

Police use of force

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Introduction

I first met Christof in late February 2014 as he was preparing his annual report to the United Nations (UN) Human Rights Council on the use of force in law enforcement. In preparation for the report, which also considered the legality of drones and autonomous weapons in international law, he had organised a meeting of legal experts in Geneva to discuss some of the key issues. In chairing that meeting, he evidenced many of the traits for which, I would soon come to understand, he was already internationally renowned – he was at all times calm and pensive, while in probing complex issues with the group he possessed a remarkable penchant for a collaborative approach to the work.

I thought at the time that the 2014 submission to the Council would be one of his most important reports as UN Special Rapporteur on extrajudicial, summary or arbitrary executions, and so it has proved. But it would be far from his last major contribution to international law in that role. He would go on to lead standard setting in crucial areas of the law of law enforcement, as this chapter discusses. His subsequent appointment onto the Human Rights Committee and his ongoing work for the benefit of the African Commission on Human and Peoples' Rights (African Commission) furnished him with influential fora within which he would continue to promote the fundamental principles governing police use of force. To the understanding and application of each of the five fundamental principles that governs police use of force – legality, necessity, proportionality, precaution, and accountability – Christof has made an enduring contribution. His legacy in this field is one of immense intellect, dedication, humanity, and clarity of thought: a potent cocktail.

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Use of force in the 2014 Report of the Special Rapporteur

Given the centrality of police use of force to the mandate, it is perhaps surprising how little time and space (in relative terms) the previous Special Rapporteurs on extrajudicial, summary or arbitrary executions had accorded to addressing the use of force by law enforcement officials under international law. At the least, it was not a regular thematic issue in their reports. Moreover, there were areas of vagueness or legal imprecision with respect to police use of force that demanded greater clarity. Christof had resolved to remedy this lacuna in our collective understanding. While his April 2014 report¹ gave particular space and attention to the issue of legality – the need for States to implement international standards on use of force by law enforcement officials in domestic law – the report covered all five of the core police use of force principles.

The principle of legality

The first step of securing the right to life is, as Christof wrote in his 2014 report to the Council, ‘the establishment of an appropriate legal framework for the use of force by the police, which sets out the conditions under which force may be used in the name of the State’.² The laws of each state ‘remain the first line and in many cases effectively the last line of defence for the protection of the right to life’.³ As such, he pointed to the ‘strong need to ensure that domestic laws worldwide comply with international standards’, for it is simply ‘too late to attend to this when tensions arise’.⁴ He called for domestic laws regulating the use of force by law enforcement officials to be brought in line with international standards, urging that the failure of a state to put into place an adequate legal framework to be ‘identified as a violation of the right to life itself’.⁵

This is a work in progress. While some states have improved their national legislation and policy on police use of force in recent years, most have still to do so. Indeed, it is remarkable how many laws in decolonised nations retain the brutal permissiveness of their colonial-era laws, some dating back to the early twentieth and even the late nineteenth century. Instead of authorising minimum necessary force

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

2 2014 Report (n 1) para 26.

3 2014 Report (n 1) para 29.

4 As above.

5 2014 Report (n 1) paras 121, 118.

in pursuit of a law enforcement objective, for instance, the formulation in a number of states is for ‘as much force as is necessary’, determined subjectively and without limitation.

Even prior to the finalisation of the report, Christof had been working with colleagues and students at the University of Pretoria (UP) to identify national laws governing police use of force around the world. But he would not stop the effort once the report was submitted such was the significance he accorded to the endeavour. The *Law on police use of force worldwide* website⁶ that he established with myself and Dr Thomas Probert is, we believe, the only one of its kind in the world. It describes how every state in the world (totalling 197, in the view of the UN Secretary-General) regulates the use of force by its police and other law enforcement agencies; grades them according to a simple traffic-light system; and identifies what they need to do to comply with international law and standards. It continues to be updated, enjoying more than 5,000 hits every month.

