

REPUBLIC OF KENYA
HIGH COURT OF KENYA AT KISUMU
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 18 OF 2014



IN THE MATTER OF
ALLEGED DENIAL, VIOLATION, INFRINGEMENT OF AND/OR TREAT TO FUNDAMENTAL
RIGHTS AND FREEDOMS OF INDIVIDUALS UNDER SECTIONS 70, 71, 74 AND 82 OF THE
REPEALED CONSTITUTION AS READ WITH ARTICLES 26, 27(1), 28, 29 AND 35 OF THE
CONSTITUTION OF THE REPUBLIC OF KENYA, 2010 AND SECTIONS 6 AND 7 OF THE
SIXTH SCHEDULE THEREOF, ARTICLES 6 AND 7 OF THE INTERNATIONAL COVENANT ON
CIVIL AND POLITICAL RIGHTS, ARTICLE 2 OF THE CONVENTION AGAINST TORTURE
AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT AND
ARTICLES 2, 3, 4 AND 5 OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS
AND

IN THE MATTER OF
THE POLICE ACT (CAP.84 REPEALED), THE ADMINISTRATION POLICE ACT (CAP.85
REPEALED), THE PENAL CODE (CAP.63), THE CRIMINAL PROCEDURE CODE (CAP.75), THE
INTERNATIONAL CRIMES ACT (NO.16 OF 2008), THE NATIONAL POLICE SERVICE ACT
(NO.11A OF 2011), THE INDEPENDENT POLICING OVERSIGHT AUTHORITY ACT (NO.35 OF
2011), THE OFFICE OF THE ATTORNEY GENERAL ACT (NO.40 OF 2012) AND THE OFFICE
OF THE DIRECTOR OF PUBLIC PROSECUTIONS ACT (NO.2 OF 2013)

BETWEEN

CITIZENS AGAINST VIOLENCE (CAVI)
INDEPENDENT MEDICO-LEGAL UNIT (IMLU)
HELLEN ATIENO OYUSO
EUNICE KABOSO ORWA
HUDSON BOB LIBABU LUMWAJI
VINCENT KIPNGENO KOECH
WINROSE CHEBET SANG
BENEDICT ODIWUOR ONYANGO
ALICE ATIENO OCHIENG
MAURICE OTIENO ALUSO
WALTER OOKO THABAKA
TOBIAS WANGA ODHIAMBO
PROTUS ONYANGO OBARE
BERNARD KIPLIMO RONO
NICHOLAS ODHIAMBO NYANGWESO PETITIONERS

AND

THE ATTORNEY GENERAL
DIRECTOR OF PUBLIC PROSECUTIONS
INDEPENDENT POLICING OVERSIGHT AUTHORITY
INSPECTOR GENERAL OF
THE NATIONAL POLICE SERVICE RESPONDENTS

AMICUS BRIEF
(Prof. Christoffel Hendrik Heyns)

INTRODUCTION

1. I respectfully submit this brief to the High Court of Kenya at Kisumu to provide the Court information on international standards concerning police use of firearms and lethal force. These standards include principles and rules governing when firearms and lethal force may be used, as well as standards concerning post-shooting procedures, the conduct of investigations, and processes to ensure accountability.

Amicus curiae's qualifications and professional background

2. I am a member of the UN Human Rights Committee, the Director at the Institute for International and Comparative Law in Africa, and a Professor of Human Rights Law at the Faculty of Law, University of Pretoria. I formerly served as the United Nations' Special Rapporteur on extrajudicial, summary or arbitrary executions (2010-2016) and in that capacity, I reported to the Human Rights Council on both protecting the right to life in law enforcement contexts¹ and on the use of force in the proper management of assemblies.² In conjunction with the Office of the United Nations High Commissioner for Human Rights, I initiated and oversaw the revision and updating of the Minnesota Protocol on the Investigation of Potentially Unlawful Death ("the 2016 Minnesota Protocol")³ between 2014 and 2016.
3. I studied at the University of Pretoria (BLC, LLB, BA (Hons), MA), Yale Law School (LLM), and the University of the Witwatersrand (PhD). I have published widely on international human rights law and on the right to life in particular. I regularly teach at the University of Oxford in the United Kingdom and at the American University in Washington, D.C. I also previously chaired the United Nations' Independent Investigation on Burundi (until September 2016), directed the Centre for Human Rights at the University of Pretoria (1987-2006), served as a Consultant to both the African Union and the South African Human Rights Commission, and worked in various positions for the United Nations High Commissioner for Human Rights, the African Commission on Human and Peoples' Rights ("ACHPR"), and as a member of the South African delegation to the meeting that drafted the Protocol establishing the African Court on Human and Peoples' Rights. In the context of my work with these international mechanisms I have collaborated in the drafting of two general comments on the right to life: *General Comment No. 3* of the ACHPR and *General Comment No. 36* of the United Nations Human Rights Committee ("UNHRC"). I am currently acting as the rapporteur for the UNHRC's next general comment, on the right of peaceful assembly.
4. I have submitted amicus briefs or expert statements in legal proceedings related to the right to life in a number of international tribunals (including both the African Court and Commission on Human and Peoples' Rights and the Inter-American Court of Human Rights) as well as national courts (including the UK Supreme Court, the 11th circuit of the US Court of Appeals, and the High Court of Malawi). I have also submitted evidence to ad hoc mechanisms such as the Marikana Commission of Inquiry.

Overview of this brief

5. The purpose of this brief is to provide the Court with an overview of international standards concerning police use of force and firearms, including standards concerning post-shooting procedures, the conduct of investigations, and processes to ensure accountability. I will use the terms "law enforcement officer" and

¹ Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, Christof Heyns, UN Doc. A/HRC/26/36, 1 April 2014 ("Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions").

