

CHAPTER IX

ACCOUNTABILITY, TRANSPARENCY, AND REPARATIONS FOR UNLAWFUL DEATH

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A. INTRODUCTION

International human rights law requires that states respect, protect, and fulfil the right to life—including by refraining from unlawful killings as well as by taking steps to protect life. International law also requires states to provide accountability, transparency, and reparations for any violations that do occur.

The substantive rules around when a life may lawfully be taken—for example by a law enforcement official acting within the confines for the use of force set out in the Basic Principles on the Use of Force and Firearms—or a failure by the state to exercise due diligence in the protection of life, are set out in the preceding chapters. This chapter covers the requirements of accountability, transparency, and reparations where a particular death is the result of a violation of human rights law. A failure to meet these procedural requirements also constitutes a violation of the right to life.

Accountability is aimed at the promotion of justice and the prevention of further violations. States are required to properly investigate suspected unlawful killings, prosecute wrongdoers, transparently explain processes and outcomes, provide reparations to victims, and implement reforms to address past wrongs and prevent continuing harms.

Accountability, transparency, and reparations play a significant role in the work of the Special Rapporteur. Often the dispute is not about the law, but about the facts; not about whether it was justified to use deadly force in specific circumstances, but rather about who did it, and exactly what the circumstances were. Ensuring the protection of the right to life often turns on such questions.

This raises important questions about the rules for assigning accountability. Accountability is a chain with many links, and if one link is absent, there may be a failure to protect the right. In many of the countries visited by the Special Rapporteurs, impunity is caused through obstacles and deficiencies at different levels of the justice system. Police may be unwilling or unable to carry out an independent and proper investigation of the scene of death. The country may lack the necessary forensic capacity to conduct thorough and effective murder investigations. The police may fail to refer cases to the prosecution service. Prosecutors may be corrupt or poorly trained. Witnesses may be unwilling to testify because of fear and inadequate witness protection programmes. Police internal affairs and oversight mechanisms may be non-existent, or unable to independently and credibly investigate police abuses. Tribunals may not be independent or impartial. If one link in the accountability chain breaks, the right to life will in all likelihood not be protected.

The Special Rapporteurs have addressed these elements in a wide range of interventions, the most comprehensive of which was the revision of the Minnesota Protocol (the process of which was discussed in Chapter 2).

The Minnesota Protocol draws on the extensive experience of the mandate and serves as a guide to its future practice.¹ It serves as a restatement of the state obligation to ensure accountability, in addition to providing a guide to good practices. It is used—in both its original and updated formats—as the gold standard for the work of police, forensic doctors, investigators, prosecutors, and others involved in the investigation of suspicious death worldwide.

This chapter extracts significantly from the Minnesota Protocol, as a product of the mandate, and because it largely summarises the approach followed by the various mandate holders over the years. It is used as the starting point to set out the applicable norms. More detailed exposition of those norms or their application in concrete cases by the Special Rapporteurs are then set out.

1 For example, Agnès Callamard, the Special Rapporteur who succeeded Special Rapporteur Heyns, relied upon the Minnesota Protocol in her investigation of the death of Mr Jamal Khashoggi. See Annex to the Report of the Special Rapporteur: Investigation into the unlawful death of Mr. Jamal Khashoggi, A/HRC/41/CRP.1, 19 June 2019.

The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016): The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (2017, ¶¶1-6)

I. Aims and Scope of the 2016 Minnesota Protocol

1. The Minnesota Protocol aims to protect the right to life and advance justice, accountability and the right to a remedy, by promoting the effective investigation of potentially unlawful death or suspected enforced disappearance. The Protocol sets a common standard of performance in investigating potentially unlawful death or suspected enforced disappearance and a shared set of principles and guidelines for States, as well as for institutions and individuals who play a role in the investigation.

2. The Minnesota Protocol applies to the investigation of all “potentially unlawful death” and, *mutatis mutandis*, suspected enforced disappearance. For the purpose of the Protocol, this primarily includes situations where:

a) The death may have been caused by acts or omissions of the State, its organs or agents, or may otherwise be attributable to the State, in violation of its duty to respect the right to life.²

This includes, for example, all deaths possibly caused by law enforcement personnel or other agents of the state; deaths caused by paramilitary groups, militias or “death squads” suspected of acting under the direction or with the permission or acquiescence of the State; and deaths caused by private military or security forces exercising State functions.³

b) The death occurred when a person was detained by, or was in the custody of, the State, its organs, or agents. This includes, for example, all deaths of persons detained in prisons, in other places of detention (official and otherwise) and in other facilities where the State exercises heightened control over their life.⁴

c) The death occurred where the State may have failed to meet its obligations to protect life. This includes, for example, any situation where a state fails to exercise due diligence to protect an individual or individuals from foreseeable external threats or violence by non-State actors.⁵

There is also a general duty on the state to investigate any suspicious death, even where it is not alleged or suspected that the state caused the death or unlawfully failed to prevent it.

3. The Protocol outlines States’ legal obligations and common standards and guidelines relating to the investigation of potentially unlawful death (Section II). It sets out the duty of any individual involved in an investigation to observe the highest standards of professional ethics (Section III). It provides guidance and describes good practices applicable to those involved in the

² See, e.g. Art. 6(1), 1966 International Covenant on Civil and Political Rights (ICCPR); Art. 6, 1980 Convention on the Rights of the Child; and Art. 1, 1948 Convention on the Prevention and Punishment of the Crime of Genocide; Arts. 12 and 13, 1984 UN Convention against Torture; Art. 10, 2006 International Convention for the Protection of All Persons from Enforced Disappearance (ICPED); UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990 [*Basic Principles*] Principles 6, 22 and 23; 1989 UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Principle 9; and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 34. In situations of international armed conflict, see Art. 121, 1949 Geneva Convention III (with respect to prisoners of war); and Art. 131, 1949 Geneva Convention IV (with respect to civilian internees).

³ Report of the Special Rapporteur, Philip Alston, E/CN.4/2005/7, 22 December 2004, paras. 70-71.

⁴ These include psychiatric hospitals, institutions for children and the elderly and centres for migrants, stateless people, or refugees.

⁵ See, e.g., Human Rights Committee, General Comment No. 31 on The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 8.

investigative process, including police and other investigators, medical and legal professionals and members of fact-finding mechanisms and procedures (Section IV). While the Protocol is neither a comprehensive manual of all aspects of investigations, nor a step-by-step handbook for practitioners, it does contain detailed guidelines on key aspects of the investigation (Section V). A glossary is included (Section VI). Annexes (Section VII) contain anatomical sketches and forms for use during autopsies.

4. States should take all appropriate steps to incorporate Protocol standards into their domestic legal systems and to promote its use by relevant departments and personnel, including, but not limited to, prosecutors, defence lawyers, judges, law enforcement, prison and military personnel, and forensic and health professionals.

5. The Protocol is also relevant to cases where the United Nations, armed non-State groups exercising State or quasi-State authority,⁶ or business entities⁷ have a responsibility to respect the right to life and to remedy any abuses they cause or to which they contribute.⁸ The Protocol can also guide the monitoring of investigations by the UN, regional organizations and institutions, civil society and victims' families, and can aid teaching and training on death investigations.

6. States Parties to relevant treaties may have specific obligations that go beyond the guidance set out in the present Protocol. Although some States may not yet be in a position to follow all of the guidance set out within it, nothing in the Protocol should be interpreted in such a way as to relieve or excuse any State from full compliance with its obligations under international human rights law.

B. LEGAL FRAMEWORK

International law requires states to investigate, prosecute, and punish alleged unlawful killings. The duty is entailed by the general obligation of states to ensure the right to life to each individual. Article 2(1) of the ICCPR provides that each state undertakes "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant," and Article 2(3) provides that states undertake to "ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy".

1. Duty to investigate, prosecute, and punish

The updated Minnesota Protocol provides detail on the international law of state responsibility in this area.

The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016): The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (2017, ¶¶7-9, 15-33)

A. The Right to Life

7. The right not to be arbitrarily deprived of life is a foundational and universally recognized right, applicable at all times and in all circumstances. No derogation is permissible, including during an armed conflict or other public emergency.⁹ The right to life is a norm of jus cogens and is protected

6 With respect to armed groups, see Report of the UN Fact-Finding Mission on the Gaza Conflict, A/HRC/12/48, 25 September 2009, para. 1836.

7 OHCHR, Guiding Principles on Business and Human Rights, HR/PUB/11/04 (2011).

8 2005 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN Basic Principles and Guidelines on the Right to Remedy and Reparation), UN General Assembly Resolution 60/147, 21 March 2006.

9 Under Article 15 of the 1950 European Convention on Human Rights (ECHR), in time of war or other public

by international and regional treaties, customary international law and domestic legal systems. The right is recognized in, among other instruments, the 1948 Universal Declaration of Human Rights, the 1966 International Covenant on Civil and Political Rights, the African, Inter-American and European human rights conventions,¹⁰ and the Arab Charter on Human Rights.¹¹

8. Protection of the right to life means preventing the arbitrary deprivation of life, including through an appropriate framework of laws, regulations, precautions and procedures. It also requires accountability for the arbitrary deprivation of life whenever it occurs. To secure the right to life, States must:

- a) Respect the right to life. States, their organs and agents, and those whose conduct is attributable to the State, must respect the right to life and not deprive any person of their life arbitrarily.
- b) Protect and fulfil the right to life. States must protect and fulfil the right to life, including by exercising due diligence to prevent the arbitrary deprivation of life by private actors. [...]
- c) Investigate potentially unlawful death, ensure accountability and remedy violations. The duty to investigate is an essential part of upholding the right to life.¹² The duty gives practical effect to the duties to respect and protect the right to life, and promotes accountability and remedy where the substantive right may have been violated. Where an investigation reveals evidence that a death was caused unlawfully, the State must ensure that identified perpetrators are prosecuted and, where appropriate, punished through a judicial process.¹³ Impunity stemming from, for example, unreasonably short statutes of limitations or blanket amnesties (de jure impunity), or from prosecutorial inaction or political interference (de facto impunity), is incompatible with this duty.¹⁴ A failure to respect the duty to investigate is a breach of the right to life. Investigations and prosecutions are essential to deter future violations and to promote accountability, justice, the rights to remedy and to the truth, and the rule of law.¹⁵

9. Depending on the circumstances, States also have a duty to cooperate internationally in investigations of potentially unlawful death, in particular when it concerns an alleged international crime such as extrajudicial execution.¹⁶

[...]

emergency threatening the life of the nation, States Parties may derogate from full observance of the right to life (Article 2) for lawful acts of war only and to the extent strictly required by the exigencies of the situation, provided that any measures are not inconsistent with their other obligations under international law.

10 Art. 6, ICCPR; Art. 2, ECHR; Art. 4, 1969 American Convention on Human Rights; and Art. 4, 1981 African Charter on Human and Peoples' Rights.

11 Art. 5, 2004 Arab Charter on Human Rights.

12 *McCann and others v. United Kingdom*, judgement of 27 September 1995, series A, No. 324, para. 161; IACtHR, *Montero-Aranguren and others (Detention Center of Catia) v. Venezuela*, Judgment, 5 July 2006, para. 66; African Commission on Human and Peoples' Rights (ACHPR), General Comment No. 3 on the Right to Life, November 2015, paras. 2, 15; Human Rights Committee, General Comment No. 31, *supra* note 5, paras. 15 and 18.

13 UN Commission on Human Rights, Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (Updated Principles to Combat Impunity), E/ CN.4/2005/102/Add.1, 8 February 2005, Principle 1.

14 See, Human Rights Committee, General Comment No. 31, *supra* note 5, para. 18.

15 Report of the Special Rapporteur, Christof Heyns, A/70/304, 7 August 2015; UN Basic Principles and Guidelines on the Right to Remedy and Reparation, *supra* note 8, preamble..

16 See, e.g., IACtHR, *La Cantuta v. Peru*, Judgment, 29 November 2006, para. 160.

C. *The Triggering and Scope of the Duty to Investigate*

15. A State's duty to investigate is triggered where it knows or should have known of any potentially unlawful death, including where reasonable allegations of a potentially unlawful death are made.¹⁷ The duty to investigate does not apply only where the State is in receipt of a formal complaint.¹⁸

16. The duty to investigate any potentially unlawful death includes all cases where the State has caused a death or where it is alleged or suspected that the State caused a death (for example, where law enforcement officers used force that may have contributed to the death). This duty, which applies to all peacetime situations and to all cases during an armed conflict outside the conduct of hostilities, exists regardless of whether it is suspected or alleged that the death was unlawful. The duty to investigate potentially unlawful death caused during the conduct of hostilities is specifically addressed in Paragraph 21.