The principles of necessity and proportionality

Force is adjudged, at the instant of use, according to the twin cumulative principles of necessity and proportionality. That much is agreed. But the interpretation and application of these principles are often contested, much misunderstood, and sometimes deliberately miscast. Seeking to remedy this, Christof expounded briefly on the qualitative and quantitative elements of the principle of necessity as it restrains police use of force: avoid the use of force wherever reasonably possible; use force only for a legitimate law enforcement objective; and do not use more force than is strictly necessary in the circumstances.⁷ Critically, too, he gave appropriate meaning to the notion of an ‘imminent’ or ‘immediate’ threat when firearm discharge is countenanced, defining it as ‘a matter of seconds, not hours’.⁸ This is the correct test. Many states would prefer far greater latitude, but the cost would be counted in the loss of even more lives.

Restrictions on the use of firearms under the law of law enforcement are also central to the application of the principle of proportionality. Proportionality balances how much force may be used by reference to the threat posed by the criminal suspect. As Christof explained in the 2014 report: ‘If necessity can be visualized as a ladder, proportionality is a scale that determines how high up the ladder of force one is allowed to go. The force used may not go above that ceiling, even if it might otherwise be deemed “necessary” to achieve the legitimate aim.’⁹ Thus,

6 See <https://www.policinglaw.info> (accessed 21 December 2021).

7 2014 Report (n 1) paras 59, 60.

8 2014 Report (n 1) para 59.

9 2014 Report (n 1) para 66.

even if, in the prevailing circumstances, a suspect can only realistically be stopped from fleeing or an individual prevented from committing a crime by recourse to firearms, in the context of law enforcement proportionality sets boundaries on when such *necessary* force is also *lawful* force. In particular, the use of firearms purely to protect property is always unlawful; shooting the escaping, unarmed thief cannot be accepted. Potentially deadly force may only be employed to save human life or limb.¹⁰ The notion of proportionality, and its application in the law of law enforcement, is thus clearly distinct from its understandings in *jus ad bellum* or *in bello*.

Firearms may be lawful where their use is strictly necessary in the circumstances in order to confront an imminent threat of death or serious injury, whether that threat is to a member of the public or a law enforcement official.¹¹ In such an instant, the aim is to stop the threat and prevent the crime, not to kill the suspect. In any event, as the 1990 UN Basic Principles on the Use of Force and Firearms stipulate, intentional lethal use of firearms may only occur when this action (that is, ‘shooting to kill’) is strictly unavoidable in order to protect life.¹² This ultimate balancing Christof termed the ‘protect life’ principle – whereby a life may be taken intentionally only to save another life – describing it emblematically as ‘the guiding star of the protection of the right to life’.¹³

The principle of precaution

Not only did Christof’s 2014 report to the Human Rights Council bring clarity to the rules that apply at the instant when force is used, it also put due emphasis on the upstream principle of precaution. First introduced into the protection of the right to life by the European Court of Human Rights in its 1995 Grand Chamber judgment in the *McCann* case, the principle dictates that a law enforcement operation must be planned in a manner that minimises the risk of the police having resort to potentially deadly force.¹⁴ For, as Christof wrote in his 2014 report:¹⁵

Once a situation arises where the use of force is considered, it is often too late to rescue the situation. Instead, in order to save lives, all possible measures should be taken ‘upstream’ to avoid situations where the decision on

10 2014 Report (n 1) paras 67, 70.

11 Human Rights Committee ‘General Comment No 36: Article 6: right to life’ UN Doc CCPR/C/GC/36, 3 September 2019 (General Comment 36), para 12.

12 Adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Cuba, 1990. United Nations General Assembly Resolution 45/166, adopted without a vote the same year, welcomed the Basic Principles and called on States to respect them in their domestic law and their law enforcement operations.

13 2014 Report (n 1) para 70.

14 European Court of Human Rights, *McCann and Others v United Kingdom* Grand Chamber Judgment (1995) 21 EHRR 97 (*McCann* case) para 194.

15 2014 Report (n 1) para 63.

whether to pull the trigger arises, or to ensure that all the possible steps have been taken to ensure that if that happens, the damage is contained as much as is possible.