² Special Rapporteur on the rights to freedom of peaceful assembly and of association and Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, *Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies*, UN Doc. A/HRC/31/66, 4 February 2016 ("Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies").

³ Office of the United Nations High Commissioner for Human Rights, *The Minnesota Protocol on the Investigation of Potentially Unlawful Death* (2016), UN Doc. HR/PUB/17/4, 2017 ("2016 Minnesota Protocol").

“police” interchangeably to refer to all officers of the law, whether appointed or elected, who exercise police powers.⁴

6. The rights to life and to freedom from torture and other forms of cruel, inhuman or degrading treatment are at obvious risk when a law enforcement official uses force against an individual. These rights are set out in Articles 6 and 7, respectively, of the 1966 International Covenant on Civil and Political Rights (“ICCPR”) and in Articles 4 and 5, respectively, of the 1981 African Charter on Human and Peoples’ Rights. Kenya is a State Party to both treaties.
7. Two main United Nations instruments set out the conditions under which law enforcement officials may use lethal force and firearms under international law: the Code of Conduct for Law Enforcement Officials of 1979 (“UN Code of Conduct”)⁵ and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials of 1990 (“UN Basic Principles”).⁶ These two instruments have been developed through intensive dialogue between law enforcement and human rights experts, and have been accepted by the UN General Assembly and explicitly endorsed by a large number of States.⁷ They reflect the fundamental importance attached to the right to life in international law,⁸ and are widely accepted as authoritative statements of international law binding on all states.⁹ These instruments confine permissible police use of firearms and lethal force to a narrow range of circumstances. They oblige States to create domestic rules to limit such use, and to ensure that particular immediate steps are taken when the police do use firearms or lethal force.
8. Additionally, the *Minnesota Protocol on the Investigation of Potentially Unlawful Death* (“the 2016 Minnesota Protocol”) sets out international standards with respect to the investigation of potentially unlawful deaths, including, relevantly, all deaths caused by law enforcement officers.¹⁰ The Protocol outlines States’ obligations with respect to developing an investigative strategy, collecting and managing evidence, dealing with victims and victims’ families, investigating physical crime scenes, interviewing and protecting witnesses, performing autopsies and so on.
9. These instruments, and a range of others, also set out States’ obligations to provide reparations to victims and, in appropriate circumstances, to prosecute those responsible for illegal acts.

GENERAL PRINCIPLES REGARDING POLICE USE OF FORCE

The rights to life and to freedom from cruel, inhuman, or degrading treatment

10. The rights to life and to freedom from cruel, inhuman, or degrading treatment inform the principles and standards governing police use of force and, specifically, of firearms and lethal force. Both rights are recognized as being of paramount importance under international law. States are obliged to ensure that their law enforcement officers respect, protect and ensure these human rights (among others).¹¹
11. The right to life has two components. The substantive component is the prohibition on arbitrary deprivation of life. “Arbitrary” here means a deprivation that is unlawful by international standards. This indicates that a person may be legitimately deprived of his or her life under certain, exceptional circumstances. The onus is on those who claim they were justified in taking a life – in the case of police use of lethal force, the State –

⁴ General Assembly Resolution 34/169, *Code of Conduct for Law Enforcement Officials*, 17 December 1979, Article 1, commentary (a) (“UN Code of Conduct”).

⁵ Ibid.

⁶ Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, September 1990 (adopted by United Nations General Assembly Resolution 45/111, 1990) (UN Basic Principles).

⁷ Secretary-General, *Extrajudicial, summary or arbitrary executions: note by the Secretary-General*, UN Doc. A/61/311, 5 September 2006, para. 35.

⁸ International Covenant on Civil and Political Rights (“ICCPR”), Article 6(1).

⁹ *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, para. 44. For example, it served expressly as the model for the National Guidelines on the Use of Force in Australia: Bronitt et al (eds.), *Shooting to kill* (Hart, 2012), p. 153.

¹⁰ 2016 Minnesota Protocol, para. 1.

¹¹ UN Code of Conduct, Article 2.

to show that it was done within the confines of the international rules. This application of these rules to policing are discussed further below.

12. States are obliged to respect and protect the right to life, and to do so “by law”.¹² As a consequence, States are required to enact an adequate domestic legal framework and to limit police use of firearms and lethal force in accordance with international standards.¹³ This is the principle of legality under international law.
13. The second, procedural component of the right to life is the requirement of proper investigation and accountability where there is reason to believe that an arbitrary deprivation of life may have taken place. This duty informs specific State obligations to investigate and ensure accountability for police shootings, discussed later in this brief.
14. When police use of firearms leads to injury without causing death it is typically the right to freedom from cruel, inhuman, or degrading treatment, rather than the right to life, that is triggered.¹⁴ The relevant international instruments similarly impose obligations on States to respect and protect the underlying right, including by ensuring the realization of the substantive and procedural components discussed above with respect to the right to life.¹⁵

Fundamental principles of necessity and proportionality

15. The specific international standards regarding the police use of lethal force and firearms are underpinned by two fundamental principles pertaining to police use of force generally, namely *necessity* and *proportionality*.¹⁶ The principle of necessity requires that any force used must be the minimum required in the circumstances: where possible, police should use non-violent means; when force is used, it must be for a legitimate law enforcement purpose, and it must be the minimum necessary in the circumstances.¹⁷ The principle of proportionality limits the amount of force used in accordance with the level of threat posed by an individual or group and the seriousness of the offence that has been committed or that is about to be committed.¹⁸ A third human rights law principle, that of *precaution*, obliges authorities to plan law enforcement operations in a manner that minimizes the risk that police will have to have recourse to lethal weapons.¹⁹

SPECIFIC STANDARDS CONCERNING THE USE OF FIREARMS AND LETHAL FORCE

16. Specific provisions in both the UN Code of Conduct and the UN Basic Principles translate these rights concerns and general principles into particular rules about when police officers might lawfully use firearms. These standards make clear that the use of firearms is an extreme measure²⁰ and restrictively delineate the circumstances in which police use of firearms and lethal force is permissible.