17. Where a State agent has caused the death of a detainee, or where a person has died in custody, this must be reported, without delay, to a judicial or other competent authority that is independent of the detaining authority and mandated to conduct prompt, impartial and effective investigations into the circumstances and causes of such a death.¹⁹ This responsibility extends to persons detained in prisons, in other places of detention (official or otherwise) and to persons in other facilities where the State exercises heightened control over their life. Owing to the control exercised by the State over those it holds in custody, there is a general presumption of state responsibility in such cases.²⁰ Without prejudice to the obligations of the State, the same presumption of responsibility will apply to the authorities managing private prisons. Particular circumstances in which the State will be held responsible for the death, unless it is proven to the contrary, include, for example, cases where the person suffered injury while in custody or where the deceased was, prior to his or her death, a political opponent of the government or a human rights defender; was known to be suffering from mental health issues; or committed suicide in unexplained circumstances. In any event, the State is under the obligation to provide all relevant documentation to the family of the deceased, including the death certificate, medical report and reports on the investigation held into the circumstances surrounding the death.²¹

18. Consonant with its responsibilities under international law, the State also has a duty to investigate all potentially unlawful death caused by individuals, even if the State cannot be held responsible for failing to prevent such deaths.²²

19. The duty to investigate applies wherever the State has a duty to respect, protect and/or fulfil the right to life, and in relation to any alleged victims or perpetrators within the territory of a state or otherwise subject to a state's jurisdiction.²³ Each State should ensure that an appropriate avenue is available for allegations of potentially unlawful death to be made and for relevant information to

17 *Ergi v. Turkey*, *supra* note 51, para. 82; *Isayeva v. Russia*, *supra* note 52, paras. 208–09; IACtHR, *Montero-Aranguren v. Venezuela*, *supra* note 12, para. 79.

18 See the UN *Standard Minimum Rules for the Treatment of Prisoners* (the “Nelson Mandela Rules”), adopted by UN General Assembly Resolution 70/175 of 17 December 2015, Rule 71(1).

19 Report of the Special Rapporteur, Philip Alston, A/61/311, 5 September 2006, paras. 49–54.

20 Human Rights Committee, *Barbato v. Uruguay*, Views (Comm. No. 84/1981), CCPR/C/OP/2 at 112 (1990), para. 9.2.

21 ECtHR, *Opuz v. Turkey*, Judgment, 9 June 2009, para. 150.

22 See, e.g., Human Rights Committee, General Comment No. 31, *supra* note 5, para. 10; ACHPR, General Comment No. 3, *supra* note 12. See also ECtHR, *Hassan v. UK*, Judgment (Grand Chamber), 16 September 2014, para. 78.

23 See, e.g., *Jaloud v. The Netherlands*, *supra* note 53, para. 164: “It is clear that where the death to be investigated occurs in circumstances of generalised violence, armed conflict or insurgency, obstacles may be placed in the way of investigators ... Nonetheless, even in difficult security conditions, all reasonable steps must be taken to ensure that an effective, independent investigation is conducted into alleged breaches of the right to life.”

be provided. Where the duty to investigate applies, it applies to all States that may have contributed to the death or which may have failed to protect the right to life.

20. The duty to investigate a potentially unlawful death – promptly, effectively and thoroughly, with independence, impartiality and transparency – applies generally during peacetime, situations of internal disturbances and tensions, and armed conflict. In the context of armed conflict, the general principles set out in Paragraphs 15–19 and 22–33 must, however, be considered in light of both the circumstances and the underlying principles governing international humanitarian law (IHL). Certain situations, such as armed conflict, may pose practical challenges for the application of some aspects of the Protocol’s guidance.²⁴ This is particularly the case with regard to the obligation on a State, as opposed to another actor, to investigate deaths linked to armed conflict when they occur on territory the State does not control. Where context-specific constraints prevent compliance with any part of the guidance in this Protocol, the constraints and reasons for non-compliance should be recorded and publicly explained.

21. Where, during the conduct of hostilities, it appears that casualties have resulted from an attack, a post-operation assessment should be conducted to establish the facts, including the accuracy of the targeting.²⁵ Where there are reasonable grounds to suspect that a war crime was committed, the State must conduct a full investigation and prosecute those who are responsible.²⁶ Where any death is suspected or alleged to have resulted from a violation of IHL that would not amount to a war crime, and where an investigation (“official inquiry”) into the death is not specifically required under IHL, at a minimum further inquiry is necessary. In any event, where evidence of unlawful conduct is identified, a full investigation should be conducted.

D. Elements and Principles of Investigations

1. Elements of the duty to investigate

22. International law requires that investigations be: (i) prompt; (ii) effective and thorough; (iii) independent and impartial; and (iv) transparent.²⁷

24 See The Public Commission to Examine the Maritime Incident of 31 May 2010, Second Report: Turkel Commission, “Israel’s mechanisms for examining and investigating complaints and claims of violations of the laws of armed conflict according to international law”, February 2013 (hereafter Turkel II), paras. 48-50, pp. 102-03.

25 See *ibid.*

26 For a discussion of the duty to investigate violations of international humanitarian law (IHL) see ICRC Customary IHL Study, Rule 158 (Prosecution of War Crimes): “States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory... They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.” In the case of grave breaches of the Geneva Conventions, the exercise of universal jurisdiction is mandatory. See the 1949 Geneva Conventions: Geneva I, Art. 49; Geneva II, Art. 50; Geneva III, Art. 129; Geneva IV, Art. 146; the 1977 Additional Protocol I, Art. 85; and see also the Basic Principles and Guidelines on the Right to a Remedy and Reparation, *supra* note 8; Report of the Special Rapporteur, Christof Heyns, A/68/382 13 September 2013, para. 101. See also, e.g., Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, A/68/389, 18 September 2013, para. 42.

27 See Human Rights Committee, General Comment No. 31, *supra* note 5, para. 15; UN Fact-Finding Mission on the Gaza Conflict, *supra* note 6, para. 1814; see also Basic Principles, *supra* note 2, Principles 22 and 23; IACtHR, *Gómez Palomino v. Peru*, Judgment, 22 November 2005, para. 79ff; and *Landaeta Mejías Brothers and others v. Venezuela*, Judgment, 27 August 2014, para. 254; ACHPR, *Amnesty International and others v. Sudan*, 15 November 1999, para. 51; ACHPR, General Comment No. 3, *supra* note 12, para. 7; ICPED, Art. 12(1).

i. Prompt

23. The rights to life and to an effective remedy are violated when investigations into potentially unlawful death are not conducted promptly.²⁸ Authorities must conduct an investigation as soon as possible and proceed without unreasonable delays.²⁹ Officials with knowledge of a potentially unlawful death must report it to their superiors or proper authorities without delay.³⁰ The duty of promptness does not justify a rushed or unduly hurried investigation.³¹ The failure of the State promptly to investigate does not relieve it of its duty to investigate at a later time: the duty does not cease even with the passing of significant time.

ii. Effective and thorough

24. Investigations of any potentially unlawful death or enforced disappearance must be effective and thorough. Investigators should, to the extent possible, collect and confirm (for example by triangulation) all testimonial, documentary and physical evidence. Investigations must be capable of: ensuring accountability for unlawful death; leading to the identification and, if justified by the evidence and seriousness of the case, the prosecution and punishment of all those responsible;³² and preventing future unlawful death.

25. Investigations must, at a minimum, take all reasonable steps to:

- a) Identify the victim(s)
- b) Recover and preserve all material probative of the cause of death, the identity of the perpetrator(s) and the circumstances surrounding the death³³
- c) Identify possible witnesses and obtain their evidence in relation to the death and the circumstances surrounding the death
- d) Determine the cause, manner, place and time of death, and all of the surrounding circumstances. In determining the manner of death, the investigation should distinguish between natural death, accidental death, suicide and homicide;³⁴ and
- e) Determine who was involved in the death and their individual responsibility for the death. It will almost always be the case that these aims will be materially assisted in some way by the performance of an autopsy. A decision not to undertake an autopsy should be justified in writing and should be subject to judicial review. In the case of an enforced disappearance, an investigation must seek to determine the fate of the disappeared and, if applicable, the location of their remains.³⁵

26. The investigation must determine whether or not there was a breach of the right to life. Investigations must seek to identify not only direct perpetrators but also all others who were responsible for the death, including, for example, officials in the chain of command who were

28 IACtHR, *Garibaldi v. Brazil*, Judgment, 23 September 2009, para. 39. For the requirement during armed conflict, see, e.g., Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, A/HRC/29/CRP.4, 24 June 2015, para. 625; Turkel II, *supra* note 24, Recommendation 10, para. 66, p. 399.

29 Turkel II, *supra* note 24, paras. 37, 63–66; pp. 385, 397–99.

30 IACtHR, *Anzualdo Castro v. Peru*, Judgment, 22 September 2009, para. 134.

31 ECtHR, *Pomilyayko v. Ukraine*, Judgment, 11 February 2016, para. 53.

32 Human Rights Committee, *José Antonio Coronel and others v. Colombia* (Comm. No. 778/1997), 24 October 2002; *Sathasivam v. Sri Lanka*, (Comm. No. 1436/2005), 8 July 2008; and *Abubakar Amirov and others v. Russia* (Comm. No. 1447/2006), 2 April 2009. Working Group on Enforced or Involuntary Disappearances, General Comment on the Right to the Truth in Relation to Enforced Disappearances, para. 5.

33 This should include telephone logs or reports, as well as digital evidence contained on mobile telephones, computers, cameras and other electronic devices.

34 IACtHR, *Véliz Franco and others v. Guatemala*, 2011, para. 191.

35 See ICPED, Art. 24(2) and (3).

complicit in the death. The investigation should seek to identify any failure to take reasonable measures which could have had a real prospect of preventing the death. It should also seek to identify policies and systemic failures that may have contributed to a death, and identify patterns where they exist.³⁶

27. An investigation must be carried out diligently and in accordance with good practice.³⁷ The investigative mechanism charged with conducting the investigation must be adequately empowered to do so. The mechanism must, at a minimum, have the legal power to compel witnesses and require the production of evidence,³⁸ and must have sufficient financial and human resources, including qualified investigators and relevant experts.³⁹ Any investigative mechanism must also be able to ensure the safety and security of witnesses, including, where necessary, through an effective witness protection programme.

iii. Independent and impartial

28. Investigators and investigative mechanisms must be, and must be seen to be, independent of undue influence. They must be independent institutionally and formally, as well as in practice and perception, at all stages. Investigations must be independent of any suspected perpetrators and the units, institutions or agencies to which they belong. Investigations of law enforcement killings, for example, must be capable of being carried out free from undue influence that may arise from institutional hierarchies and chains of command. Inquiries into serious human rights violations, such as extrajudicial executions and torture, must be conducted under the jurisdiction of ordinary civilian courts. Investigations must also be free from undue external influence, such as the interests of political parties or powerful social groups.

29. Independence requires more than not acting on the instructions of an actor seeking to influence an investigation inappropriately. It means that the investigation's decisions shall not be unduly altered by the presumed or known wishes of any party.

30. Investigators must be able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference, and must be able to operate free from the threat of prosecution or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics. This applies equally to lawyers, whatever their relationship to the investigation.⁴⁰

31. Investigators must be impartial and must act at all times without bias. They must analyse all evidence objectively. They must consider and appropriately pursue exculpatory as well as inculpatory evidence.

36 For example, in order to establish the element of “widespread or systematic”, evidence of the same chronology of events in different towns could be valuable (e.g. the arming of certain groups within the area, the arrival of paramilitaries into an area shortly before mass killings, communication and interaction between military and paramilitary groups, action by the military in support of paramilitary groups (e.g. shelling in advance of ground movement by paramilitaries), the establishment of detention facilities as part of a take-over plan, transfer of prisoners in an organized way between detention facilities in different towns, advanced preparation of mass graves, or templated paperwork used for the arrest, detention and transfer of prisoners).

37 See, e.g., Human Rights Committee, *Abubakar Amirov and others v. Russia*, paras. 11.4 ff.; IACtHR, *Rodríguez Vera and others (The Disappeared from the Palace of Justice) v. Colombia*, Judgment, 14 November 2014, para. 489.

38 ECtHR, *Paul and Audrey Edwards v. UK*, Judgment, 14 March 2002.

39 IACtHR, “*Mapiripán Massacre*” *v. Colombia*, Judgment, 15 September 2005, para. 224.

40 UN Basic Principles on the Role of Lawyers, Principles 16 and 17.

iv. Transparent

32. Investigative processes and outcomes must be transparent, including through openness to the scrutiny of the general public⁴¹ and of victims' families. Transparency promotes the rule of law and public accountability, and enables the efficacy of investigations to be monitored externally. It also enables the victims, defined broadly, to take part in the investigation.⁴² States should adopt explicit policies regarding the transparency of investigations. States should, at a minimum, be transparent about the existence of an investigation, the procedures to be followed in an investigation, and an investigation's findings, including their factual and legal basis.

33. Any limitations on transparency must be strictly necessary for a legitimate purpose, such as protecting the privacy and safety of affected individuals,⁴³ ensuring the integrity of ongoing investigations, or securing sensitive information about intelligence sources or military or police operations. In no circumstances may a state restrict transparency in a way that would conceal the fate or whereabouts of any victim of an enforced disappearance or unlawful killing, or would result in impunity for those responsible.

In his 2015 report to the General Assembly on the—then ongoing—revision of the Minnesota Protocol, Special Rapporteur Heyns tracked the development of the duty to investigate, prosecute, and punish in both international human rights law and international humanitarian law, and dealt with its treatment in various regional mechanisms.

Report to the General Assembly (A/70/304, 7 August 2015, ¶¶20-33)

20. Investigations into suspected violations of the right to life are necessary if respect for the right is to be ensured and to prevent the development of a climate of impunity. States have a duty under international law to investigate allegations of violations.

1. International human rights law

21. International human rights law mandates investigation when its norms have been breached. In particular, in article 2 (2) of the International Covenant on Civil and Political Rights, States are required to “adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant”. The Human Rights Committee, in general comment No. 31, noted 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 Covenant”.⁴⁴

22. The Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions likewise call for “thorough, prompt and impartial investigation of all suspected cases of extralegal, arbitrary and summary executions, including cases where complaints by relatives or other reliable reports suggest unnatural death”. The Principles stipulate that Governments must maintain investigative offices and procedures to undertake such inquiries. They then elaborate the purpose of the investigation, namely “to determine the cause, manner and time of death, the person responsible, and any pattern or practice which may have brought about that death”. Investigations should include “an adequate autopsy, collection and analysis of

41 A victim's immediate family “must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests”. Report of the Special Rapporteur, Philip Alston, A/65/321, 23 August 2010; ECtHR, *Hugh Jordan v. UK*, Judgment, 4 May 2001, para. 109. See also ACHPR, General Comment No. 3, *supra* note 12, para. 7.