The *McCann* case concerned Irish Republican Army (IRA) operatives who had travelled to Gibraltar to place a bomb. The United Kingdom (UK) security forces knew who they were and watched them enter the British Overseas Territory. Rather than stop them and arrest them, they allowed the three to proceed towards their objective, putting at risk a deadly outcome both for the IRA operatives and for the public in Gibraltar. Rejecting the UK government's protestations that delaying arrest would enable them to prosecute, convict, and then incarcerate the three operatives for a far longer period, the European Court of Human Rights stated that it was obliged to 'carefully scrutinise ... not only whether the force used by the soldiers was strictly proportionate to the aim of protecting persons against unlawful violence but also whether the antiterrorist operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force'.¹⁶

Christof would strive to ensure that the precautionary principle was duly reflected in General Comments on the right to life by both regional and global human rights treaty bodies. In 2015, the African Commission, in its General Comment on the right to life under the African Charter, whose drafting he led, would declare that the state 'must take all reasonable precautionary steps to protect life and prevent excessive use of force by its agents, including but not limited to the provision of appropriate equipment and training as well as, wherever possible, careful planning of individual operations'.¹⁷ Then in its General Comment on the right to life under the 1966 International Covenant on Civil and Political Rights (ICCPR),¹⁸ concluded in 2018 under the rapporteurship of Yuval Shany, the Human Rights Committee would identify the need for 'procedures designed to ensure that law enforcement actions are adequately planned in a manner consistent with the need to minimize the risk they pose to human life'.¹⁹

In 1995, in the wake of the judgment by the European Court of Human Rights in *McCann*, a member of the UK Government derided the European Convention on Human Rights as a 'terrorists charter'. By 2011, the Manual of Guidance on Police Use of Firearms published by the Association of Chief Police Officers in England and Wales was not

16 *McCann* case (n 14) para 194.

17 African Commission, 'General Comment No 3 on the African Charter on Human and Peoples' Rights: Article 4, the Right to Life', adopted in November 2015, para 27.

18 International Covenant on Civil and Political Rights; adopted at New York 16 December 1966; entered into force 23 March 1976.

19 General Comment 3 (n 11) para 13.

only citing the precautionary principle – ‘Is the operation being planned to minimise, to the greatest extent possible, recourse to the use of lethal force?’ – it was even citing the judgment in *McCann* as evidence.²⁰

The principle of accountability

Hand in hand with the principles of legality, necessity, proportionality, and precaution goes the principle of accountability: a system of responsibility for cases in which the limits laid down by the international standards are transgressed.²¹ The procedural component of the right to life requires that states first investigate apparently unlawful or arbitrary killings and then, where evidence of criminal wrongdoing is uncovered, prosecute the offenders. This is both consonant with, and an integral element of, the right to a remedy under conventional and customary international human rights law.²² The failure of the state to properly investigate cases of death following the use of force is thus cast as a violation of the right to life itself.²³

Independent, external oversight of police is, Christof’s 2014 report declared, ‘a best practice’.²⁴ But, he explicitly recognised, the ‘mere establishment’ of an external oversight body is in and of itself ‘insufficient’.²⁵ ‘An effective external police oversight agency requires the necessary powers, resources, independence, transparency and reporting, community and political support, and civil society involvement’.²⁶ Accordingly, the Law on Police Use of Force Worldwide website devotes a section on each country profile to not only the existence of an external oversight agency but also its powers, independence, and effectiveness. A ‘high degree of transparency’ is required, the 2014 report added, to ensure the agency’s ‘long-term success’.²⁷

But any accountability framework worthy of the name must include a combination of criminal, administrative, and disciplinary sanctions. ‘Modes of criminal accountability must include command or superior responsibility’, the report recalled.²⁸ While respect for the principle of legality is a prerequisite for accountability, the general existence of laws ‘is not enough to ensure accountability of State officials – special

20 *Manual of Guidance on Police Use of Firearms* (3rd ed) Association of Chief Police Officers, London, 2011, <https://bit.ly/3rkeWvh> (accessed 21 December 2021), para 1.23.

21 2014 Report (n 1) para 26.

22 2014 Report (n 1) para 78.

23 2014 Report (n 1) para 79.

24 2014 Report (n 1) para 84.