Shooting “to stop”

¹² ICCPR, Article 6(1).

¹³ United Nations Human Rights Committee (UNHRC), *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, UN Doc. CCPR/C/GC/36, 30 October 2018, para. 10 (“UNHRC General Comment No. 36”): “Even those exceptional measures leading to deprivations of life which are not arbitrary per se must be applied in a manner which is not arbitrary in fact. Such exceptional measures should be established by law and accompanied by effective institutional safeguards designed to prevent arbitrary deprivations of life.”; and African Commission on Human and Peoples’ Rights (ACHPR) *General Comment No. 3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Article 4)*, 2015, para. 27 (“ACHPR General Comment No. 3”). See also Nils Melzer, *Targeted Killing in International Law* (Oxford University Press, 2008) pp. 104-105.

¹⁴ See for instance ECtHR, *Ilhan v Turkey*, Grand Chamber Judgment of 27 June 2000, para. 76.

¹⁵ ICCPR, art 7.

¹⁶ See UN Code of Conduct, Article 3: “Law enforcement officers may use force only when strictly necessary and to the extent required for the performance of their duty”.

¹⁷ I discussed necessity in more depth in *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, paras. 59-62. See also Stuart Casey-Maslen and Sean Connolly, *Police Use of Force Under International Law* (Cambridge University Press, 2017), pp. 82-89 (“Casey-Maslen and Connolly”).

¹⁸ I discussed proportionality in more depth in *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, paras. 65-73. See also Casey-Maslen and Connolly, pp. 92-94.

¹⁹ I discussed precaution in more depth in *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, paras. 63-64. See also Casey-Maslen and Connolly, pp. 95-96.

²⁰ UN Code of Conduct, Article 3, commentary (c).

17. Basic Principle 9 of the UN Basic Principles sets out an exhaustive list of four scenarios in which law enforcement officials may have recourse to firearms in order to stop a suspected offender:²¹
- a) In defense against imminent threat of death or serious injury;
 - b) To prevent a particularly serious crime involving grave threat to life;
 - c) To enable a person resisting arrest to be arrested if he or she is about to commit a particularly serious crime that involves grave threat to life;
 - d) To prevent a person resisting arrest from escaping where he or she is about to commit a particular serious crime that involves grave threat to life.

In each of these four scenarios, use of a firearm can only be lawful when less extreme measures are insufficient. In addition, the intent must be to incapacitate the suspect and not to kill him or her.

18. With respect to the first scenario, a threat is considered “imminent” when it is likely to be realized in a matter of seconds, not hours;²² the term “serious injury” is construed narrowly to mean a potentially fatal injury and, possibly, something similarly serious such as to prevent rape.²³ The second, third and fourth scenarios concern a grave threat to life only and where use of firearms is necessary but where the threat is not necessarily imminent. In none of the four scenarios is the protection of property a sufficient reason to justify the use of a firearm.²⁴

Shooting “to kill”

19. Basic Principle 9 also envisages one sort of scenario in which police officers may make intentional lethal use of firearms: when such use is “strictly unavoidable in order to protect life”. This “protect life” principle – that a life may only be taken when absolutely necessary to avoid the loss of another life – may be described as the guiding star of the protection of the right to life. The requirement of imminent threat must be strictly complied with, and as with the case of shooting to stop, the protect life principle strongly reaffirms the principles of necessity and proportionality.²⁵
20. The heightened standards for use of firearms demand that potentially or intentional lethal force may not be used to disperse protests, to arrest a suspected non-violent offender, or to safeguard other interests such as property. For example, a fleeing thief who poses no immediate danger may not be shot, much less killed, even if it means that the thief will escape.²⁶

Police use of firearms while policing protests and assemblies

21. A number of important rights are at stake during assemblies and protests – in particular, rights to free expression and association and of peaceful assembly. Law enforcement should, therefore, generally respect and ensure the rights of all persons to participate in lawful and peaceful protests, including unplanned and spontaneous assemblies and protests, and work to facilitate and enable them so far as is possible.
22. The UN Basic Principles acknowledge individuals’ rights to participate in lawful and peaceful assemblies.²⁷ With respect to assemblies that are unlawful but non-violent, law enforcement officials must avoid the use of force or, where that is not practicable, restrict such force to the minimum extent necessary.²⁸ In the dispersal of *violent* assemblies, law enforcement officials may use firearms only when less dangerous means are not practicable, and only when the conditions stipulated by Basic Principle 9 (discussed above at para. 17) arise.²⁹

²¹ UN Code of Conduct, Article 3.

²² Secretary-General, *Extrajudicial, summary or arbitrary executions: note by the Secretary-General*, UN Doc. A/68/382, 13 September 2013, paras. 33-37 and Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, Philip Alston, UN Doc. A/HRC/14/24, 28 May 2010.

²³ See the discussion in Casey-Maslen and Connolly, pp. 118-121.

²⁴ *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, para. 72.

²⁵ *Ibid.*

²⁶ *Ibid.*, para. 72.

²⁷ UN Basic Principles, Basic Principle 12.

²⁸ *Ibid.*, Basic Principle 13.

²⁹ *Ibid.*, Basic Principle 14.

In the anticipation of such circumstances, law enforcement agencies may make the tactical decision to arm police officers attending an assembly with firearms, but firearms should not be used for crowd management.