42 See ICPEP, Arts. 12 and 24.

43 Under Art. 137 of 1949 Geneva Convention IV, information concerning a protected person, including about his/her death, may be withheld by the Information Bureau if transmission is “detrimental” to the relatives.

44 See Human Rights Committee, General Comment No. 31, *supra* note 5, para. 15.

all physical and documentary evidence and statements from witnesses” and should “distinguish between natural death, accidental death, suicide and homicide”.⁴⁵

23. The form of the necessary investigations, particularly of those concerning the use of force by State agents, has been elaborated in other documents. For example, the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials requires Governments and law enforcement agencies to “ensure that an effective review process is available and that independent administrative or prosecutorial authorities are in a position to exercise jurisdiction in appropriate circumstances”. In cases where death or serious injury have resulted from law enforcement operations, officials must send a detailed report “promptly to the competent authorities responsible for administrative review and judicial control”. Those affected by the alleged violation, their family or their legal representatives must enjoy access to an independent process, including a judicial process.⁴⁶

24. In several decisions concerning the right to life or physical integrity, the Human Rights Committee has held that the failure to investigate and punish the perpetrators constitutes a violation of the Covenant. For instance, in *Bautista de Arellana v. Colombia*, the Committee held that the State party “is under a duty to investigate thoroughly alleged violations of human rights, and in particular forced disappearances of persons and violations of the right to life, and to prosecute criminally, try and punish those held responsible for such violations”.⁴⁷

25. Regional human rights bodies have made similar findings. The European Court of Human Rights found in *McKerr v. the United Kingdom* that “the obligation to protect the right to life under article 2 of the Convention [for the Protection of Human Rights and Fundamental Freedoms], read in conjunction with the State’s general duty under article 1 of the Convention to ‘secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention’, also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force”.⁴⁸ The Court highlighted a number of requirements for investigations. Governmental authorities must take “whatever reasonable steps they can to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death”.⁴⁹ The Court also noted that the next of kin must be involved in the process as necessary.⁵⁰

26. In *Ergi v. Turkey*, which involved clashes between Turkey and Kurdish rebels, the Court similarly held that “neither the prevalence of violent armed clashes nor the high incidence of fatalities can displace the obligation under article 2 to ensure that an effective, independent investigation is conducted into the deaths arising out of clashes with security forces”.⁵¹ Similarly, in *Isayeva v. Russia*, the Court held that the protection of article 2 continued to imply that there should be some form of effective judicial investigation when individuals have been killed as a result of the use

45 1989 UN Principles, *supra* note 2.

46 *Basic Principles*, *supra* note 2.

47 Human Rights Committee, communication No. 563/1993, *Bautista de Arellana v. Colombia*, views adopted on 27 October 1995, para. 8.6.

48 European Court of Human Rights (ECtHR), *McKerr v. the United Kingdom*, Application No. 28883/95, judgement of 4 May 2001, para. 111. This finding reinforced the decisions concerning the requirement to investigate uses of force resulting in death previously found, for example, in *See McCann and Others v. United Kingdom*, European Court of Human Rights, Appl. No. 18984/91, 27 September 1995, para. 161 and *Kaya v. Turkey*, case No. 158/1996/777/1978, judgement of 19 February 1998, paras. 85-86.

49 See *McKerr v. United Kingdom*, *supra* note 48, para. 113.

50 *Ibid.*, para. 115.

51 ECtHR, *Ergi v. Turkey*, case No. 66/1997/850/1057, judgement of 28 July 1998, para. 85.

offorce in the context of armed conflict, namely indiscriminate shelling in Chechnya.⁵² In *Jaloud v. the Netherlands*, the Court underlined the extraterritorial nature of the duty to investigate under article 2, including in armed conflict.⁵³

27. Other human rights tribunals have arrived at comparable conclusions, both regarding the link between the absence of a credible investigation and impunity and the substantive requirements for credibility. Collectively, international human rights courts have elaborated a series of principles that such an investigation should observe, including that authorities must act on their own motion, act with independence, be effective and prompt.⁵⁴

2. International humanitarian law

28. As noted above, the human rights law obligation to investigate violations of the right to life continues to apply during armed conflict albeit interpreted, during the conduct of hostilities, with reference to the complementary principles of international humanitarian law.⁵⁵

29. However, in addition, humanitarian law imposes its own obligation to investigate. Common article 1 of the four Geneva Conventions requires that parties “undertake to respect and to ensure respect for the present Convention in all circumstances”.

30. Article 146 of the Fourth Geneva Convention stipulates that each party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, “grave breaches”, and shall bring such persons, regardless of their nationality, before its own courts. Alternatively, it may hand such persons over for trial to another party concerned, provided that that party has made out a *prima facie* case.

31. Article 87 (3) of Protocol I to the Geneva Conventions states that parties to the conflict “shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof”. In its commentary on the Protocols, the International Committee of the Red Cross (ICRC) expressly contemplates investigations conducted by the commander, who would in such cases “act like an investigating magistrate”.⁵⁶ As emphasized in the commentary, whether concerned with military operations, occupied territories or places of internment, “the necessary measures for the proper application of the Conventions and the Protocol must be taken at the level of the troops, so that a fatal gap between the undertakings entered into by parties to the conflict and the conduct of individuals is avoided”.⁵⁷ Thus, article 87 imposes a duty on members of the armed forces to act proactively in the face of potential or possible international humanitarian law violations.⁵⁸

52 ECtHR *Isayeva, Yusopva and Bazayeva v. Russia*, case Nos. 57947/00; 57948/00; 57949/00, Judgment, 24 February 2005.

53 ECtHR, *Jaloud v. the Netherlands*, application No. 47708/08, judgement of 20 November 2014.

54 In addition to the European jurisprudence discussed above, see generally Inter-American Court of Human Rights (I-ACtHR), *Case of the Ituango Massacres v. Colombia*, judgement of 1 July 2006; *Case of the “Mapiripán Massacre” v. Colombia*, judgement of 15 September 2005; and *Case of González et al (“Cotton Field”) v. Mexico*, judgement of 16 November 2009.

55 See discussion of the examples of the *Isayeva v. Russia* and *Jaloud v. the Netherlands* cases above.

56 ICRC, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Geneva, Martinus Nijhoff Publishers, 1987), para. 3562.

57 Ibid., para. 3550.

58 Michael N. Schmitt, “Investigating violations of international law in armed conflict”, *Harvard National Security Journal*, 2:1 (2011)

32. Organs of the United Nations have repeatedly cited the obligation to investigate and prosecute war criminals, ever since the very first session of the General Assembly in 1946, when it called upon States to apprehend war criminals and return them to those States where the offences were committed.⁵⁹ More recently, in 2005, the General Assembly adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. Paragraph 3 provides that “the obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, *inter alia*, the duty to ... investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law”.⁶⁰

33. Although not explicitly included in Protocol II to the Geneva Conventions, the inclusion of the notion of command responsibility for failure to prosecute in the statute of the International Criminal Tribunal for Rwanda supports the idea of general applicability to non-international armed conflicts.⁶¹

The following country extracts demonstrate how the mandate dealt with these core state obligations in various factual contexts. In the case of this communication to Israel, Special Rapporteur Alston alerted the Government to potential flaws caused by a lengthy delay during the investigation:

Allegation letter sent to the Government of Israel (27 September 2005)

Allegation letter sent regarding the recent decision by your Ministry of Justice to close all investigations into the killing of 13 men by police forces during riots in October 2000.

In this respect, I would like to recall that at the outbreak of these disturbances, on 3 October 2000, my predecessor as Special Rapporteur on extrajudicial, summary or arbitrary executions addressed an urgent appeal to your Excellency’s Government, urging your Government “to ensure that government forces are immediately ordered to act with restraint and to respect international human rights standards when carrying out their duties” ... Finally, the then Special Rapporteur urged that “[a]ll incidents of alleged killings by government forces must be investigated without delay and the persons responsible ... be brought to justice”. In its reply dated 10 October 2000, your Excellency’s Government assured the then Special Rapporteur that “[u]tmost restraint exemplifies the conduct of the Israeli forces throughout these incidents, in conformity with international standards and even far beyond”.

As mentioned above, my purpose in writing to you today, however, is to bring to the attention of your Excellency’s Government concerns regarding the investigation of 13 instances of lethal police shooting that did occur during those days, and to receive information from the Government in this respect. On the basis of the information I have received, the relevant facts regarding investigations into the death of the 13 men may be summarised as follows:

On 2 October 2000, protests broke out in numerous locations in Galilee. These disturbances saw young men, Arab Israelis and Palestinians, hurling stones at the security forces. On several occasions, the police opened fire on the protestors, using both rubber bullets and live ammunition. The police killed 13 men, 12 Arab Israeli citizens and a Palestinian.

⁵⁹ General Assembly resolution 3(I).

⁶⁰ General Assembly resolution 60/147, annex, para. 3 (b).

⁶¹ See Schmitt, “Investigating violations of international law” *supra* note 58. Also see International Tribunal for the Former Yugoslavia, *Prosecutor v. Tadic*, case No. IT-94-I-I (2 Oct. 1995).

During the months from October 2000 to May 2001, the Police Investigations Department (PID) of the Ministry of Justice took some initial steps to investigate the deaths. Due also to the ongoing disturbances, the investigators did not go to the scene of several of the incidents before the evidence was destroyed, autopsies were carried out only in some of the cases, and many of the police officers involved in the clashes that had resulted in lethal shootings were not heard. This investigation came to a halt in May 2001, when the state prosecutor ordered the PID not to carry out a separate investigation during the hearings of the commission on inquiry that had in the meantime been set up by the Government.

On 8 November 2000, the Government had decided to appoint a commission of inquiry to investigate what occurred during the riots. The commission, headed by a member of the Supreme Court, justice Theodor Or, submitted its report in September 2003. It found that the police had repeatedly had recourse to excessive force in order to quell the riots. Among other findings, the commission concluded that the commander of the police's Northern District at the time and the former Amakim District police chief had issued directives to snipers to open fire on stone-throwing protesters in several instances. The commission also found that the Misgav police station commander could have prevented clashes with the rioters and that he used live fire without justification, causing the death of two civilians and the wounding of others. The commission recommended that the PID open criminal investigations into ten separate instances of shooting deaths during the riots.

After the publication of the commission report, the PID restarted its investigation. During this probe, hundreds of policemen and civilians who were present at the scene of the incidents were questioned. After close to two years of investigation, in September 2005 the PID has concluded that there is not sufficient evidence to indict anyone for the killings. In some of the cases identified as unjustified use of lethal force by the commission of inquiry, the PID concludes that in fact the use of lethal force was justified (e.g. on the ground of a different assessment of the risks faced by the police officers at the time of the shooting). In other instances, the PID concludes that the firing was illegal, but is unable to identify those responsible. The PID adduces numerous reasons for its inability to gather sufficient evidence to raise criminal charges, among them:

- Investigation teams did not reach the scenes soon enough after the incident and did not attempt to collect evidence shortly thereafter as the fierce violence during the riots would have endangered the investigators had they tried to do so.
- In some cases, investigators were unable to locate the police officers involved in the riots. In other instances, they were unable to determine which police officer was responsible for the gunfire that killed the rioters.
- The families of those killed did not cooperate with the investigation, in particular they did not agree to the PID's requests (made at the end of the year 2003) to disinter the victims to allow an autopsy.

In reply to some of these arguments, it has been pointed out that:

- it was the state prosecutor who ordered the PID to stop all investigations in May 2001, and allowed their resumption only in September 2003, three years after the killings;
- the exhumation of the victims and the autopsies, while offensive to the feelings of piety of the victims' families, were unlikely to yield any results significant to the investigation. Some of those killed in October 2000 were hit by rubber bullets, which cannot be matched up with a specific gun. All were buried without coffins, and contact with the earth is liable to make also metal bullets useless for the purpose of laboratory tests. The PID itself admitted in court that any information obtained from the bodies was liable to be partial.
- where an autopsy had been carried out immediately after the killing and the commission of inquiry concluded that charges should be raised, the PID decided nonetheless not to

initiate criminal proceedings. The autopsy report on Musalah Abu Jarad of Umm al-Fahm, for instance, determines that he was killed on 2 October 2000 by a sniper's bullet. The commission of inquiry report identifies the source of the firing, noting that the commander of the Police's Northern District took responsibility for deploying snipers during the incident in which Musalah was killed. It also finds that the deployment of snipers and the orders to open fire were excessive. The PID, however, concludes that it is impossible to determine, with the level of certainty needed for a criminal proceeding, that the deployment of snipers and orders for opening fire were improper.

- in other cases, exhumation was requested although it would appear that the available evidence is sufficient to raise charges. In the case of the shooting of Asil Asala, for instance, the Commission report notes that at the time of his death he was surrounded by three uniformed policemen, indicating their names. (My predecessor as Special Rapporteur sought clarification from your Government on this specific case in a letter dated 23 October 2000, which has remained without a reply to date).

