's ability to investigate these claims and protect individuals.¹³⁰ Indeed, 'to acknowledge and further encourage' its work, the Ombudsman was awarded the 2014 Chaillot Prize for the Promotion of Human Rights in the GCC by the European Union.¹³¹

Nonetheless, there are concerns about the independence and efficacy of the Ombudsman. Bahrain's NIHR has noted that the structure of the Ombudsman's office and its position within the MoI administrative hierarchy 'does not achieve the required independence, in view of the potential conflict of interest'.¹³² Furthermore,

¹²⁴ The National Security Agency (NSA) Inspector General has a website and a Twitter account. Neither of these provides information on complaints received or investigations conducted by his office.

¹²⁵ See 'Terror Warning to Britons in Bahrain', *Daily Mail*, 26 July 2017.

¹²⁶ 'Bahrain Court Dissolves Main Secular Opposition Group', *BBC*, 31 May 2017.

¹²⁷ 'Bahrain Approves Military Trials for Civilians', *Aljazeera*, 3 April 2017.

¹²⁸ See Human Rights Watch, Bahrain: Arrest Powers Restored to Abusive Agency, 31 January 2017, available at www.hrw.org/news/2017/01/31/bahrain-arrest-powers-restored-abusive-agency.

¹²⁹ Kingdom of Bahrain, Royal Decree no. 27/2012.

¹³⁰ Interview conducted on 7 May 2017.

¹³¹ NIHR, Ombudsman Win Chaillot Prize 2014, *Bahrain News Agency*, 8 December 2014.

¹³² NIHR, *supra* note 105, at 43.

Table 1: Statistics on investigations conducted by the MoI Ombudsman

Year	Number of complaints	Number of complaints by gender	Number of complaints relating to death in custody	Number of complaints referred to investigatory/prosecutorial authorities
2013–2014 ^a	242	n/a	11	45
2014–2015 ^b	908	Female: 331 Male: 550	11	102
2015–2016 ^c	992 ^e	Female: 365 Male: 558	7	75
2016–2017 ^d	1,156 ^f	Female: 348 Male: 761	8	83

Notes:

^a Kingdom of Bahrain, MoI Ombudsman Report 2013–2014 (2014).

^b Kingdom of Bahrain, MoI Ombudsman Report 2014–2015 (2015).

^c Kingdom of Bahrain, MoI Ombudsman Report 2015–2016 (2016).

^d Kingdom of Bahrain, MoI Ombudsman Report 2016–2017 (2017).

^e Of these complaints, 687 were ‘assistance requests’.

^f Of these complaints, 691 were ‘assistance requests’.

like the reports of the SIU, the reports on the Ombudsman’s work provide limited information about the complaints it has received and the actions taken in response to these complaints. For instance, the reports categorize complaints under relatively innocuous headings such as ‘respect’, ‘conditions of the place of detention’ and ‘safety’, without indicating the nature of the abuses suffered by complainants and whether they amount to torture.¹³³ Another weakness is that the Ombudsman may refer complaints to prosecutorial authorities, such as the SIU, but it cannot ensure that cases are investigated or that offenders are prosecuted. It is also unclear from the Ombudsman’s reports whether it continues to track the cases referred to the SIU or whether the referred cases are adequately investigated by the SIU.¹³⁴

The establishment of the SIU and the MoI’s Ombudsman is a positive development. Despite concerns regarding their independence and their transparency, it is important to acknowledge that they have investigated some human rights abuses, which have resulted in some convictions. Nonetheless, these bodies have not fully achieved the purposes for which the BICI recommended them. These bodies have not fully investigated the human rights violations documented by the BICI, which the commission felt was necessary for reconciliation in a divided society. Moreover, the track record of these bodies does not demonstrate that they have evolved into an effective institutional

¹³³ Kingdom of Bahrain, MoI Ombudsman Report 2014–2015 (2015), at 22.