23. The ACHPR Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa (“ACHPR Guidelines”) provide that “[f]irearms are not an appropriate tactical tool for the policing of assemblies. Firearms must never be used to disperse an assembly. The indiscriminate discharge of firearms into a crowd is a violation of the right to life.”³⁰

REQUIREMENT TO IMPLEMENT DOMESTIC RULES AND TRAINING

24. Reflecting both the abovementioned principle of precaution and States’ positive obligations to protect the rights to life and humane treatment, the UN Basic Principles make clear that States are to develop domestic rules and regulations on police use of firearms that accord with the standards set out in Basic Principle 9.³¹ Such domestic rules must address certain specific matters, including the circumstances under which law enforcement officials are authorized to carry firearms, the types of firearms and ammunition permitted,³² and the circumstances in which they may be used.³³ They must regulate the control, storage and issuing of firearms, and establish procedures to ensure accountability for their use.³⁴ Basic Principle 19 also requires governments and law enforcement agencies to ensure that officials authorized to carry firearms are properly trained.³⁵

INTERNATIONAL STANDARDS ON POST-SHOOTING PROCEDURES

Provision of medical assistance

25. The UN Code of Conduct provides that law enforcement must provide medical assistance to persons injured by police use of force or firearms. The ACHPR Guidelines sets out the same obligation in more detail, requiring that first aid must be provided to any person free of charge and stating that police must, in advance, receive training and make contingency plans for the provision of such first aid.³⁶

Notification

26. The UN Basic Principles provide that relatives or close friends of people injured by police use of force, including when firearms are used, must be notified at the earliest possible moment.³⁷

Reporting

27. The UN Basic Principles and UN Code of Conduct emphasize the important role that reporting and monitoring tools play in ensuring accountability for the use of force and professionalism in law enforcement. Basic Principles 6 and 11(f) oblige law enforcement officials to report to their supervisors promptly whenever firearms are used, and whenever force or firearms result in death or serious injury. Article 3 of the UN Code of Conduct similarly requires that a report be made to competent authorities whenever a firearm is discharged.³⁸ Principle 22 requires law enforcement authorities to establish effective reporting and review procedures for this purpose. The ACHPR Guidelines require police to establish procedures for debriefing policing of assemblies and for identifying and recording lessons to be learned.³⁹ The ACHPR Guidelines also specify that the discharge of a firearm must be reported to an oversight authority with a mandate to review police conduct.⁴⁰

³⁰ ACHPR *Policing in Africa: Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa*, 4 March 2017 (“ACHPR Guidelines”). See also *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, para. 70.

³¹ UN Basic Principles, Basic Principle 1.

³² *Ibid.*, Basic Principle 11(a).

³³ *Ibid.*, Basic Principle 11(b).

³⁴ *Ibid.*, Basic Principle 11(c).

³⁵ *Ibid.*, Basic Principle 19.

³⁶ ACHPR Guidelines, para. 17.

³⁷ UN Basic Principles, Basic Principle 5(d).

³⁸ UN Code of Conduct, Article 3, commentary (c).

³⁹ ACHPR Guidelines, para. 24.

⁴⁰ ACHPR Guidelines, para. 24.4.

28. Incident reports should be written and registered in chronological order immediately after the incident in question in order to discourage delayed reporting and make it easier to detect. This “real time registration” also prevents attempts to conceal or alter recorded facts after an incident has occurred. Each incident report should be reviewed by a supervising officer, who should formulate an opinion on the use of force. This officer should consider whether the use of force was justified, whether disciplinary or other action is required, and whether there are lessons to be learned or training needs that can be identified.⁴¹
29. Reports should be informed by investigations carried out in accordance with the sorts of procedures discussed in more detail in the following section.

INTERNATIONAL STANDARDS CONCERNING INVESTIGATIONS

General principles and form of investigations

30. As introduced at paras. 13-14 above, the rights to life and freedom from cruel, inhuman or degrading treatment impose upon States a duty to investigate alleged or suspected violations, including those arising when police officers use firearms or other lethal force.⁴² The UNHRC has stated that Article 2(3) of the ICCPR obliges State parties to “ensure that individuals ... have accessible and effective remedies to vindicate [ICCPR] rights”,⁴³ and has emphasized that “a failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the [ICCPR].”⁴⁴
31. International human rights law requires that effective investigations must comply with six principles. They must be effective – that is, capable of identifying and punishing those responsible – independent and impartial, thorough, and prompt and expeditious; additionally, they must allow for both family participation and public scrutiny.⁴⁵

Investigation capable of identifying and punishing those responsible

32. The UNHRC has explained that a failure to bring perpetrators to justice could give rise to a separate breach of the ICCPR, particularly in respect of violations of the right to life and to be free from torture and inhuman treatment.⁴⁶ The ACHPR has similarly stated that the failure to take necessary measures to identify and hold to account state agents responsible for violations of the right to life itself constitutes a violation of the right.⁴⁷ In *Zongo v Burkina Faso*, the African Court on Human and Peoples’ Rights stated that States were compelled to make all necessary efforts to “search, prosecute and bring to trial” perpetrators of rights violations.⁴⁸ States’ duties in this regard “[require] punishment not only of material authors, but also of the intellectual authors of those acts.”⁴⁹
33. The 2016 Minnesota Protocol requires that investigations must be capable of ensuring accountability for unlawful death, leading to the investigation of and (as appropriate) the prosecution and punishment of those responsible, as well as preventing future unlawful conduct.⁵⁰

Independent and impartial

34. Article 2(3) of the ICCPR imposes a “general obligation to investigate allegations of violations ... through independent and impartial bodies.” The 2016 Minnesota Protocol states that investigators and investigative

⁴¹ United Nations Office on Drugs and Crime, *Resource book on the use of force and firearms in law enforcement*, UN Doc. HR/PUB/17/6, 2017, p. 152-153. See also UN Basic Principles, Basic Principles 20 and 22.