To sum up, five years after the fatal shooting of 13 Arab men by Israeli police forces, and after a commission of inquiry set up by your Excellency's Government concluded that the use of force in these cases had been excessive, a decision has been taken by the Government not to hold anyone accountable for their deaths.

[...]

In the present case, it is undisputed that your Government has investigated at length whether the use of lethal force was proportionate to the requirements of law enforcement. However, one of the reasons adduced for the loss of evidence that would have been essential to issuing indictments is that the PID investigations were on hold from May 2001 to September 2003. The decision of the state prosecutor to order a halt to the investigations in May 2001 was reportedly intended to allow the various witnesses to share all the information at their disposal with the commission of inquiry without fearing a criminal investigation. The conclusion of the commission of inquiry that in some instances the use of lethal force was not justified, based on three years of inquiry and a report of more than 800 pages, is now disavowed by the PDI on the ground that it is no longer possible to determine whether the use of lethal force was disproportionate and, if so, who is responsible for that disproportionate use of lethal force. This outcome – and particularly the way in which the interplay of commission inquiry and PDI investigation have produced it – would appear to fall short of the international standards referred to above.

I therefore urge your Government to subject the decision of the Police Investigations Department to stringent review and to examine requests of or on behalf of the victims' families to reconsider this decision with the greatest attention and an open mind.

Response of the Government of Israel (18 January 2006)

The Government of Israel responded that on September 18, 2005 the head of the Justice Ministry's Police Investigations Department's decisions concerning the October 2000 incidents were released. The investigations resulted in lack of evidence and unknown offenders (and in regard to one injury, the finding of "no Offence"). Following several requests for re-examination of the decisions, and based on the abovementioned and due to the high sensitivity of the issue, which deserves further examination, the Attorney General, the State Attorney and the director of the department reached the conclusion that it would be advisable to initiate an appeal process, which will be carried out by the deputy state attorney (special functions). This appeal is intended to re-consider a previous decision to close this file. I would like to underline that the appeal procedure is applied as an exercise of the right to criticism and reconsideration of the decisions of legal authorities. The results of this procedure will be transmitted to the Special Rapporteur when they are published.

In other cases, the Special Rapporteurs were alerted to the fact that no investigation was taking place into a particular incident or into a pattern of incidents at all. In 2008, Special Rapporteur Alston reminded the government of Pakistan that a failure to punish “honour” killings was to acquiesce in the practice.

Allegation letter sent to the Government of Pakistan (8 September 2008) (with the Special Rapporteur on violence against women, its causes and consequences and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment)

In this connection, we would like to draw the attention of your Government to allegations we have received concerning the killing of five women belonging to the Umrani tribe by burying them while still alive in Baba Kot, a village located 80 kilometres from Usta Mohammad City, Jafferabad district, Balochistan province.

[...]

To the extent that honour killings are not met with stringent punishments, the State acquiesces in the practice. Under international law, Pakistan has the legal obligation to ensure the right to life by effectively punishing those who commit murder. Article 6(1) of the International Covenant on Civil and Political Rights, which Pakistan signed on 17 April 2008, recognizes that every human being has the right not to be arbitrarily deprived of his or her life. Article 2(1) requires the State to ensure to all individuals within its territory the rights recognized in ICCPR, without distinction as to sex. Article 2(2) elaborates that each State Party must undertake all necessary steps to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the ICCPR.

In this context, we would like to draw your attention to the latest report of the Special Rapporteur on Torture to the Human Rights Council, A/HRC/7/3, in which he stated that “the concept of “acquiescence”, aside from the protection obligations, entails a duty for the State to prevent acts of torture in the private sphere and [...] the concept of due diligence should be applied to examine whether States have lived up to their obligations” (para. 64). Similarly, the Special Rapporteur on extrajudicial, arbitrary and summary executions noted in a report to the Commission on Human Rights, “Crimes, including murder, can also give rise to State responsibility in instances in which the State has failed to take all appropriate measures to deter, prevent and punish the perpetrators.” (E/CN.4/2005/7, para. 71.)

In his 2009 report to the Human Rights Council on his visit to the United States, Special Rapporteur Alston criticized the U.S. military for its lack of effective investigation in relation to killings occurring in the Afghanistan and Iraq conflicts.

Report on Mission to the United States of America (A/HRC/11/2/Add.5, 28 May 2009, ¶¶51-52)

(b) Lack of effective investigation and prosecution

51. While the U.S. military justice system has achieved a number of convictions for unlawful killings in Afghanistan and Iraq, numerous other cases have either been inadequately investigated or senior officers have used administrative (non-judicial) proceedings instead of criminal prosecutions. In cases in which criminal convictions were obtained, some sentences appear too light for the crime committed, and senior officers have not been held to account for the wrongful conduct of their subordinates.

52. The legal obligation to effectively punish violations is as vital to the rule of law in war as in peace. It is thus alarming when States either fail to investigate or permit lenient punishment of

crimes committed against civilians and combatants. The legal duty to investigate and punish violations of the right to life is not a formality. Effective investigation and prosecution vindicates the rights of the victims and prevents impunity for the perpetrators. Yet, based on the military's own documents, one study of almost 100 detainee deaths in U.S. custody between August 2002 and February 2006 found that investigations were fundamentally flawed, often violated the military's own regulations for investigations, and resulted in impunity and a lack of transparency into the policies and practices that may have contributed to the deaths.

In his 2012 report dedicated to the protection of the right to life of journalists, Special Rapporteur Heyns highlighted effective investigations as a key element in the fight against impunity for the killings of journalists.

Report to the Human Rights Council (A/HRC/20/22, 10 April 2012, ¶¶43-44)

43. Impunity, as has been noted, is widely recognized as one of the main causes of the continued killing of journalists. One of the elements of the right to life is accountability where a breach has occurred. It is an inherent aspect of the State's due-diligence obligation to prevent, punish, investigate and redress threats to and violations of the right to life.⁶² The Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions⁶³ provide that investigations in instances of extrajudicial executions are to be thorough, prompt and impartial and conducted by independent bodies.⁶⁴ Prosecutors are also required to act independently, impartially and expeditiously.⁶⁵ States are obliged to enable prosecutors to act independently and free from interference, including, where necessary, ensuring the safety of prosecutors.⁶⁶

44. The European Court of Human Rights has determined that an investigation: should be initiated by the State of its own volition; should be independent, effective, sufficiently open to public scrutiny and reasonably prompt; and should involve the next of kin/family.⁶⁷ Additionally, any deficiency in the investigation which undermines its ability to identify the perpetrator or perpetrators will risk falling foul of this standard.⁶⁸ A parallel jurisprudence has been developed by the Inter-American Court of Human Rights and in the African Commission on Human and Peoples' Rights.⁶⁹ Impunity, in other words, in itself can also constitute a violation of the right to life.⁷⁰

62 See Human Rights Committee general comment No. 6 (1982) on the right to life; Human Rights Committee communication No. 161/1983, *Herrera Rubio v. Colombia*, Views adopted on 2 November 1987, para. 10.3; E/CN.4/2005/7, *supra* note 3, paras. 72-75.

63 Economic and Social Council resolution 1989/65.

64 Principles 7 and 9. See also *McCann v. United Kingdom*, *supra* note 48, paras. 161-164 and Human Rights Committee communication No. 146/1983, *Baboeram-Adhin et al v. Suriname*, Views adopted on 4 April 1985. See also Human Rights Committee general comment No. 6; E/CN.4/2005/7, *supra* note 3, paras. 72-75; and *Velasquez Rodríguez v. Honduras*, *Annual Report of the Inter-American Court of Human Rights*, OAS/Ser. L/V./III.19, doc. 13 (1988), 28 ILM (1989) 291.

65 Guidelines on the Role of Prosecutors, paras. 12-13.

66 *Ibid.*, para. 5.

67 See in particular *Tanrikulu v. Turkey*, Application No. 26763/94, Judgement of 8 July 1999; *Osman v. United Kingdom*, Application No. 23452/94, Judgement of 28 October 1998; *Ergi v. Turkey*, *supra* note 51; and *Nachova and others v. Bulgaria*, Application Nos. 43577/98 and 43579/98, Judgement of 26 February 2004 (endorsed by the Grand Chamber in its Judgement of 6 July 2005). See also, for example, *Piersack v. Belgium*, Application No. 8692/79, Judgement of 1 October 1982.

68 ECtHR, *Ramsahai and others v. Netherlands*, Application No. 52391/99, Judgement of 15 May 2007, para. 324.

69 Inter-American Court of Human Rights, *Mack Chang v. Guatemala*, Judgement of 25 November 2003; *Velasquez Rodríguez v. Honduras*, *supra* note 64; and African Commission on Human and Peoples' Rights, Communication No. 87/93, *The Constitutional Rights Project v. Nigeria* (1995), para. 14.

70 Human Rights Committee, General comment No. 31, *supra* note 5, para. 18.

2. Duty to provide a remedy

States must ensure appropriate remedies to the families of victims of extrajudicial executions in cases of official responsibility for killings, and ensure adequate access to civil remedies for victims' families in cases of private actor abuse.

The legal obligation arises from the basic responsibility of states to make full reparations for injuries caused by their internationally wrongful acts, as well as specific requirements to provide reparations for human rights violations and violations of the right to life as set out in the International Covenant on Civil and Political Rights, and by the Economic and Social Council, the Human Rights Committee, and the Commission on Human Rights.⁷¹ The Minnesota Protocol also restates states' obligations in this area.

An important part of redress for right to life violations is providing adequate information to the victim and their families. The right to truth, as it is commonly known, is frequently invoked in relation to enforced disappearances. At the United Nations level, the Committee on Enforced Disappearances and the Working Group on Enforced or Involuntary Disappearances have been pivotal in promoting this right. The Minnesota Protocol cites both of these bodies in its declaration of the legal standards surrounding states' duty to provide information.

The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016): The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (2017, ¶¶10-14, 35-37)

B. Accountability and Remedy

10. Persons whose rights have been violated have the right to a full and effective remedy.⁷² Family members of victims of unlawful death have the right to equal and effective access to justice; to adequate, effective and prompt reparation;⁷³ to recognition of their status before the law;⁷⁴ and to have access to relevant information concerning the violations and relevant accountability mechanisms. Full reparation includes restitution, compensation, rehabilitation, guarantees of non-repetition, and satisfaction.⁷⁵ Satisfaction includes government verification of the facts and public disclosure of the truth, an accurate accounting for of the legal violations, sanctions against

71 In its General Comment 31 on the ICCPR, the Human Rights Committee stated: "16. [ICCPR] Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations."

72 See UN Basic Principles and Guidelines on the Right to Remedy and Reparation, *supra* note 8; Updated Principles to Combat Impunity, *supra* note 13, Principle 4; Art. 2(3), ICCPR.

73 Reparation includes restitution, compensation, rehabilitation, guarantees of non-repetition, and satisfaction. See, e.g. Working Group on Enforced or Involuntary Disappearances (WGEID), General Comment on Article 19 of the Declaration on the Protection of All Persons from Enforced Disappearance, E/CN.4/1998/43, paras. 68-75; and Report of the WGEID, A/HRC/22/45, 28 January 2013, paras. 46-68.

74 Art. 24(6) ICPED obliges States Parties to adopt adequate measures (for example, issuing certificates of absence due to enforced disappearance) to regulate the legal status of a disappeared person and his/her relatives in fields such as social welfare, family law and property rights. See WGEID, General comment on the right to recognition as a person before the law in the context of enforced disappearances, General Comment No. 11, 2011, in UN doc. A/HRC/19/58/Rev.1 (2012), para. 42.

75 See, e.g., Human Rights Committee, General Comment No. 31, *supra* note 5, paras. 15-17 and 19; Art. 24, ICPED; and Committee on Enforced Disappearance, *Yrusta v. Argentina*, Views (Comm. No. 1/2013), April 2016.

those responsible for the violations, and the search for the disappeared and for the bodies of those killed.⁷⁶

11. Family members have the right to seek and obtain information on the causes of a killing and to learn the truth about the circumstances, events and causes that led to it.⁷⁷ In cases of potentially unlawful death, families have the right, at a minimum, to information about the circumstances, location and condition of the remains and, insofar as it has been determined, the cause and manner of death.

12. In potential cases of enforced disappearance, under the International Convention for the Protection of All Persons from Enforced Disappearance families have the right, at a minimum, to information about the authorities responsible for the disappearance and deprivation of liberty, the dates and place of the disappearance, and any transfers, and the victim's whereabouts.⁷⁸ Determining the final whereabouts of the disappeared person is fundamental to easing the anguish and suffering of family members caused by the uncertainty as to the fate of their disappeared relative.⁷⁹ A violation is ongoing as long as the fate or whereabouts of the disappeared is not determined.⁸⁰

13. The right to know the truth⁸¹ extends to society as a whole, given the public interest in the prevention of, and accountability for, international law violations.⁸² 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.⁸³

14. In armed conflict, all parties must take all feasible measures to account for persons reported missing as a result of the conflict, and to provide family members with any information they have on the fate of their relatives.⁸⁴ In the event of death, all parties must use all means at their disposal to identify the dead, including by recording all available information prior to the disposal of the

⁷⁶ See UN Basic Principles and Guidelines on the Right to Remedy and Reparation, *supra* note 8, para. 22.

⁷⁷ See, e.g., UN General Assembly Resolution 68/165, adopted on 18 December 2013; ICPED Arts. 12 and 24(2); WGEID, General Comment on the right to the truth in relation to enforced disappearance, General Comment No. 10, in Report of the WGEID, A/HRC/16/48, 26 January 2011, para. 39. Inter-American Commission on Human Rights (IACHR), Report on the Demobilization Process in Colombia, OEA/Ser.L/V/II.120, Doc. 60, December 13, 2004, para. 18, citing, *inter alia*, IACHR, Annual Report of the Inter-American Commission on Human Rights 1985-86, OEA/Ser.L/V/II.68, Doc. 8 rev. 1, 26 September 1986, chap. V.