25 As above.

26 As above.

27 As above.

28 2014 Report (n 1) para 82.

measures are needed to ensure that those in office are held responsible'. 'Many States', Christof observed, 'lack such mechanisms'.²⁹

The revision of the Minnesota Protocol on the Investigation of Potentially Unlawful Death

Inherent to any coherent system of accountability is also, as the 2014 report had recalled, an effective investigation. It was to this issue that Christof next turned in his work as Special Rapporteur on extrajudicial, summary or arbitrary executions. During a mission to India in 2012, he encountered the application of the so-called Minnesota Protocol (more correctly entitled the UN Manual on the Effective Prevention and Investigation of Extra-legal Arbitrary and Summary Executions). The Manual, which had been elaborated thanks to work by a civil-society organisation in Minnesota and forensic experts, especially in the United States, was originally published in 1991.³⁰

Two decades later, in mortuaries in India, medical personnel involved in autopsies emphasised to the Special Rapporteur the importance of the Protocol, but pointed out that, since its conclusion, it had become materially outdated. Forensic science, as well as the international legal standards represented in the Manual, had evolved significantly. The duty to investigate had taken on an autonomous existence, especially in jurisprudence in the Strasbourg court.³¹ With respect to the science, when the original Protocol had been drafted, DNA evidence had barely been heard of, the first digital cameras had only just entered the market, and computerised tomography (CT) scanning machines were a long way from being standardised. Technology since then had revolutionised the processes and procedures for investigations.

Consulting with experts around the world, it became clear that the Minnesota Protocol had been a critical normative reference, but that if it were to remain so in the future, it would need major revision. Christof took the initiative, setting about the task thoughtfully and in a structured framework. Working with the Office of the UN High Commissioner for Human Rights (OHCHR) and on the basis of the collaborative approach that typified his work, a team of several dozen international

29 As above.

30 The Protocol was so-named not because of its international legal connotations but rather as a set of procedures in the medical sphere. It was derived from the Principles on the investigation of extra-legal executions endorsed by the UN General Assembly in 1989.

31 For instance, a few of the international standards incorporated in the new Protocol were the 1990 Basic Principles on Use of Force and Firearms, the 2004 Arab Charter on Human Rights, the 2005 UN Principles on Action to Combat Impunity, the 2005 Basic Principles on the Right to a Remedy, the 2006 Convention against Enforced Disappearance, the 2015 Nelson Mandela Rules, and the 2015 African Commission's General Comment on the Right to Life.

legal, human rights, investigation, and forensic experts set out to revise and update the Protocol.³² The new Protocol was elaborated over the course of two years with support from a high-level advisory panel from around the world. The aim was to produce a document that would set out international law on investigations in a holistic manner and outline good practice in investigation in compliance with that law and in light of the many advances in forensic science. Input was also sought from States, international organisations, and UN treaty bodies, and incorporated into the text before it was finalised.

Published by the OHCHR in 2017 (and now available in all six official UN languages), the Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)³³ offers detailed guidance to States as well as other subjects of international law on how to conduct a human-rights compliant investigation into a suspicious death or enforced disappearance. It is first and foremost a tool to enable better investigations, but it is also a standard by which investigations can be judged. As the then High Commissioner for Human Rights said in his Foreword to the Protocol, the updated version of the Protocol provides ‘a comprehensive and shared platform for forensic investigators, pathologists, law enforcement officials, lawyers, prosecutors, presiding officers and NGOs to make accountability a worldwide reality’.

The Protocol describes the international legal framework, including the triggers for an investigation (which do not demand an official complaint). It depicts the character that an investigation must have if it is to comply with the right to life: it must be *effective and thorough, prompt* (but not rushed), *independent and impartial* (meaning, for instance, that police and military units cannot investigate themselves or their colleagues), and as *transparent* as the demands of justice will allow. A new section on professional ethics in the revised Protocol confirms that forensic doctors have obligations to justice (not to the police or the State, even though these entities may be the ones directly contracting them), as well as, of course, to the relatives of the deceased.