⁴² United Nations Human Rights Committee, *General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 15 (“UNHRC General Comment No. 31”) and the cases and reports cited in Casey-Maslen and Connolly, pp. 377-378.

⁴³ UNHRC General Comment No. 31, para. 15.

⁴⁴ *Ibid.*

⁴⁵ See *ibid.*; see also 2016 Minnesota Protocol, paras. 22–35; UN Basic Principles, Principles 22 and 23; *Amnesty International and others v. Sudan*, ACHPR, 15 November 1999, para. 51; and ACHPR General Comment No. 3, para. 7.

⁴⁶ UNHRC General Comment No. 31, para. 18; see also UNHRC, *General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, A/44/40, 10 March 1992, para. 15.

⁴⁷ ACHPR General Comment No. 3, para. 15.

⁴⁸ *Beneficiaries of Late Norbert Zongo et al v Burkina Faso*, AfCtHPR, Judgment of 28 March 2014.

⁴⁹ *Corumbiara Massacre v. Brazil*, IACommHR, Case 11.566, Report No. 32/04 (2004), para. 256.

⁵⁰ 2016 Minnesota Protocol, para. 24.

mechanisms “must be, and must be seen to be, independent of undue influence”.⁵¹ To this end, all stages of an investigation must be independent in an institutional and formal sense, as well as in practice and perception. Investigations must be carried out independently of any influence on the part of suspected perpetrators, units and hierarchies.⁵² The UNHRC has affirmed that complaints against the police should not be investigated by or under the authority of the police.⁵³

Thorough investigation

35. States have a duty to investigate cases of killings or inhuman treatment by state agents thoroughly.⁵⁴ Investigations must, at minimum, take all reasonable steps to identify victim(s), recover and preserve all probative material, identify possible witnesses and obtain their evidence, determine the cause, manner, place and time of death, and all surrounding circumstances, and determine who was involved in the death and their individual responsibility for it.⁵⁵ They must also, to the extent possible, collect and confirm all testimonial, documentary and physical evidence.
36. Investigators must have adequate powers to perform these all these functions. These include the legal power to compel witnesses and require the production of evidence. They must have sufficient financial and human resources and training, and must benefit from appropriate safety and security arrangements.⁵⁶
37. To be sufficiently thorough, an investigation must determine whether or not there was a breach of human rights, in particular the right to life, and identify any failures to take reasonable measures which could have had a real prospect of preventing the death.⁵⁷ It must also identify any policies and systemic failures that may have contributed to the death.⁵⁸

Prompt and expeditious

38. All suspected cases of illegal killings by state agents must be investigated as soon as possible and must proceed without unreasonable delay. A failure to comply with these requirements will amount to a breach of the rights to life and to an effective remedy.⁵⁹ The duty of promptness does not compel or justify a rushed or unduly hurried investigation. Nor does a State’s failure promptly to investigate relieve it of its duty to investigate at a later time: this duty does not cease, even as time passes.⁶⁰

Family participation

39. The participation of family members of other close relatives of a deceased person is an important element of an effective investigation. Family members should be sought out and informed of the investigation. The State must facilitate such persons’ participation in the investigation, to the extent possible without compromising the investigation’s integrity.⁶¹
40. The 2016 Minnesota Protocol provides that family members should be granted legal standing and must be enabled to make suggestions and arguments as to the conduct of the investigation.⁶² Additionally, they must be provided with necessary legal assistance and advice and must be protected against any ill-treatment and

⁵¹ Ibid., para. 28.

⁵² Ibid., para. 28.

⁵³ UNHRC, *Concluding Observations on Hong Kong*, UN Doc. CCPR/C/79/Add. 57, 9 November 1995, para. 11; *Concluding Observations on Kenya*, UN Doc. CCPR/CO/83/KEN, 29 April 2005, para. 18; *Concluding Observations on Slovenia*, UN Doc. CCPR/CO/84/SVN, 25 July 2005, para. 9; *Concluding Observations on Zambia*, UN Doc. CCPR/C/79/Add. 62, 3 April 1996, para. 12.

⁵⁴ *José Vicente et al. v. Colombia*, UNHRC, Views of 29 July 1997, UN Doc. CCPR/C/60/D/612/1995, para. 8.8; *Stephens v. Jamaica*, UNHRC, Views 18 October 1995, UN Doc. CCPR/C/55/D/373/1989, para. 9.2; *Ristic v. Yugoslavia*, UNCAT, Views of 11 May 2001, UN Doc. CAT/C/26/D/113/1998, para. 9.6.

⁵⁵ 2016 Minnesota Protocol, para. 25.

⁵⁶ Ibid., para. 27.

⁵⁷ Ibid., para. 26.

⁵⁸ Ibid., para. 26.

⁵⁹ Ibid., para. 23. See also *Stephens v. Jamaica*, para. 9.2.

⁶⁰ 2016 Minnesota Protocol, para. 23.

⁶¹ Ibid., para. 35.