⁷⁸ Under the ICPED, a victim is not only the person who is subjected to enforced disappearance but "any individual who has suffered harm as the direct result" of the crime (ICPED, Art. 24). As a consequence, the family and the community to which the disappeared person belonged can all be regarded as victims under the Convention. See also ICPED, Art. 12.

⁷⁹ IACHR, Report on the Right to Truth in the Americas, August 2014; see also WGEID, General Comment on the right to the truth in relation to enforced disappearance, *supra* note 77, para. 4.

⁸⁰ ICPED, Arts. 18 and 24(6); and General Comment on enforced disappearance as a continuous crime, General Comment No. 9, in A/HRC/16/48, *supra* note 77, para. 39. Under Art. 24(1), for the purposes of the ICPED, "victim" means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance.

⁸¹ See, e.g., Art. 2, ICCPR and Art. 24, ICPED. See also Principles 2-5, Updated Principles to combat impunity, *supra* note 13; and see also Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening their Domestic Capacity to Combat All Aspects of Impunity, By Professor Diane Orentlicher, E/CN.4/2004/88, 27 February 2004 and Study on the Right to Truth, Report of the Office of the High Commissioner for Human Rights, E/CN.4/2006/91, 8 February 2006.

⁸² See, e.g., IACtHR, *Slaughter of the Rochela v. Colombia*, Judgment, 11 May 2007, para. 195; IACtHR, *Bámaca Velásquez v. Guatemala*, Judgment, 25 November 2000, para. 197.

⁸³ Tshwane Principles on National Security and the Right to Information, 2013, Principle 10.

⁸⁴ 1977 Additional Protocol to the 1949 Geneva Conventions, Relating to the Protection of Victims of International Armed Conflicts (1977 Additional Protocol I), Arts. 32, 33; ICRC Customary IHL Study, *supra* note 26, Rule 117.

body and by marking the location of graves; and in a situation of international armed conflict they must at least endeavour to facilitate the return of the remains of the deceased at the request of, *inter alia*, the next of kin.⁸⁵ Moreover, each Party to an international armed conflict has to establish an information bureau to forward any information regarding, among other things, the death of protected persons in its hands to the power to which these persons belong.⁸⁶

[...]

D. Elements and Principles of Investigations

3. The participation and protection of family members during an investigation

35. The participation of the family members⁸⁷ or other close relatives of a deceased or disappeared person is an important element of an effective investigation.⁸⁸ The State must enable all close relatives to participate effectively in the investigation, though without compromising its integrity. The relatives of a deceased person must be sought, and informed of the investigation. Family members should be granted legal standing, and the investigative mechanisms or authorities should keep them informed of the progress of the investigation, during all its phases, in a timely manner.⁸⁹ Family members must be enabled by the investigating authorities to make suggestions and arguments as to what investigative steps are necessary, provide evidence, and assert their interests and rights throughout the process.⁹⁰ They should be informed of, and have access to, any hearing relevant to the investigation, and they should be provided with information relevant to the investigation in advance. Where necessary to ensure that the family members are able to participate effectively, the authorities should provide funding for a lawyer to represent them. In the case of a child (and where there are no other relatives), a trusted adult or guardian (who may not be related to the deceased or disappeared person) may represent the interests of the child. In certain circumstances – for example, where family members are suspected perpetrators – these rights may be subject to restrictions, but only where, and to the extent, strictly necessary to ensure the integrity of the investigation.

36. Family members should be protected from any ill-treatment, intimidation or sanction as a result of their participation in an investigation or their search for information concerning a deceased or disappeared person. Appropriate measures should be taken to ensure their safety, physical and psychological well-being, and privacy.

37. Family members have specific rights in relation to human remains. When the identity of a deceased person has been determined, family members should be informed immediately and thereafter a notification of death posted in an easily accessible way. To the extent possible, family members should also be consulted prior to an autopsy. They should be entitled to have a representative present during the autopsy. Upon completion of the necessary investigative

85 ICRC, Customary IHL Study, *supra* note 26, Rules 116 and 114; 1949 Geneva Convention I, Arts. 16, 17; 1949 Geneva Convention II, Arts. 19, 20; 1949 Geneva Convention III, Art. 120; 1949 Geneva Convention IV, Arts. 129, 130; and 1977 Additional Protocol I, Art. 34.

86 1949 Geneva Convention I, Art. 16; 1949 Geneva Convention II, Art. 19; 1949 Geneva Convention III, Arts. 120, 122; 1949 Geneva Convention IV, Art. 136. Where relevant, this duty applies, *mutatis mutandis*, to enforced disappearance.

87 The term “family” in this Protocol should be understood broadly as applying to the relatives of the deceased.

88 Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, A/HRC/21/46, 9 August 2012, para. 54.

89 See, e.g., IACtHR, *Villagrán-Morales and others v. Guatemala*, Judgment, 19 November 1999, paras. 225, 227, 229.

90 UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Principle 16; IACHR, *Manuel Stalin Bolaños v. Ecuador*, Report No. 10/95, Case 10.580, 12 September 1995, para. 45.

procedures, human remains should be returned to family members, allowing them to dispose of the deceased according to their beliefs.

In 2010, Special Rapporteur Alston highlighted the lack of research surrounding the issue of compensation and other reparations in the armed conflict context.

Report to the Human Rights Council (A/HRC/14/24, 20 May 2010, ¶¶56-58, 84-89)

56. Whenever a State is responsible for an unlawful killing, international law requires reparations in the form of compensation and/or satisfaction. This obligation is based in general customary international law, as well as duties arising from human rights and humanitarian law. The State is also required to ensure that victims have access to remedies, including judicial remedies, for violations of their rights.

57. As a general matter, a great deal more can and must be done by States to meet their reparations obligations. Governments in many countries visited by the mandate, such as Kenya and Sri Lanka, have not met their obligations, either because they have not created reparations programmes, or because programmes are difficult for victims' families to access, or because tort remedies have undue jurisdictional impediments. Reparations should also be adequately provided for under post-conflict transitional justice mechanisms. This is often not the case (see A/HRC/14/24/Add.2).

[...]

I. Reparations for unlawful killings and amends for civilian harm

84. Human rights law, humanitarian law and the international law on State responsibility require that individuals should have an effective remedy when their rights are violated, and that the State must provide reparations for its own violations.⁹¹ States must ensure that victims' families are able to enforce their right to compensation, through judicial remedies where necessary. In many cases, reparations can mean the difference between the destitution of innocents and their families, and their ability to rebuild their lives and livelihoods.

85. Yet there is a dearth of legal and factual research on the precise content of States' legal obligations and how those obligations are, or should be, implemented in practice, as well as on emerging State practice relating to amends for lawful harm to civilians during conflict.

86. During visits to countries experiencing armed conflict or other large-scale violence, I have found that States rarely complied with their reparations obligations,⁹² although some States, such as the United States and the United Kingdom of Great Britain and Northern Ireland, have made commendable efforts.⁹³ Those efforts include monetary payments to the families of those killed even in lawful attacks. Such payments – unlike formal reparations – are offered without legal implication and as a gesture of condolence and respect. The Government of the United States also makes amends by providing livelihood assistance programmes to individuals (e.g. skills training

91 Human Rights Committee, General comment No. 31, *supra* note 5, para. 16; ICRC Customary IHL Study, *supra* note 26 Rule 150; and Official Records of the General Assembly, Fifty-Sixth Session, Supplement No. 10 (A/56/10), Draft articles on responsibility of States for internationally wrongful acts, para. 76.

92 Report of the Special Rapporteur, Philip Alston, Mission to Sri Lanka, E/CN.4/2006/53/Add.5, 27 March 2006 para. 75; Report of the Special Rapporteur, Philip Alston, Follow-up on Mission to Nigeria, A/HRC/8/3/Add.3, 14 May 2008 para. 63; and Report of the Special Rapporteur, Philip Alston, Mission to Kenya, A/HRC/11/2/Add.6, 26 May 2009, paras. 81-82.

93 Report of the Special Rapporteur, Philip Alston, Mission to Afghanistan, A/HRC/11/2/Add.4, 6 May 2009, paras. 37 and Report of the Special Rapporteur, Philip Alston, Mission to the United States of America, A/HRC/11/2/Add.5, 28 May 2009, paras. 67-68.

to enable widows to make a living) or communities (e.g. to repair damage caused by military operations). Most countries with combat troops in Afghanistan now offer monetary payments for lawful civilian harm, but programme implementation suffers from flaws, including a lack of common funding among International Security Assistance Force (ISAF) partners, inconsistency due to an over-reliance on commander discretion and different troop-contributing country rules and practices, lack of access for civilians seeking payments, lack of a formal ISAF programme, and a lack of transparency. Some other States have also announced amends programmes in different contexts. In March 2010, Yemen promised payments to civilians killed in counterterrorism operations. These examples illustrate an expanding practice which is not yet being systematically tracked or instituted by the international community.

87. Legal and factual research on extrajudicial killings and reparations in the context of armed conflict could:

- a) Clarify the forms and amounts that reparations currently take;
- b) Promote best practices in the form and amounts of reparations;
- c) Assess how best to facilitate victims' and family members' access to reparations;
- d) Study how to promote consistency in amounts paid;
- e) Assess what measures (such as repairing facilities or providing training) best address different kinds of losses;
- f) Assess how States should provide reparations for losses caused by their private security contractors;
- g) Study how States should best ensure transparency (consistent with individuals' privacy and security needs) about payments;
- h) Clarify the relationship between reparations and amends.

88. Comparable research on amends could:

- a) Document existing State practice, including in relation to civilian deaths, injuries and property damage through lawful acts;
- a) Promote best practices in terms of the form and amounts of amends such as monetary payments, livelihood assistance, community aid and rebuilding, and psychosocial efforts;
- b) Assess how best to facilitate victims' and family members' access to amends;
- c) Study how to ensure consistency and/or appropriate cultural context in amounts paid;
- d) Assess how parties to a conflict can ensure amends for losses caused by lawful conduct of their private security contractors.

89. Outside the context of armed conflict, research is also needed on the practices of States in providing effective remedies for violations of the right to life. What obstacles do families experience when attempting to enforce their right to a remedy? What statute of limitations (if any) commonly apply where a victim has been killed? How can States best ensure that unlawful killings are fairly compensated? Where the State is responsible for killings on a large scale, what systems or programmes can best provide and distribute reparations?

In some countries visited by the Special Rapporteurs, both legal obstacles (such as narrow statutes of limitations) and practical obstacles (such as families' inability to hire lawyers) have prevented access to compensation.

Report on Mission to Kenya (A/HRC/11/2/Add.6, 26 May 2009, ¶¶81-82)

81. The families of victims unlawfully killed have little redress. Throughout the country, I met children and widows whose parents or husbands had been murdered. The family members have been left with few avenues to obtain sufficient funds to meet even basic necessities such as housing,

food, and school fees. The Government should ensure that compensation is paid to the families of victims.

82. There is a one-year statute of limitations period for claims in tort against government officials. Given the factual complexity of many cases, the difficulties in accessing lawyers for many Kenyans, and the widespread displacement that the post-election violence caused, the limitation period has prevented many families of victims of the [post-election violence] from bringing civil suits against police or other officials. The [Director of Public Prosecutions] acknowledged that this was a problem. For unlawful killings and other serious abuses, the one-year limitation period should be removed.

Report on Mission to Afghanistan (A/HRC/11/2/Add.4, 6 May 2009, ¶¶35-37)

35. The Government provides some payments (approximately US\$1,900) to civilians killed by AGEs, but this programme is uneven, and operates in a highly unsatisfactory manner. The various international forces have implemented diverse programmes for compensating civilian victims of military operations. Such payments are consistent with international law requirement for reparations for human rights or IHL violations.⁹⁴ Governments have generally cited the rationale of “winning hearts and minds” and eschewed any notion of obligation. But the fact remains that reparations are increasingly often paid to the families of those killed, even in lawful attacks, and this goes well beyond the practice in previous conflicts. Publicly-available records are insufficient for estimating the proportion of victims who receive payments. However, informed interlocutors suggested that victims do routinely obtain payments, although doing so is not always easy, and the payments are not always fair or timely.

36. Women, in particular, face obstacles, as illustrated by interviews with many women in Kandahar who lost male relatives in air strikes, Taliban attacks, or IMF convoy shootings. Their incomes had been eliminated or drastically reduced. Some had received monetary assistance from the Afghan government or ISAF, but many did not know how to even begin to seek such aid. If they are lucky, their families support them. Some enter the workforce, and receive second-class wages. Others will have no way to access education or employment and will be forced to beg to feed their children. Compensation can be especially important for women, and payment programmes should be designed with their unique circumstances and needs in mind.