In articulating how an investigation should be conducted, the Protocol brought together domestic and regional approaches for the first time in an in-depth international standard. Detailed guidelines are incorporated into the extended Protocol on the management of the crime/death scene(s), the conduct of interviews, the excavation

32 See, for example, C Heyns, S Casey-Maslen, T Fisher, S Knuckey, T Probert & M Tidball-Binz ‘Investigating potentially unlawful death under international law: the 2016 Minnesota Protocol’ (2019) 52(1) *International Lawyer* 47. Morris Tidball-Binz is now the UN Special Rapporteur on extrajudicial, summary or arbitrary executions.

33 Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016), OHCHR, Geneva/New York, 2017 (Minnesota Protocol), <https://bit.ly/3aH8Yh7> (accessed 21 December 2021).

of graves, the organisation of an autopsy, and the analysis of skeletal remains. They are not tantamount to standing operating procedures (SOPs) but they clearly light up the path towards them.

Naturally, the importance of ensuring the chain of custody for evidence is especially accentuated in the Protocol, as is the role of the autopsy. As the Protocol makes explicit, investigations must, at a minimum, take all reasonable steps to: identify the victim or victims; recover and preserve all material probative of the cause of death, the identity of the perpetrator(s), and the circumstances surrounding the death; identify possible witnesses and obtain their evidence in relation to the death and the circumstances surrounding the death; determine the cause, manner, place, and time of death, and all of the surrounding circumstances;³⁴ and determine who was involved in the death and their individual responsibility for the death.³⁵ It will ‘almost always be the case’, the Protocol confirms, that these aims ‘will be materially assisted in some way by the performance of an autopsy. Accordingly, a decision not to undertake an autopsy should be justified in writing and should be subject to judicial review’.³⁶

The Protocol has already become the new international reference for the conduct of death investigations. The Human Rights Committee, in its General Comment 36 on the right to life, decrees that investigations and prosecutions of potentially unlawful deprivations of life should be undertaken in accordance with relevant international standards, including, explicitly, the Minnesota Protocol.³⁷ Moreover, the Protocol can and should be used at all times, including in situations of armed conflict.³⁸ Indeed, in its Grand Chamber judgment in *Hanan v. Germany* of February 2021, the European Court of Human Rights specifically cites the paragraph from the Protocol pertaining to investigations of deaths resulting from the conduct of hostilities as part of the relevant international law and practice.³⁹

34 In determining the manner of death, the investigation should distinguish between natural death, accidental death, suicide, and homicide.

35 Minnesota Protocol (n 33) para 25.

36 As above.

37 General Comment 36 (n 11) para 27.

38 This is even though, as is well known, the rules governing the use of force in the conduct of hostilities differ materially to law of law enforcement rules, being generally and significantly more permissive.

39 European Court of Human Rights *Hanan v Germany* Judgment 16 February 2021 para 88.

The United Nations Guidelines on the Use of Less-Lethal Weapons

The 2014 report to the Human Rights Council on the law of law enforcement had made a number of important recommendations. In addition to those noted above, Christof had singled out the need for detailed guidance on less-lethal weapons in law enforcement. In 2016, in the joint report with the Special Rapporteur on the rights to freedom of peaceful assembly and of association, a call had been made to the UN High Commissioner for Human Rights to convene an expert group to examine the application of the international human rights framework to less-lethal weapons, including with a focus on their use in the context of assemblies.⁴⁰

The 1990 Basic Principles on the Use of Force and Firearms had exhorted States to develop and use so-called ‘non-lethal incapacitating weapons’⁴¹ with a view to reducing police recourse to firearms.⁴² The Basic Principles had also called for the development and deployment of such weapons to be ‘carefully evaluated in order to minimize the risk of endangering uninvolved persons’, and for their use to be ‘carefully controlled’.⁴³ But there was no dedicated international framework of standards by which to do so. Clear and appropriate international standards were, the 2014 report to the Human Rights Council justly averred, badly needed.⁴⁴ To be effective, this called for the elaboration of ‘independent guidelines on the development and use of these weapon technologies, over and above standards that may be set by individual police forces or the manufacturers’.⁴⁵

Once again, Christof seized the mantle, convening and leading a process of expert meetings with the OHCHR involving law enforcement officials, diplomats, weapons experts, and human rights lawyers. The meetings, which over the course of one year the Geneva Academy of International Humanitarian Law and Human Rights hosted with the support of the Swiss Government, enabled a detailed set of guidelines to be elaborated for consideration by the OHCHR. A careful balance had

40 ‘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), para 67(i).