⁶² Ibid.

safety risks.⁶³ Family members must be entitled to access materials in the investigation, to be informed of the investigation's progress, to be allowed to participate (for example in the instruction of experts), and to be informed of the outcome of the investigation.⁶⁴

Public scrutiny

41. For an investigation to be "effective", international law also requires that the investigation be conducted in public and that its results be published.⁶⁵ Transparency in investigative processes and outcomes promotes the rule of law and public accountability, and facilitates the external monitoring and assessment of an investigation's efficacy. It also ensures that victims (defined broadly) can participate in an investigation. At a minimum, States should be transparent about the existence of an investigation, procedures to be followed, and the ultimate findings.⁶⁶ These should be made publicly available.⁶⁷
42. Any limitation on transparency must be for a legitimate purpose, such as ensuring the integrity of the investigation, protecting sensitive intelligence sources, or safeguarding the safety or privacy of affected individuals.⁶⁸

Additional principles

43. The 2016 Minnesota Protocol sets out additional principles that must guide the conduct of any investigation into police use of force. First, the preservation of the lives of both the public and the investigative team is paramount, and so all activities should accordingly be risk-assessed. Second, the overarching strategy of any investigation should be methodical and transparent. Third, all evidence gathered – whether or not it will subsequently be used in a judicial proceeding – should be secured, recorded and logged. This includes all decisions taken, information gathered and witness statements.⁶⁹ The system used to document the processing and storage of evidence must be comprehensive, consistent and secure in order to preserve material and to provide an audit trail to demonstrate that evidence has not been tampered with.⁷⁰

The specific processes mandated by the 2016 Minnesota Protocol

44. The 2016 Minnesota Protocol sets out, in some detail, the particular processes that investigations must follow if they are to comply with the principles discussed above.

Initial steps and developing the investigative strategy

45. When a report or allegation of a death caused by a law enforcement officer is brought to the attention of the authorities, an initial investigation should be conducted to identify lines of inquiry and further actions. This includes collecting relevant witness statements, identifying sources of potential evidence, and prioritizing the collection and preservation of that evidence.⁷¹
46. Once a significant body of evidence has been collected and analyzed, preliminary conclusions should be developed and compiled into a single report. This should detail the inquiries pursued so far and present interim conclusions on matters such as the identity of the victim(s), the time(s), date(s) and location(s) of death, the individual(s) believed to be responsible, the underlying reason for death and other specific details. This initial report should also recommend further lines of inquiry and should set out an overall strategy for locating and gathering further material to support the investigation and potential judicial proceedings.⁷² The investigatory

⁶³ Ibid., para. 36.

⁶⁴ ECtHR, *Trubnikov v. Russia*, Judgment of 5 July 2005, para. 93; *Kucheruk v. Ukraine*, Judgment of 6 September 2007, para. 158; *Ogur v. Turkey*, Judgment of 20 May 1999, para. 92.

⁶⁵ 2016 Minnesota Protocol, para. 17; *see also* Special Rapporteur on summary or arbitrary executions, *Report to the Commission on Human Rights*, UN Doc. E/CN.4/1986/21, 7 February 1986, para. 209.

⁶⁶ 2016 Minnesota Protocol, para. 32.

⁶⁷ ECtHR, *McKerr v. United Kingdom*, Judgment of 4 May 2001, para. 141.

⁶⁸ 2016 Minnesota Protocol, para. 33.

⁶⁹ Ibid., paras. 47-49.

⁷⁰ Ibid., para. 54.

⁷¹ Ibid., para. 50.

⁷² Ibid., para. 51.

strategy should be reviewed periodically or in light of new material or methods that come to light, with records of the view process being kept.⁷³

47. The assistance of other States' law enforcement agencies, as well as international bodies such as Interpol, may help the investigation cover any gaps in local technical capacity.⁷⁴ As investigators pursue the investigation in accordance with the standards set out below, they should develop and continually update a "living" chronology of events.⁷⁵

Investigations of crime-scenes and other important physical locations

48. Every important physical location in the investigation should be located and identified. This includes the site of encounters between the victim and the officer alleged to have used force, the location of the alleged use of force, and (if relevant) burial sites. Global positioning system (GPS) coordinates should be taken and recorded. If the victim's identity is unknown, it should be established using missing person reports, family witness statements, dental and other physical records, as well as fingerprints and DNA technology.⁷⁶
49. A "crime scene" is any physical scene where investigators may locate, record and recover physical evidence, without prejudice to the determination of whether a crime has actually occurred. Crime scenes can include locations such as public spaces, buildings, or vehicles, and relevant individual items such as clothing, weapons or personal effects. The 2016 Minnesota Protocol sets out how such places are to be investigated and documented in its Detailed Guidelines on Crime-Scene Investigation.

Securing the scene and collecting physical evidence

50. A crime scene must be secured at the earliest possible opportunity so that evidence at the scene can be protected and gathered effectively, and to minimize the contamination or loss of material. Unauthorized personnel must not be permitted entry to a crime scene. A crime-scene entry log (to record any personnel entering the scene) should be opened and maintained until the scene has been fully processed.⁷⁷ This enables evidence to be protected and gathered effectively and minimizes contamination or loss of relevant material. The scene should also be protected from weather and other factors that could degrade evidence.⁷⁸ Protective clothing should be worn to minimize interference with evidence, and DNA and fingerprints of any individuals interacting with evidence should be taken.⁷⁹
51. Where official access to the crime scene is delayed, non-forensic experts (such as medical workers or journalists) may be the first to come across the scene. What these witnesses document may be important to future investigations and should be therefore be recorded and taken into account.⁸⁰ When such access is delayed, a crime scene should still be secured as far as possible at the earliest opportunity in accordance with the principles above, so as to minimize ongoing contamination or loss of material.
52. The crime scene should be searched for evidence. This could include (but is not limited to) documentary evidence (such as maps, administrative records and so on), physical evidence (such as fragments of clothing and fibers and bullet casings), biological evidence (such as blood, body parts and bones); and digital evidence (such as mobile phones, digital storage devices, and close-circuit television footage).⁸¹ Where possible, the search should be conducted jointly with an investigator who is aware of background information on the death, though care must be taken to not bias the investigation. The search criteria must be documented in investigators' notes,⁸² discussed in more depth below. Items of physical evidence must be identified and

⁷³ Ibid., para. 53.