37. Among the international forces, the US is the most systematic in providing compensation. Commanders are authorized to make “condolence” or “solatia” payments and frequently do so. The maximum payment amount provided for a death on either basis is roughly \$2,500. A British

94 See ICCPR, Art. 2(3); Human Rights Committee, General Comment No. 31, *supra* note 5, para. 16; ICRC Customary IHL Study, *supra* note 26, Rule 150: “A State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused.” While the modalities of this obligation under IHL continue to be clarified, “There is an increasing trend in favour of enabling individual victims of violations of international humanitarian law to seek reparation directly from the responsible State.” This interpretation is, moreover, obligatory pursuant to the international human rights law requirement to “ensure that any person whose rights ... are violated shall have an effective remedy” The injury for which reparation is due includes both material and moral damage, and the reparation therefore “shall take the form of restitution, compensation and satisfaction” (Draft Articles on State Responsibility, arts. 31, 34). Because restitution – “re-establish[ing] the situation which existed before the wrongful act was committed” would be “materially impossible” in the case of an individual’s death, the requisite reparation will comprise compensation and satisfaction (Draft Articles, art. 35). The compensation “shall cover any financially assessable damage” (Draft Articles, art. 36), and the satisfaction “may consist in an acknowledgment of the breach, an expression of regret, a formal apology or another appropriate modality” (Draft Articles, art. 37). In practice, the monies and goods provided for deaths in Afghanistan typically carry elements of both compensation and satisfaction, helping to compensate for the loss of a productive member of the family and serving as an expression of regret.

commander informed me that they make ex gratia payments, with the amount determined by general guidelines and negotiation with the *shura* of the victim's village. Some of the other national contingents within ISAF run similar programs. But some governments have held back. One concern has been that offering payments would inherently constitute an admission of legal liability. This concern is baseless, as demonstrated by the experiences of governments who do make such payments. Another concern expressed has been that for their military contingents to offer payments would encroach on "humanitarian space" by involving soldiers in the provision of "aid". This is unpersuasive: such payments are an integral part of responsible military action rather than an ancillary humanitarian activity. The existing payment programmes are extremely promising and, in many respects, unprecedented. The flaws lie in the overall system's excessively discretionary and fragmentary character, which mean that whether payment is provided for a particular civilian's death depends on the national contingent involved, the attitudes of local commanders and Government officials, and the ability of the surviving family to navigate the process for obtaining a payment.

In following up on his predecessor's recommendations concerning Afghanistan, Special Rapporteur Heyns welcomed the adoption of guidelines for civilian compensation for all troop-contributing states in 2010, however he highlighted concerns about the manner in which they were being implemented at ground level:

Follow-up to Country Recommendations – Afghanistan (A/HRC/17/28/Add.6, 27 May 2011, ¶¶38-44)

38. The Special Rapporteur welcomes the adoption of non-binding guidelines on civilian compensation for all troop-contributing nations in Afghanistan by the North Atlantic Council in June 2010 and the creation of the NATO civilian casualties tracking cell to investigate claims of civilian casualties. The guidelines focus on prompt acknowledgement by ISAF of combat-related civilian harm, proper investigations and the proactive offering of assistance to survivors.

39. Despite the progress made, compensation for victims remains a concern in Afghanistan. According to information received, the ISAF Commander forwarded these guidelines to commanders without any detailed implementation instructions, leaving a gap between political will and practice on the ground.

40. ISAF member countries thus continue to offer compensation in their own specific way, with variations from one State to the other or even within a single command. The various international forces have implemented different programmes for compensating civilian victims of military operations, and some information has been diffused through the media on such payments.⁹⁵ However, it appears that publicly available records are insufficient for an estimate of the number of victims who receive payments and the proportion of compensations to be made.

41. According to information received, compensation is mainly financial, leaving aside a holistic approach to compensation, which would include, for example, dignifying civilian losses by upholding the right to the truth. Moreover, the procedures to determine when compensation should be paid remain unclear and lack transparency. For example, information received suggested that, in some regions of Afghanistan, some monetary compensation was distributed to victims of night raids and air strikes. In the first quarter of 2010, this included 60 families in Kapisa province, who were mostly victims of night raids and air strikes. In a separate incident, on 21 March 2010, international military forces reportedly left 50,000 Afs (approximately \$1,000) in a house following a night raid, during which a 92 year-old man was reportedly killed. However, the victim's son returned the money to ISAF on the grounds that it could not put a price on his father's life.

95 See "Afghanistan civilian compensation: the sums received from UK forces", Guardian Datablog, 28 March 2011, available at: www.guardian.co.uk/world/datablog/2011/mar/28/afghanistan-civilian-compensation.

42. The Afghan National Army and related security forces have neither a systematic compensation mechanism nor are they trained to address civilian harm. President Discretionary Fund 99, a small ad hoc fund, is administered by the President's executive office. The Government programme that provides a form of monetary compensation to civilians killed by anti-Government elements appears to be inadequate. Furthermore, the President Discretionary Fund appears to be disconnected from the activities of the Afghan National Security Forces, which have no civilian casualty tracking capabilities and thus are unable to assess best practices, pitfalls and lessons learned. With more combat responsibility being transferred to the Afghan National Army by ISAF, the need for a nationally owned, coordinated and unified compensation system (including recordkeeping, evidence protection, investigations and holistic compensations) is evident.

43. In this regard, the Special Rapporteur concurs with the stakeholders' opinion on the need to create an effective system for recording civilian casualty incidents, analyse lessons learned to minimise harm, properly recognise civilian losses and provide immediate and appropriate redress and compensation.

44. The Special Rapporteur welcomes the support provided by the international community to help Afghanistan to move towards the creation of such a system. In his view, international and Afghan security forces should redouble efforts to ensure accountability for violations to international humanitarian law and human rights abuses.

In Colombia, where an internal conflict between the government and various guerrilla forces endured for more than 50 years, Special Rapporteur Alston suggested that access to information could be improved through the creation of a centralised national database.

Report on Mission to Colombia (A/HRC/14/24/Add.2, 31 March 2010, ¶¶85-86)

C. Victims' access to information

85. Coordinating and tracking the results of investigations by the various institutions is problematic and victims' family members justifiably complained about the difficulty of obtaining information about the status of cases. A relatively easy and inexpensive solution would be a centralized database system through which each institution reports its activity and progress on each individual case. Information from this system should be available through institutional representatives at the regional, municipal and community level, so that families would not need to travel long distances to obtain it. Responsibility for maintaining the system and ensuring that all institutions comply with reporting obligations could be assigned to the Office of the Vice-President or another Government unit; the key is that it be an institutional actor with the stature to enforce reporting obligations.

86. Given the influence of IAGs or guerrillas on officials in some local communities, the database should not include sensitive information that could expose witnesses and victims' families to greater security risks. Nor should it include genuinely confidential information related to ongoing investigations or prosecutions (family members could be directed to the local fiscal for that information).

In his follow-up report, Special Rapporteur Heyns noted at least partial implementation of these recommendations, with the establishment of a national registry of missing persons:

Follow-up Report on Mission to Colombia (A/HRC/20/22/Add.2, 15 May 2012, ¶¶68-69)

Victims' access to information

68. In the mission report, the Special Rapporteur observed that it was difficult for victims and family members to gain access to information on the status of cases. It was recommended that a centralized database system should be established through which each institution reports its activity and progress on each individual case.

69. The Special Rapporteur welcomes information indicating that a National Registry of Disappeared Persons has been established, however, he notes that a central database with information on cases and progress on investigations relating to killings by State agents has not yet been created.

C. ACCOUNTABILITY MECHANISMS AND THE JUSTICE SYSTEM

In most countries visited by the Special Rapporteurs, impunity results from problems at various stages of the justice system. Because each country's justice system—including its institutions and their functions and interrelationships, applicable laws and regulations—is unique, causes of impunity must be examined on a country-by-country basis. Thus, for example, the structure or functions of an institution may contribute to impunity in one country, but not in another; and reforms necessary in one context may be irrelevant or even damaging in another. Before undertaking country missions, the Special Rapporteurs carried out extensive research on the background and functions of each of the relevant components of the justice system.

While the importance of examining each system on its own terms and in its own context cannot be underestimated, the Special Rapporteurs have observed many common problems in justice systems around the world, and much is learned from analysing various country specific problems. In most countries, the following institutions will be relevant: *police, forensic services, prosecutors, witness protection programmes, courts and the judiciary, ombudsperson offices, police internal affairs and external oversight, commissions of inquiry, and national human rights institutions, NGOs, and international mechanisms.* This section examines each institution in detail and the deficiencies that commonly lead to impunity at each stage. It will also consider the challenges that can be posed at any level by systemic corruption, the complication of accountability for the acts of private security providers, and the extent which good data-collection and presentation of vital statistical indicators can act as a driver for accountability.

The Minnesota Protocol dedicated a section to the necessary components of an effective investigative process, and also covered the professional ethics of investigators:

The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016): The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (2017, ¶¶41-45, 50-76, 83)

III. PROFESSIONAL ETHICS

41. All those involved in investigating potentially unlawful death must meet the highest professional and ethical standards at all times. They must work to secure the integrity and effectiveness of the investigation process and to advance the goals of justice and human rights. Those involved in investigations bear ethical responsibilities toward victims, their family members and others affected by an investigation, and they must respect the safety, privacy, well-being, dignity and human rights of anyone affected, working in accordance with the applicable humanitarian principles, in particular humanity and impartiality.

42. When dealing with family members, potential witnesses and others contacted in the course of an investigation, investigators must take care to minimize the harm that the investigation process

may cause, especially regarding the physical and mental well-being of those involved in the investigation and the dignity of the dead. Special consideration is required for those at particular risk of harm, such as victims of sexual abuse, children, the elderly, refugees, those with diverse gender identities and expressions, and persons with disabilities.

43. Investigators shall act in accordance with domestic and international law and shall avoid arbitrary or unduly intrusive investigatory activity. They should endeavour to respect the culture and customs of all persons affected by the investigation, as well as the wishes of family members, while still fulfilling their duty to conduct an effective investigation.⁹⁶

44. Any forensic doctor involved in the investigation of a potentially unlawful death has responsibilities to justice, to the relatives of the deceased, and more generally to the public. To discharge these responsibilities properly, forensic doctors, including forensic pathologists, must act independently and impartially. Whether or not they are employed by the police or the State, forensic doctors must understand clearly their obligations to justice (not to the police or the State) and to the relatives of the deceased, so that a true account is provided of the cause of death and the circumstances surrounding the death.

45. More generally, as stipulated by the International Code of Medical Ethics of the World Medical Association (WMA), “A physician shall be dedicated to providing competent medical service in full professional and moral independence, with compassion and respect for human dignity.”⁹⁷ For its full realization, this also requires the State to create the circumstances in which such independence can be exercised, including by protecting the forensic doctor from harm or harassment as a result of involvement with potentially sensitive case work.

[...]

IV. CONDUCT OF AN INVESTIGATION

B. The Investigation Process

50. When a report or allegation of a potentially unlawful death is submitted or brought to the attention of the authorities, an initial investigation should be conducted to identify lines of inquiry and further actions. This includes identifying all sources of potential evidence and prioritizing the collection and preservation of that evidence. All relevant witness statements should be collected, including but not limited to accounts of events provided by law enforcement personnel. Once a significant body of evidence has been collected and analysed, preliminary conclusions should be developed and compiled into a single report. The report should detail the lines of inquiry pursued and the outcome of these inquiries, and should recommend further inquiries that may advance the investigation.

51. A detailed analysis of information known about the circumstances of the death and those believed to be responsible should be provided in a written report. The report should include the following key information: the identity and official status of the individual making the initial report; the circumstances under which the report was made; the identity(ies) of the victim(s) (if known); the date(s), time(s) and location(s) of the death(s); the location(s) of the victim(s); the method(s) of causing the death(s); the individual(s) or organization(s) believed to be responsible; the underlying reason(s) for the death(s); and other specific details. Areas in need of further

96 International Consensus on Principles and Minimum Standards in Search Processes and Forensic Investigations in cases of Enforced Disappearances, Arbitrary or Extrajudicial Executions, Annex 6 in International Commission of Jurists, *Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction, A Practitioners Guide*, 2015.

97 WMA, International Code of Medical Ethics, at: <http://www.wma.net/en/30publications/10policies/c8/>.

investigation should be identified. An overall strategy for locating and gathering further material to support the investigation, and potential judicial proceedings, should be developed. A plan should be made for evidence collection.

52. A set of operational and tactical processes, deriving from the overall strategy, should be designed. These processes should seek to establish significant facts, preserve relevant material and lead to the identification of all the parties involved. Activities should be planned and appropriate resources allocated in order to manage the following: The collection, analysis and management of evidence, data and materials

- The forensic examination of important physical locations, including the death/crime scene
- Family liaison
- The development of a victim profile
- Finding, interviewing and protecting witnesses
- International technical assistance
- Telecommunications and other digital evidence
- Financial issues
- The chronology of events.⁹⁸

53. The investigation strategies should be reviewed periodically or in light of new material (or new, more robust methods). A record of the review process should be kept, with all critical decisions noted and the evidence to support each one clearly referenced. Any change of direction in investigative strategy should be justified and recorded, with relevant material logged. The review process should be open, recorded, and disseminated to the investigation team members.

1. Collecting and managing data and materials

54. Material should be collected in a systematic manner. An effective information management system is required to ensure that all material gathered is recorded, analysed and stored appropriately, taking into account security concerns. This system does not need to be complex or technologically advanced, but it should be comprehensive, consistent and secure in order to ensure that no material is lost, damaged, degraded or overlooked; that provides an audit trail that can demonstrate that evidence has not been tampered with; and that it can be easily found, referenced and cross-referenced.

55. The gathering, recording and retaining of material – both inculpatory and exculpatory – requires expertise to ensure that all relevant evidence can be disclosed in any judicial process. The relevance of material may only become apparent as the investigation progresses. The investigation team must not, however, withhold information that could, for example, weaken the prosecution's case in any judicial proceedings.