41 This term is no longer widely used as it is understood that all weapons can be lethal in certain circumstances. United Nations Human Rights Guidance on Less-Lethal Weapons in Law Enforcement OHCHR Geneva (2020) (Guidance on Less-Lethal Weapons) at v.

42 Principle 2, 1990 Basic Principles on the Use of Force and Firearms.

43 Principle 3, 1990 Basic Principles on the Use of Force and Firearms.

44 2014 Report (n 1) para 105.

45 2014 Report (n 1) paras 105, 106.

to be struck between the aspirations of civil society and the desire to remain grounded in international law so that weapons manufacturers and law enforcement agencies would not be able to ignore or dismiss the guidelines. As ever, Christof's seemingly endless patience and his almost infinite ability to find a path acceptable to all won the day. Following their internal review within the Office, the United Nations Human Rights Guidance on Less-Lethal Weapons was published in its final edition in 2020.⁴⁶

The guidelines offer both general and specific guidance on the design and production, legal review, testing, and procurement, and use of less-lethal weapons.⁴⁷ They identify weapons that should not be used in law enforcement, notably spiked batons, lasers designed to cause permanent blindness, and directed energy weapons liable to cause serious injury.⁴⁸ With respect to other weapons, States are called upon to ensure that, prior to their procurement, a legal review is conducted to ascertain whether they would in any circumstances be prohibited by any rule of international or domestic law, in particular human rights law.⁴⁹ The Guidance emphasises that testing should be conducted independently of the manufacturer and should be based on impartial legal, technical, medical and scientific expertise and evidence. Testing should evaluate the effects of 'all reasonably likely or expected' uses of the weapon(s) being reviewed.⁵⁰

The use of specific less-lethal weapons and related equipment is considered in detail, looking systematically at their utility and design, the circumstances of potentially lawful use, the specific risks resulting from their use, and the circumstances of potentially unlawful use in each case. Weapons given such detailed consideration are police batons, hand-held chemical irritants (for example, pepper spray), chemical irritants launched at a distance (tear gas), conducted electrical weapons ('Tasers'), kinetic impact projectiles (such as plastic bullets), dazzling laser weapons, water cannon, and acoustic weapons.

With respect, for example, to tear gas – the 'go-to' weapon for many States in public order management – the Guidance observes that if chemical irritants are deployed behind a group of violent individuals,

46 At <http://bit.ly/367c0ac> (accessed 21 December 2021).

47 Less-lethal weapons are defined in the Guidance as: 'Weapons designed or intended for use on individuals or groups of individuals and which, in the course of expected or reasonably foreseen use, have a lower risk of causing death or serious injury than firearms. Less-lethal ammunition may be fired from conventional firearms. For the purpose of th[e] Guidance, the term includes conventional firearms when they are used to discharge less-lethal ammunition, but not when they are used to discharge conventional bullets or other ammunition that would be likely to result in life-threatening injuries.' Guidance on Less-Lethal Weapons (n 41) Section 9, p 45.

48 Guidance on Less-Lethal Weapons (n 41) para 5.1.

49 Guidance on Less-Lethal Weapons (n 41) para 4.2.1.

50 Guidance on Less-Lethal Weapons (n 41) para 4.2.2.

this may prompt them to move towards law enforcement officials and agencies, thereby increasing the risk of a violent confrontation.⁵¹ A stampede may result when irritants are used against a crowd in an enclosed area.⁵² In any event, projectiles should not be fired at the head or face, owing to the risk of death or serious injury from impact trauma.⁵³ In general, chemical irritants should not be used in confined spaces, such as prison cells, where there is no viable exit or adequate ventilation, owing to the risk of death or serious injury from asphyxiation.⁵⁴