¹³⁴ Human Rights Watch, *The Blood of the People Who Don’t Cooperate*, 22 November 2015.

infrastructure that is capable of overcoming what the commission called the ‘culture of impunity’.¹³⁵

6 Conclusion

The BICI was established to investigate the unrest that occurred in Bahrain during February and March 2011. The establishment of this commission was part of a strategy to contain the domestic and international fallout of the unrest. Coupled with other conciliatory measures, the BICI’s establishment helped to placate domestic anger at the GoB’s repression of the protestors and to lessen the severity of the criticism directed at Bahrain from foreign governments and international organizations. The BICI also made a difference during its presence in Bahrain. Its intercessions improved the treatment of detainees and led to the release of high-profile detainees and the reinstatement of expelled students and dismissed employees. Also upon the BICI’s recommendations, reforms, such as the creation of compensation mechanisms for victims of human rights abuses, were undertaken to help advance reconciliation.

After five months of investigations, and contrary to the expectations of some activists that the commission would be a whitewash,¹³⁶ the BICI submitted a report that was described as a ‘damning indictment’ of the GoB.¹³⁷ It determined that excessive force had been used against protestors, found a systematic pattern of mistreatment of detainees that often included acts of torture and concluded that violations of due process were committed. The commission also highlighted that Bahrain’s law enforcement agencies operated within a culture of impunity that created a permissive atmosphere for the perpetration of human rights violations. Therefore, the BICI recommended conducting investigations to hold those responsible for these abuses accountable and proposed reforms to prevent the recurrence of these abuses.

Assessing the BICI’s record and its impact depends on the evaluator’s perspective. Bahrainis of every political persuasion and sectarian background, domestic human rights defenders, foreign NGOs, international organizations, opposition parties and the GoB – which, as discussed above, is not a monolith – will probably have differing views regarding the BICI’s impact and whether it has succeeded. However, if evaluated on the basis of its own mandate, it is perhaps fair to conclude that the BICI succeeded, first, in providing an impartial historical record of the unrest that was accepted by the government and the opposition and, second, in documenting the pattern of abuses that were committed during that period. On the other hand, the BICI has failed to have its fully desired impact in the area of accountability. Although the GoB has established bodies to investigate human rights abuses, it ultimately failed to hold all of those responsible for the human rights abuses identified by the BICI accountable. Similarly,

¹³⁵ Amnesty International, *Window-Dressing or Pioneers of Change? An Assessment of Bahrain’s Human Rights Oversight Bodies* (2016), at 49.

¹³⁶ Alaa Al-Shehabi, ‘BICI: A Path to Justice or Political Shield?’ *Jadaliyya*, 22 November 2011.

¹³⁷ C. Coughlin, ‘Arab Monarchs Are Keeping Their Heads as the Dictators Lose Theirs’, *The Telegraph*, 24 November 2011.

despite the encouraging efforts of the MoI's Ombudsman and the SIU, the track record of these bodies does not provide sufficient evidence that they are evolving into fully impartial and independent bodies that rigorously investigate claims of human rights abuses and hold those responsible accountable.

Accounting for the shortcomings in the implementation of the BICI's recommendations requires placing the commission within its socio-political context. It is commendable that Bahrain's leadership took the politically risky and, by regional standards, unprecedented step of establishing a commission of international experts to prepare a report on a national crisis and to investigate abuses committed by law enforcement agencies. Moreover, unlike other governments, some of which are discussed in this symposium, Bahrain accepted the commission's findings and exerted considerable efforts to implement its recommendations. Nonetheless, the GoB's inability or unwillingness to fully execute the BICI's recommendations reflects a general lack of political will to comprehensively address the sources of discontent that fuelled the protests of 2011. The BICI's report discussed the chronic patterns of injustice that caused repeated periods of unrest in Bahrain. The commission hoped that this would highlight that guaranteeing the stability of Bahrain requires recognizing and remedying these grievances. However, more recent events, including a crackdown on opposition leaders and parties, has cast doubts on the GoB's commitment to institute comprehensive political and socio-economic reform.¹³⁸ Indeed, shortly before his passing in September 2017, Cherif Bassiouni lamented that the 'fundamental socio-economic issues involved in the Shiite population have not been addressed', which does not bode well for the security, stability and prosperity of Bahrain.¹³⁹

¹³⁸ Amnesty International, *No One Can Protect You: Bahrain's Year of Crushing Dissent*, 7 September 2017.

¹³⁹ E. Abrams, 'How Obama Caved on Bahrain', *Foreign Policy*, 25 February 2015.