2. Important physical locations, including the death/ crime scene

56. In the investigation of a potentially unlawful death there may or may not be a body in a known location, which in turn may or may not be the place where the death occurred.⁹⁹ Every important physical location in the investigation should be located and identified, including the site of encounters between the victim(s) and any identified suspects, the location of any crimes, and possible burial sites. Global positioning system (GPS) coordinates should be taken and recorded. The identity of the victim(s) will need to be established if this is not known. The lifestyle, routines

⁹⁸ For more detail on these areas, see e.g. documentation by the UN Office on Drugs and Crime (<http://www.unodc.org>) and Interpol (<http://www.interpol.int>).

⁹⁹ If investigators are unable to locate a body or remains they should continue to gather other direct and circumstantial evidence which may suffice for identifying the perpetrator(s).

and activities and the political, religious or economic background of the victim(s) may indicate possible reasons for the death. Missing person reports, family witness statements, dental and other reliable physical records (i.e. so-called ante-mortem data), as well as fingerprints and DNA (deoxyribonucleic acid), can be used to assist in identifying the deceased.

57. If DNA profiling is to be used for identifying human remains, other means of identification should be used in parallel. The sample used to generate the profile and the profile itself are powerful repositories of information that must be safeguarded against misuse.¹⁰⁰ In profiling DNA to establish the probability of kinship as part of identifying the deceased, mistaken beliefs about kinship may be discovered. Dealing properly with such incidental findings is an ethical issue of great importance, and policies on this should be established in advance.¹⁰¹

58. A crime scene is any physical scene where investigators may locate, record and recover physical evidence. The term “crime scene” is used without prejudice to the determination of whether a crime has actually occurred.¹⁰² A crime scene may be a place where a person’s body or skeletal remains are found, as well as any relevant building, vehicle or place in the environment, including individual items within that environment such as clothing, a weapon or personal effects.

59. A crime scene should be secured at the earliest possible opportunity and unauthorized personnel shall not be permitted entry. This enables evidence at the scene to be protected and gathered effectively and minimizes the contamination or loss of relevant material. Securing the scene requires controlling the entrance and egress of individuals and, where possible, restricting access to trained personnel only. Even in medico-legal systems that do not require forensic doctors to visit a crime scene, such a visit may be valuable to the investigation. The scene and any evidence within it should be protected by the use of a cordon. Where possible and relevant, it should be protected from weather or other factors that could degrade evidence.

60 A record of all personnel entering the scene should be kept with the corresponding date and time of their visit. Individuals interacting with evidence should provide DNA and fingerprints as reference samples. To minimize forensic contamination and to protect the health and safety of personnel, suitable protective clothing should be worn wherever it is available, including, at a minimum, gloves and masks. To ensure that evidence is preserved, the correct packaging and methodology for each type of evidence need to be used. When resources or logistics do not allow for this, packaging that will minimize cross-contamination or the forensic degradation of the sample should be used.

61. All material located at a crime scene should be considered potentially relevant to the investigation. Material that may be found at a crime scene includes, but is not limited to, the following:

- a) Documentary evidence, such as maps, photographs, staffing records, interrogation records, administrative records, financial papers, currency receipts, identity documents, phone records, letters of correspondence, and passports
- b) Physical evidence, such as tools, weapons, fragments of clothing and fibres, keys, paint, glass used in an attack, ligatures, and jewellery
- c) Biological evidence, such as blood, hair, sexual fluids, urine, fingernails, body parts, bones, teeth and fingerprints

100 See, e.g., ICRC, *Missing People, DNA Analysis and Identification of Human Remains: A Guide to Best Practice in Armed Conflicts and Other Situations of Armed Violence*, 2nd ed., 2009.

101 See, e.g., L.S. Parker, A.J. London, J.D. Aronson, “Incidental findings in the use of DNA to identify human remains: An ethical assessment”, *Forensic Science International: Genetics*, 7 (2013), pp. 221–29.

102 Even if a crime has not occurred, the death scene should be processed as though it is a crime scene.

d) Digital evidence, such as mobile phones, computers, tablets, satellite phones, digital storage devices, digital recording devices, digital cameras and closed-circuit television (CCTV) footage.

62. All relevant material should be recorded in documentary and photographic form as described in the Detailed Guidelines on Crime-Scene Investigation. Investigations vary in their capability to examine the material scientifically, but effectively recording the crime scene using notes, sketch plans and photographs will be necessary. Crime-scene recording and recovery of evidence should be thorough.

63. Samples should ideally be recovered and recorded by personnel with appropriate training or knowledge. Some sampling requires only basic training, but those undertaking medico-legal examinations will need advanced training in the context of their own judicial framework.

64. Investigators should be appropriately equipped, including with personal protective equipment; relevant packaging such as bags, boxes and plastic and glass vials/bottles; and recording materials, including photographic equipment.

65. Every stage of evidence recovery, storage, transportation and forensic analysis, from crime scene to court and through to the end of the judicial processes, should be effectively recorded to ensure the integrity of the evidence. This is often referred to as the “chain of evidence” or “chain of custody”. Chain of custody is a legal, evidentiary concept requiring that any prospective item of evidence be conclusively documented in order to be eligible for admission as evidence in a legal proceeding. This includes the identity and sequence of all persons who possessed that item from the time of its acquisition by officials to its presentation in court. Any gaps in that chain of possession or custody can prevent the introduction of the item as evidence against a criminal defendant. Evidential material should be transported in a manner that protects it from manipulation, degradation and cross-contamination with other evidence. Each piece of evidence recovered, including human remains, should be uniquely referenced and marked to ensure its identification from point of seizure to analysis and storage. To meet chain of evidence and integrity requirements, the transportation, tracking and storage of this evidence should include the investigator’s details.

66. Evidential material should be kept in an appropriate storage facility at all stages of the investigation. Storage facilities should be clean, secure, suitable for maintaining items in appropriate conditions, and protected against unauthorized entry and cross-contamination. Digital evidence should be collected, preserved and analysed in accordance with international best practice.¹⁰³

3. *Family liaison*

67. Wherever it is feasible, a specific and suitably trained and experienced family liaison expert should be appointed to offer the family of the deceased information and support as well as to collect the information, such as ante-mortem data, required for identifying a deceased person.¹⁰⁴ The expert should meet the family at the earliest opportunity, should provide regular updates about the investigation, its progress and results, and should address any concerns the family may have as the investigation progresses.¹⁰⁵ A positive relationship with the family of any missing or deceased person can produce useful information and results for any investigation.

103 See, e.g., Association of Chief Police Officers, “Good Practice Guide for Digital Evidence”, UK, http://www.digital-detective.net/digital-forensics-documents/ACPO_Good_Practice_Guide_for_Digital_Evidence_v5.pdf.

104 There will be circumstances when the authorities themselves are implicated in a suspicious death and liaison with the authorities to transmit and receive information about the investigation will not be acceptable to the family. Legal representatives for the family, or the involvement of non-governmental organizations, may be possible ways to ensure that important information is available.

105 See also paras. 35–37 (which are excerpted above in Section B.2).

4. *Understanding the victim*

68. Lifestyle inquiries about the victim should be conducted and a victim profile developed. Appropriate sensitivity should be used with respect to, for example, findings of marital infidelity or other stigmatized sexual behaviour. The profile will test the working hypotheses of the case and assist in generating investigative opportunities where other lines of inquiry have been exhausted. It may also assist in identifying a motive for the crime. Information may be gathered from the victim's associations, lifestyle, behaviour patterns and electronic devices.

5. *Finding, interviewing and protecting witnesses*

69. Individuals who might have information about a potentially unlawful death should be sought and interviewed. Publicizing the investigation may encourage witnesses and others to come forward in the knowledge that their information will be dealt with confidentially and sensitively.

70. The purposes of witness interviews are to:

- a) Obtain as much relevant information as possible, through a systematic and fair process, to assist the investigators in objectively establishing the truth
- b) Identify possible suspects
- c) Allow individuals an opportunity to provide information that they believe is relevant to establishing the facts
- d) Identify further witnesses
- e) Identify victims
- f) Establish the location of crime scenes and burial sites
- g) Establish background information and facts relevant to the alleged killing(s),¹⁰⁶ and
- h) Identify leads in the investigation.

71. Investigators conducting interviews should approach all witnesses with an open mind and observe the highest ethical standards. A careful assessment of risk, strategies and adequate human and financial resources must be in place to ensure the safety and security of all witnesses in the case. Families in some circumstances could, with reason, fear for their safety. Careful attention should also be paid to the safety of the investigator, since a witness may be the perpetrator.

72. A list of significant witnesses should be drawn up and their interviews prioritized. These witnesses include those who saw or heard the crime being committed, people with relevant knowledge of the victim(s) and/or suspected perpetrator(s), and people in the same organization or chain of command as the suspected perpetrator who may be able to provide information linking people other than the direct perpetrator to the death.¹⁰⁷ Full statements should be taken from these witnesses. Where feasible and appropriately secure, investigators should consider recording their interviews by audio or video means. During the investigation phase, witness lists are highly sensitive and must be carefully safeguarded to ensure that witnesses are not exposed to undue risk. Electronic documents that may identify a witness should be taken outside the investigation office only in encrypted form. Access to hardcopy documents that may identify a witness must be restricted to the maximum extent possible.

¹⁰⁶ This may include, for example: the identity of political officials or military and paramilitary leaders; the identity and description of perpetrators; chains of command; communication codes and methods; details of official documentation linked to the killings; public announcements relevant to the crimes; interaction between military and political structures; the financing of military operations; and the chronology of events leading up to the killing(s).

¹⁰⁷ For example, this could be through various modes of liability, including participation in a joint criminal enterprise, superior responsibility, ordering, aiding and abetting, planning, or instigating.

73. House-to-house inquiries should be conducted in the vicinity of important physical locations and the crime scene, if it has been identified. House-to-house inquiries help the investigators to identify witnesses who live or work in key areas, gather local information and intelligence, identify other witnesses or suspects and raise awareness of the investigation, which may encourage people with information to come forward.

74. Interviews with family members and others to collect ante-mortem data for body identification – such as hair, blood, saliva samples, dental or chest X-rays, and information about possible bone fractures and other injuries or diseases – should be conducted by trained professionals who are in a position to answer technical questions authoritatively and with at least a basic knowledge of the correct medical and odontological terms. Proper equipment is needed to take samples, and donors should complete consent forms that state how the samples will be stored, who can access them, who manages the genetic database and how the data is to be used.

75. A media appeal may help to identify and locate people and material that could be useful to the investigation. This could include setting up a telephone hotline, an email address and/or a social media web page, which people could use for providing information to investigators confidentially or even anonymously. Consideration should also be given to offering a reward in return for relevant information.

76. A specific strategy should be developed, especially if a suspect is a state official, to ensure that anyone coming forward will be assured that the information they provide will be dealt with confidentially, within the limits of the law.

[...]

9. Chronology of events

83. A “living” chronology of events should be developed as the investigation proceeds. This should be sourced from any material obtained during the investigation, including:

- a) Witness statements
- b) Known movements of the victim
- c) Known movements of any suspects
- d) Call and other communication data
- e) Documents, including police reports logs and notebooks
- f) Mobile phone site data
- g) Financial transactions
- h) CCTV footage and photographs
- i) Lifestyle data.

A chronology can help provide an overall understanding of events, identify gaps in knowledge and generate new lines of inquiry.

In the extracts that follow, the Special Rapporteurs reported on how the various institutions involved in investigations and oversight function together in a specific country, and how failures in one can result in system-wide failures.

Report on Mission to Nigeria (E/CN.4/2006/53/Add.4, 7 January 2006, Summary, ¶¶88, 100)

The problem of extrajudicial executions in Nigeria is closely linked to the remarkable inadequacies of almost all levels of the Nigerian criminal justice system, as exemplified by the following:

- *Investigation*: there is no tradition of systematic forensic investigation in Nigeria, only one ballistics expert in the entire country, only one police laboratory, and no fingerprint database. According to one estimate, confessions are the basis for 60 percent of prosecutions;
- *Coroner's inquiries*: coroners are an endangered species and inquiries a rarity; it is commonplace for pathologists to sign reports without even examining the body; Prosecution: public prosecutors have no control over police investigations, nor can they demand that individuals be produced in court;
- *Judiciary*: adjournments are handed out with reckless abandon, resulting in thousands charged with capital offences being left to rot in prison;
- *Detention*: police routinely obtain a "holding charge" that permits suspects to be held more or less indefinitely in a legal limbo based on little more than a suspicion of criminal activity.

[...]

88. There is no single entry point for reformers of the dismally inadequate Nigerian criminal justice system. Virtually every component part of the system functions badly. The result is a vicious circle in which each group contributing to the problem is content to blame others. Thus for example, police officers complain about a lack of resources, but the politicians complain that the police are thugs and their performance undeserving of increased resources. The judiciary blames the prison system and the police for the scandalous number of uncompleted cases, while the police observe that arresting robbers is futile because the courts will never convict them. It is essential to understand the vicious cycle of blame and for all actors to acknowledge their own responsibilities.

[...]

100. The result of the vicious cycle described above is predictable. Investigations are replaced by heavy-handed tactics to extract confessions from suspects. Coronial findings rarely challenge police accounts, holding charges are used and abused where necessary, and where confessions are not available the well-cultivated inefficiencies of the system will ensure the long-term incarceration of the unconvicted accused. The result is a largely unaccountable police force, a system that does little to deter police killings or deaths in custody, and impunity for those accused of associated misconduct.

Political will is often the key ingredient necessary to implement the necessary reforms at each level to improve accountability.