In July 2021, the Human Rights Council adopted a resolution on the ‘promotion and protection of the human rights and fundamental freedoms of Africans and of people of African descent against excessive use of force and other human rights violations by law enforcement officers’.⁵⁵ Under the resolution, the Council decided to establish an international independent expert mechanism in order to further the agenda towards transformative change for racial justice and equality in the context of law enforcement globally. The resolution further noted the importance of international standards on police use of force, specifically recommending that domestic legal regimes on the use of force by law enforcement officials be brought into line with appropriate international standards, including the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and the 2020 United Nations Human Rights Guidance on Less-Lethal Weapons in Law Enforcement.⁵⁶

Facilitating the right of peaceful assembly

The right to assembly peacefully, defined as ‘the non-violent gathering by persons for specific purposes, principally expressive ones’,⁵⁷ is a ‘fundamental right in a democratic society’, in the words of the European Court of Human Rights.⁵⁸ States not only have an obligation to refrain from violating the rights of individuals involved in an assembly, but must also ensure the rights of those who participate in, or are affected by

51 Guidance on Less-Lethal Weapons (n 41) para 7.3.4.

52 Guidance on Less-Lethal Weapons (n 41) para 7.3.3.

53 Guidance on Less-Lethal Weapons (n 41) para 7.3.6.

54 Guidance on Less-Lethal Weapons (n 41) para 7.3.7.

55 Human Rights Council Resolution 47/21, adopted without a vote on 13 July 2021, para 10.

56 Human Rights Council Resolution 47/21, para 5.

57 Human Rights Committee, ‘General Comment No 37 (2020) on the right of peaceful assembly (Article 21)’, UN Doc CCPR/C/GC/37, 17 September 2020 (General Comment 37), para 4.

58 This statement, made in its 2003 judgment in the *Djavit An* case, has been reiterated by the Court on a number of occasions since. European Court of Human Rights, *Djavit An v Turkey* Judgment 20 February 2003, para 56.

an assembly, including by facilitating an enabling environment within which the assembly can proceed peacefully.⁵⁹ But in reality abuses by law enforcement officials frequently occur in the context of assemblies such as public demonstrations and protests. Although police forces are supposed to serve the public impartially, without fear or favour, in many States they are effectively instrumentalised by the regime. Suppressing peaceful protest is all too often one of the tasks with which they are charged by those in power.

In March 2014, Human Rights Council Resolution 25/38 called upon the Special Rapporteur on extrajudicial, summary or arbitrary executions and the Special Rapporteur on the rights to freedom of peaceful assembly and of association (Maina Kiai) to elaborate and present a compilation of practical recommendations for the proper management of assemblies. In their joint report, submitted to the Council in 2016, the two Special Rapporteurs affirmed that force ‘shall not be used unless it is strictly unavoidable, and if applied it must be done in accordance with international human rights law’.⁶⁰ In reiterating the core principles governing use of force in law enforcement, they also identified rules specific to assemblies, including that firearms ‘should never be used simply to disperse an assembly’ and declaring that ‘indiscriminate firing into a crowd is always unlawful’.⁶¹

The report noted the constraints placed by international law on dispersal, which may be considered ‘where violence is serious and widespread and represents an imminent threat to bodily safety or property, and where law enforcement officials have taken all reasonable measures to facilitate the assembly and protect participants from harm’. Before countenancing dispersal, however, the report recommended that law enforcement agencies ‘seek to identify and isolate any violent individuals separately from the main assembly and differentiate between violent individuals in an assembly and others’, which might allow the assembly to continue.⁶² International law, the authors stated, ‘allows for dispersal of a peaceful assembly only in rare cases’.⁶³ Once again, Christof’s talent for standard setting and clear interpretation of international human rights law were advancing the cause of protection.