⁷⁴ Ibid., para. 77.

⁷⁵ Ibid., para. 83.

⁷⁶ Ibid., paras. 56-57.

⁷⁷ Ibid., para. 172.

⁷⁸ Ibid., para. 58.

⁷⁹ Ibid., para. 60.

⁸⁰ Ibid., para. 169.

⁸¹ Ibid., para. 61.

⁸² Ibid., para. 174.

labelled with unique markers, and a site code developed that allows for the location of physical items and their relation to other items of evidence to be comprehensively documented.⁸³

53. As mentioned at para. 43 above, every stage of evidence recovery, storage, transportation and forensic analysis – from crime scene to court through to the end of a judicial process – should be effectively recorded. This record of “chain of custody” ensures the safety and integrity of evidence, and its potential admissibility as evidence in investigatory proceedings.⁸⁴
54. Investigators should be properly trained and equipped to comply with all these standards.⁸⁵

Forms of documentation

55. Crime scenes should be documented through photographs, measurements, and notes, all carried out by forensic experts with relevant training. The 2016 Minnesota Protocol’s Detailed Guidelines on Crime-Scene Investigation provides guidance on handling all three forms of evidence. For instance, three types of photographs should be taken in sequence to properly document crime scenes and evidence: overview photographs to establish the spatial dimensions of a scene, medium-range photographs to establish the relationship between items and their location within a scene, and close-up photographs to establish the characteristics of particular pieces of evidence.⁸⁶ Measurements should be taken to establish and corroborate the spatial dimensions documented by photographs. Notes should be taken in order to establish a contemporaneous and written record by an individual crime-scene examiner or forensic expert.⁸⁷ Photographs, measurements, notes and resulting diagrams should be recorded along with the name of the investigator, and the date and time.⁸⁸

Dealing with families of victims and building a victim profile

56. When possible, a trained and experienced family liaison expert should be appointed to offer the family of the deceased information and support and to collect information required for identifying a deceased person. Such a liaison assists both the family (through updates on the investigation) and the investigation (as a positive relationship with the family of a deceased person can produce useful information for the investigation). Interactions with family members should be informed by the principles discussed below with respect to conducting interviews and managing witnesses.
57. The investigating team should make inquiries, as appropriate, into the victim’s lifestyle⁸⁹ and financial position⁹⁰ as part of the development of a victim profile, which will assist in generating investigative opportunities. Within the confines of applicable law, investigators should also request relevant mobile telephone data from service providers. This may assist with building a chronology of the victim’s location, as well as the identity, roles and relationships of other persons of interest.⁹¹

Interviews and witness protection

General principles

58. Individuals who may have information about a death caused by law enforcement should be sought and interviewed. Publicizing an investigation and assuring potential witnesses that the information they provide will be dealt with confidentially (within applicable legal limits) and sensitively may be an effective way to encourage witnesses to come forward.⁹²
59. Witness interviews have several purposes. They aim to: obtain as much relevant information as possible as part of a broader attempt to establish the truth of what happened; identify individual suspects; allow

⁸³ Ibid., paras. 174 and 94-97.

⁸⁴ Ibid., para. 65.

⁸⁵ Ibid., paras. 63-64.

⁸⁶ Ibid., paras. 176-178.

⁸⁷ Ibid., para. 180.

⁸⁸ Ibid., paras. 179-182.

⁸⁹ Ibid., paras. 67-68.

⁹⁰ Ibid., paras. 81-82.

⁹¹ Ibid., paras. 78-80.

⁹² Ibid., paras. 84-87.

individuals to provide information that they believe is relevant to establishing the facts; identify further witnesses; identify victims; establish the location of crime scenes and of remains; establish background information and facts; and identify leads in investigations.⁹³ If interviews are conducted well, they can obtain reliable, accurate and complete information from victims, witnesses, suspects and others. If conducted poorly, they can undermine investigations and place people at risk.⁹⁴

60. Investigators conducting interviews should approach all witnesses with an open mind, observe high ethical standards; and carefully assess any risks to both potential witnesses and investigators.⁹⁵ Investigators should take measures appropriate to the situation to ensure the well-being and security of witnesses. Possible measures include protecting the identity of the witness (within applicable legal limits), and providing physical protection and/or relocation and witness protection.⁹⁶

Detailed Guidelines on Interviews

61. The 2016 Minnesota Protocol sets out Detailed Guidelines on Interviews, addressing how investigators should prepare for and conduct interviews.⁹⁷ They provide that, for instance, investigators should first identify the purpose of the interview and consider how it fits in the overall investigative strategy, learn what relevant information they can about interviewees, and consider appropriate logistical matters before beginning an interview.⁹⁸ They require that interviewers must, among other matters, explain the purpose of the interview and possible consequences, obtain informed consent from interviewees, discuss any relevant security matters,⁹⁹ act neutrally and sensitively, demonstrate fairness and integrity, and treat sensitive topics appropriately.¹⁰⁰ They must keep accurate records of the interview, whether in video, audio or written form,¹⁰¹ and allow interviewees to confirm the accuracy of these records at the end of the interview.¹⁰²