Christof’s expertise in assemblies would again be employed when he became a member of the Human Rights Committee in 2017. He accepted the task entrusted to him by the Committee to lead the drafting of the widely acclaimed General Comment 37 on the right of peaceful assembly. After only two years of drafting and review, ably

59 Joint report (n 40) para 13.

60 Joint report (n 40) Best Practice (E).

61 Joint report (n 40) para 60.

62 Joint report (n 40) para 61.

63 Joint report (n 40) para 62.

supported by Dr Probert, the new General Comment was accepted by the Committee in July 2020.⁶⁴

The General Comment emphasises that the basic approach of the authorities should be, as and where necessary, to seek to *facilitate* peaceful assemblies.⁶⁵ For many, this demands a sea change in philosophy and policy. Legality for any police use of force is a key starting point. As is observed: ‘Domestic law must not grant officials largely unrestricted powers, for example to use “force” or “all necessary force” to disperse assemblies, or simply to “shoot for the legs”. In particular, domestic law must not allow use of force against participants in an assembly on a wanton, excessive or discriminatory basis’.⁶⁶

The General Comment also stresses the precautionary nature of the obligation on law enforcement agencies: ‘Where the presence of law enforcement officials is required, the policing of an assembly should be planned and conducted with the objective of enabling the assembly to take place as intended, and with a view to minimizing the potential for injury to any person and damage to property’.⁶⁷ This calls for the development of generic contingency plans and training protocols by relevant law enforcement agencies, especially for the policing of spontaneous assemblies that may affect public order.⁶⁸

Appropriate less-lethal weapons should be deployed and used, consonant of course with the UN Human Rights Guidance.⁶⁹ Firearms are not an appropriate tool for the policing of assemblies and must never be used simply to disperse an assembly.⁷⁰ Containment (‘kettling’), where law enforcement officials encircle and close in a section of the participants, ‘may be used only where it is necessary and proportionate to do so’. ‘Necessary law enforcement measures targeted against specific individuals are often’, the General Comment provides, ‘preferable to containment’.⁷¹

With respect to accountability, the State is ‘ultimately responsible for law enforcement during an assembly’ and, as such, may delegate tasks to private security service providers ‘only in exceptional circumstances’. In such cases, however, the State remains responsible for the conduct of those service providers. This is an important normative statement given the widespread use of private security in managing public assemblies.

64 General Comment 37 (n 57).

65 General Comment 37 (n 57) para 74.

66 General Comment 37 (n 57) para 80.

67 General Comment 37 (n 57) para 76.

68 General Comment 37 (n 57) para 77.

69 General Comment 37 (n 57) para 78.

70 General Comment 37 (n 57) para 88.

71 General Comment 37 (n 57) para 84.

Concluding remarks

The examples given in this chapter of Christof's work only scratch the surface of his work with respect to police use of force, but they do give a sense of his tremendous achievements in both normative development and promotion of implementation of the law and associated standards. He never tired of either task. The revised Minnesota Protocol on the Investigation of Potentially Unlawful Death and the United Nations Human Rights Guidance on Less-Lethal Weapons would not exist if it were not for his farsightedness and dogged commitment. The Human Rights Committee's General Comment on the right of peaceful assembly might exist, but it is inconceivable that it would be anything like as good as it is.

Writing in January 2021 the foreword to a book I had authored, Christof observed that the modern focus of human rights law on the individual 'has led to an emphasis on the recognition of the equal value of each individual life, and resistance against the idea that the life of any person can be sacrificed in the pursuit of any other social objectives'.⁷² Nowhere is this more true than in adjudging police use of force. Our understanding of how international law controls and restricts that use of force has been immeasurably advanced by Christof's work, his intellect, and his humanity.

At the time of his tragic passing, Christof was leading with Dr Probert preliminary research for a study into the use of force by African nations mandated by the African Commission in March 2020.⁷³ Not yet complete as of writing this chapter, once finalised the Commission's study should prove to be one more building block in Christof's astonishing legacy: a selfless career dedicated to legal precision in the protection of others, and one that ended far, far too soon.

72 Foreword to *The right to life under international law: an interpretive manual* (CUP 2020) at ix.

73 African Commission, Resolution 437, Resolution on the Need to Prepare a Study on the Use of Force by Law Enforcement Officials in Africa – ACHPR/Res. 437 (EXT.OS/ XXVI1) 2020, adopted on 4 March 2020, <https://bit.ly/3eA0B8O>.