Recovery of human remains, identification of dead bodies, and autopsies

62. The 2016 Minnesota Protocol also sets out general principles and specific Detailed Guidelines for recovering human remains, identifying dead bodies, and conducting autopsies. Together, these principles and Guidelines emphasize the importance of actors having appropriate training, following pre-determined processes, documenting their work and labelling evidence, and ensuring appropriate chain of custody.¹⁰³ They also address important technical and procedural matters.
63. Autopsies are important when police use of force is a suspected cause of death. Autopsies are conducted to establish the identity of the deceased, to discover and record the pathological process, including injuries, and to draw conclusions as to the causes and circumstances of death. The performance of an autopsy will almost always assist in the conduct of an effective and thorough investigation, and a decision not to undertake one should be justified in writing and should be subject to judicial review.¹⁰⁴
64. When autopsies are conducted, it is important that forensic doctors are properly trained and that they record their factual observations according to established protocols. It is also important that forensic doctors are independent and are given sufficient resources and access to the body of the deceased.¹⁰⁵ The Detailed Guidelines on Autopsy emphasize the importance of adequate photographic and other records being documented. They set out in some detail the steps that forensic doctors should take to examine bodies, conduct tests, draw conclusions as to the cause of death and report on their findings.¹⁰⁶

⁹³ Ibid., para. 70.

⁹⁴ Ibid., para. 84.

⁹⁵ Ibid., para. 71.

⁹⁶ Ibid., para. 86.

⁹⁷ Ibid., para. 183.

⁹⁸ Ibid., paras. 184-192.

⁹⁹ Ibid., para. 195.

¹⁰⁰ Ibid., paras. 196-201.

¹⁰¹ Ibid., para. 88.

¹⁰² Ibid., paras. 220-227.

¹⁰³ Ibid., paras. 90-130, 148-166, and 233-292.

¹⁰⁴ Ibid., para. 25.

¹⁰⁵ Ibid., paras. 148-157.

¹⁰⁶ Ibid., paras. 250-273.

INTERNATIONAL STANDARDS ON ACCOUNTABILITY, REPARATIONS AND REMEDIES

Prosecution

65. In addition to the above-mentioned obligations to investigate and report on violations of the rights to life and humane treatment, States are obliged to prosecute those responsible for violations.¹⁰⁷ The aims of such prosecution should be to ensure that those responsible are brought to justice, to promote accountability and prevent impunity, and to avoid repeat violations.¹⁰⁸
66. The UN Basic Principles concern the application of this principle in the context of law enforcement more specifically. Basic Principle 22 obliges States to ensure that independent administrative or prosecutorial authorities are in a position to exercise jurisdiction in appropriate circumstances, and the 2016 Minnesota Protocol re-states this obligation in the case where the actions of a law enforcement official lead to a death.¹⁰⁹
67. Basic Principle 7 provides that governments must ensure that arbitrary or abusive use of force and firearms by law enforcement officials is punished as a criminal offence under the law. Liability should extend to supervising officers who have failed to exercise effective command and control. Where superior officers knew, or should have known, that law enforcement officials under their command resorted to the unlawful use of force or firearms, and they did not take all measures in their power to prevent, suppress or report such use, they should also be held responsible.¹¹⁰
68. Prosecutors must carry out their functions impartially and without discrimination, and should give due attention to prosecuting crimes committed by public officials.¹¹¹ When law enforcement officials are prosecuted, the judiciary must decide matters impartially, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect.¹¹² Defendants should be brought before an ordinary court or tribunal, and must be availed of the fair trial protections guaranteed under international law.
69. In addition to guaranteeing accountability through judicial processes, States should implement additional levels of non-judicial oversight, including an effective internal investigations process and an independent oversight body. These systems should operate in addition to, and not as an alternative to, criminal, public and private legal remedies for police misconduct.¹¹³ The role of a dedicated civilian oversight body may be complemented by the work of the national human rights institution or ombudsman.

Reparations and other remedies

70. As well as ensuring prosecution and other appropriate non-judicial oversight, States are required to make reparation to victims for unlawful killings by law enforcement officers. Reparation should be proportional to the gravity of the violation and the harm suffered, and should include elements of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, as well as access to relevant information concerning violations and reparation mechanisms.¹¹⁴ The State must verify all the facts and publicly disclose the truth, give an accurate accounting of for all the legal violations, enforce sanctions against those responsible for the violations, and conduct a search for the bodies of the killed (if relevant).¹¹⁵

¹⁰⁷ UNHRC General Comment No. 36, paras. 27 and 67.

¹⁰⁸ See the discussion in Casey-Maslen and Connolly, p. 383

¹⁰⁹ 2016 Minnesota Protocol, para. 17.

¹¹⁰ UN Basic Principles, Basic Principle 24.

¹¹¹ *Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies*, para. 93.

¹¹² *Ibid.*, para. 93.

¹¹³ *Ibid.*, para. 94; Council of Europe Commissioner for Human Rights, *Opinion of the Commissioner for Human Rights concerning independent and effective determination of complaints against the police* (12 March 2009), para. 25.

¹¹⁴ UN Basic Principles, Basic Principle 11. See also ACHPR General Comment No. 4 on the African Charter on Human and Peoples' Rights: *The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)*, 2017, para. 44

¹¹⁵ 2016 Minnesota Protocol, para. 10. See also UN Basic Principles, Basic Principle 32, which provides that persons affected by the use of force or firearms (and, in the case of their death, their dependents) shall have access to an independent process, including a judicial process.

71. Family members of victims of unlawful deaths have the right to equal and effective access to justice; to reparation of the sort outlined in the preceding paragraph; to recognition of their status before the law; and to relevant information concerning the violations and relevant accountability mechanisms.¹¹⁶ The right to know the truth extends to society as a whole, given the public interest in the prevention of, and accountability for, international law violations. Family members and society as a whole both have a right to information held in a state's records that pertains to serious violations, even if those records are held by security agencies or military or police units.¹¹⁷

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¹¹⁶ 2016 Minnesota Protocol, para. 11.

¹¹⁷ Ibid., para. 12.