Report on Mission to Sri Lanka (E/CN.4/2006/53/Add.5, 27 March 2006, ¶¶51-52, 59-61)

51. [...] In 2002 the Constitution was amended to establish an independent National Police Commission (NPC) with power over police discipline and a mandate to respond to public complaints. The NPC and the Human Rights Commission (HRC) have undertaken promising initiatives – but their efforts will be thwarted without political support and adequate resources. The other half of the problem is the broader deficiency of the Sri Lankan system of criminal justice. Progress requires transforming the culture and practices of police, prosecutors, and the judiciary. This is a daunting but not a hopeless task – these institutions have functioning bureaucracies with no small number of sophisticated and well-intentioned officials.

52. In Sri Lanka no single sweeping reform will transform the system of justice; instead, many relatively small problems must be solved. Such incremental reforms will be achievable only once their necessity is recognized. Today most Sri Lankans – in and out of Government – are complacent about the criminal justice system. Reform will require the recognition of uncomfortable truths. A single-digit conviction rate is unacceptable. And the conviction of only a handful of government officers implicated in the killing of Tamils is a travesty that has deeply corrosive effects. Recording

confessions extracted with torture bears no relation to criminal investigation. An ineffective justice system creates a climate of public opinion conducive to condoning police torture and the summary execution of suspects. If these principles are recognized, and if the current sense of complacency is replaced with a sense of urgency, Sri Lankans face no insuperable obstacles to expeditiously establishing an effective system of democratic policing and criminal justice.

[...]

59. The failure to effectively prosecute government violence is a deeply-felt problem in Sri Lanka. The paucity of cases in which a government official – such as a soldier or police officer – has been convicted for the killing of a Tamil is an example. Few of my interlocutors could name any such case ... many people doubt that their lives will be protected by the rule of law.

60. The State's failure to convict anyone for the Bindunuwewa massacre is an example of this impunity: on 25 October 2000, 27 Tamil men were beaten, cut, and trampled to death by a mob while they were in custody and "protected" by roughly 60 police officers, but not a single private person or public official has been convicted. I had previously corresponded with the Government concerning this case and, during my visit, I met with the mothers of Bindunuwewa victims, a survivor, and an attorney for the families.

61. That there was both State and individual criminal responsibility is undeniable, and supported by multiple government reports. However, not a single person has been convicted of any crime related to the events at Bindunuwewa. I was offered various explanations for this failure of justice: an inadequate police investigation led to insufficient evidence for conviction; judicial bias or corruption produced acquittals; the complexity of the case forced the prosecution to rely on novel legal theories. I do not have the information available to form a judgement, but the bottom line remains that this is a deeply unsatisfactory outcome and one which is all too consistent with fears of impunity for those who kill Tamils.

Report on Mission to Guatemala (A/HRC/4/20/Add.2, 19 February 2007, ¶¶58-60, 62)

58. There is [...] little political will to end impunity and implement a working justice system capable of ensuring the rule of law. There is diffidence among the elite and in Congress regarding the commitments made in the Peace Accords related to security and the criminal justice system. For the wealthy, effective policing and criminal justice is a low priority in part due to their reliance on private security guards. (There are roughly 100,000 private security guards in Guatemala, more than five times the number of police.) The lack of political will to establish a functioning criminal justice system in part reflects a sense that the State has very limited responsibilities to society, and that it is wholly appropriate for even security and justice to be private rather than public goods. There is a sense that the State has fulfilled its responsibilities so long as it protects the borders and refrains from killing innocent people. This understanding of State responsibility is incompatible with the content of that concept under international law [...]

59. The Congress has demonstrated little political will to establish a functioning criminal justice system, often allowing key legislation to linger for years. In addition, the inadequacy of the resources allocated to the institutions constituting the criminal justice is a justified complaint of nearly every interlocutor in and out of Government. This complaint is widely articulated by comparing the resources available in Guatemala to those available in other countries, especially El Salvador, a neighbouring country that also emerged from a devastating civil war in the recent past. As discussed above, Guatemala has, even after accounting for the difference in population, far fewer police officers, criminal investigators, prosecutors and judges than El Salvador. When government officials complain about a lack of resources, it serves in part as a convenient excuse: Yes, people get away with murder, but you cannot expect more when I have so few employees,

such poor equipment, etc. As an excuse, it is indeed somewhat self-serving: one would imagine that Guatemala could do better than a single-digit conviction rate for murder without spending an additional dollar. Nevertheless, the resources provided to the PNC, the Ministerio Público, and the courts are woefully inadequate and place a harsh upper limit on how effective the criminal justice system will be.

60. It is important to emphasise that, while limited resources may provide some excuse for particular Government agencies, it provides no excuse at all for the State as a whole. Guatemala is not an exceptionally poor country, and it could readily afford a criminal justice system on par with that provided in other Central American countries. While Guatemala's per capita gross domestic product is significantly less than those of Belize, Costa Rica, and Panama, it is roughly equal to that of El Salvador, twice that of Honduras, and nearly three times that of Nicaragua.

[...]

62. It is precisely because Guatemala could so readily afford a far better criminal justice system that it is impossible to fully distinguish the issue of resources from the issue of political will. The lack of resources is due to a lack of political will: rather than funding a high-quality criminal justice system, Congress has decided to impose very low levels of taxation and, thus, to starve the criminal justice system and other parts of Government. Insofar as impunity is due to a lack of resources, it is also due to a lack of political will.

Report on Mission to the Philippines (A/HRC/8/3/Add.2, 16 April 2008, ¶45)

45. There is impunity for extrajudicial executions [...] The criminal justice system's failure to obtain convictions and deter future killings should be understood in light of the system's overall structure. Crimes are investigated by two bodies: the PNP [Philippines National Police], which is organized on a national level but is generally subject to the "operational supervision and control" of local mayors; and the National Bureau of Investigation (NBI), which is centrally controlled. Prosecutors, who are organized in the National Prosecution Service (NPS) of the DOJ [Department of Justice], determine whether there is probable cause and then prosecute the cases in the courts. This is the normal process; however, in cases implicating public officials, the Ombudsman should take over the investigation and conduct the prosecution. Cases are tried before the courts, with the Supreme Court both administering the judiciary and providing the highest level of appellate review. Cases against senior Government officials should be prosecuted by the Ombudsman before the Sandiganbayan rather than the ordinary courts, but the Supreme Court still provides the highest level of appellate review. The Inter-Agency Legal Action Group (IALAG) is the latest addition to the system, affecting the operations of the NBI, NPS, and PNP.

Report on Mission to Brazil (A/HRC/11/2/Add.2, 23 March 2009, ¶¶49-50)

49. The Civil Police have primary responsibility for homicide investigations. This is true whether the suspected perpetrator is a private citizen or a member of either police force. The Civil Police then refer the case to the Public Prosecutor's Office, which may initiate criminal proceedings. In homicide cases, it is a jury that pronounces the verdict and the judge who decides on the sentence. Two other institutions help to ensure the quality of the investigation and the integrity of the subsequent process. A state Institute of Forensic Medicine may support the investigation by conducting an autopsy. And witness protection programmes may be used to prevent suspects from intimidating witnesses.

50. While each of these institutions performs well some of the time, obtaining a conviction requires them all to work well at the same time, and this happens infrequently. For example, in Rio de Janeiro

and São Paulo, only about 10% of homicides end up being tried in the courts; in Pernambuco the rate is about 3%. Of the 10% tried in São Paulo, it is estimated that about half are actually convicted. These rates are even lower for cases implicating police.

Report on Mission to Kenya (A/HRC/11/2/Add.6, 26 May 2009, ¶¶22-24)

22. Failures in the criminal justice system, and in internal and external police accountability mechanisms, encourage the commission of unlawful killings by police.

23. The criminal justice system as a whole was widely described as “terrible”. Investigation, prosecution, and judicial processes are slow and corrupt. Predictably, this leads to widespread distrust of the system, and impunity for criminals (particularly for those with power and money). It also acts as an incentive for police to kill, rather than arrest suspects: because of the low probability of securing convictions, many police think it is easier and more effective to take “justice” into their own hands. And, significantly, police themselves also benefit from the systemic faults – they are rarely held to account for the abuses they commit.

24. In theory, if a killing occurs, the police provide the relevant information to a magistrate, so that an inquest can be opened. Where investigations disclose evidence that a private individual or a police officer is criminally responsible for a death, a murder case file is opened, and the case is prosecuted in Kenya’s High Court by state counsel from the Attorney-General’s office. The reality is very different.

Report on Mission to Colombia (A/HRC/14/24/Add.2, 31 March 2010, ¶¶29-30)

29. Lack of sufficient accountability has been a key factor in the continuation of *falsos positivos* [unlawful killings by members of the security force that are set-up to look like lawful killings in combat]. Estimates of the current rate of impunity for alleged killings by the security forces are as high as 98.5 per cent. Soldiers simply knew that they could get away with murder... More generally, other problems, discussed below, occur at each stage of the investigation and disciplinary or criminal justice process.

30. Colombia has a complex and sophisticated government structure and responsibility for responding to citizens’ complaints about killings is shared by a number of different institutions, including the Offices of the Attorney-General (*Fiscalía*), the Inspector-General (*Procuraduría*), and the Ombudsman (*Defensoría*). Each of these institutions has an important role under the 1991 Constitution’s system of checks and balances. The *Fiscalía*, part of the judicial branch, is the civilian prosecutorial authority with prosecutors (*fiscales*) assigned both at the national level, sometimes in specialized units, and to local offices. The *Procuraduría* is a civilian entity that has jurisdiction over disciplinary matters related to public servants (including the military) and can conduct investigations and impose administrative sanctions, such as suspension or dismissal. The *Defensoría* is the national public defender service and also incorporates a nationwide system of regional ombudsmen (*personeros*) to whom citizens can complain of abuses.

Report on Mission to the Democratic Republic of the Congo (A/HRC/14/24/Add.3, 1 June 2010, ¶¶96-100)

96. The Government’s failure to hold perpetrators to account is the central factor driving continued human rights abuses in the DRC. The justice system is in shambles, and impunity is widespread for all forms of killings. Alleged war criminals continue to hold senior command positions in the armed forces, massacres are committed without sanction or investigation, and nearly all extrajudicial executions remain unpunished.

97. I held many meetings with military and civilian judges and other experts on the criminal and military justice systems. The institutional, financial, resource, and structural problems in those systems are generally well-acknowledged. As the Ministry of Justice's recent Roadmap to Justice itself states, "The background, the causes, and the diagnosis of the ills and dysfunctions that plague our system of justice, have been the objects of numerous reports, studies, workshops, colloquia and seminars."

98. Corruption and political interference are key problems. Accused individuals with money or connections can escape punishment with relative ease. Corruption extends through the entire justice system: police request money to arrest or release alleged perpetrators; judges take bribes to decide cases; and registrars and other officials request money to enforce judgments. Magistrates told me of frequent attempts to bribe them, and of threats against their careers and lives. Political interference also frequently affects the appointment, career path, and removal of judges, although judges rarely speak publicly of such matters for fear of retaliation. The newly established High Council of Judicature is a positive measure to increase oversight of judges, and to promote independent appointments, although at the time of this report it was not yet fully operational.

99. Additional serious problems that require long-term planning and commitment from the Government, the international community and civil society include: severe underfunding; a shortage of judges and prosecutors, sometimes so severe that courts cannot sit; the lack of adequate training for judges, support staff, and investigators; a lack of basic resources for judicial officials, such as office space, or even paper; and the lack of any forensic capacity. In the military justice system, resource deficiencies mean that judges often do not have their own transport, and so must rely on the armed forces to facilitate investigations (including reliance upon the very units under inquiry).

100. Many victims are justifiably afraid to complain to police or prosecutors. There is a very real risk that doing so would open them up to retaliation, especially because there is no witness protection program. MONUC itself provides for witness protection for a small number of individuals and their families. But its limited resources and reach, and small staff size, mean only a small number are protected.

Report on Mission to The Gambia (A/HRC/29/37/Add.2, 11 May 2015, ¶¶69-73)

69. A general culture of accountability and the existence of effective institutional channels for redress are essential for protection of the right to life. On several occasions, the Special Rapporteur heard that police or judicial authorities either do not carry out investigations, or, if they do, they are not carried out properly. Other institutions mandated to address misconduct by law enforcement officials appear to be underutilized or ineffective.

70. It is generally perceived that citizens avoid reporting abuse by the police due to fear of reprisal, lack of substantive redress and a general mistrust of the police. Complaints against the police are generally dealt with by the Complaints and Discipline Unit, based in the Gambian Police Force since 1994, which handles most complaints relating to police misconduct. The Inspector General of the Police informed the Special Rapporteur about the creation in 2012 of a Human Rights Unit within the police force, which deals with complaints of torture and inhuman treatment at the hands of the police. While the Special Rapporteur welcomes the establishment of the unit, he is concerned that, being staffed by police officers and positioned within the police, this complaint mechanism may be perceived as ineffective, vulnerable to internal pressure and lacking impartiality, dissuading victims of abuse from submitting complaints. Moreover, certain victims, for example those held in prisons under police control, may refrain from submitting complaints due to fear of reprisals. The Special Rapporteur was informed that only one complaint has so far been brought before the unit, but it was subsequently withdrawn. The Office of the Ombudsman is also tasked with handling

complaints about police misconduct, but has no mandate to investigate human rights violations. 50 Official data about the number of law enforcement officials reprimanded or prosecuted for violations of the right to life under these mechanisms was not forthcoming.

71. Mistrust and fear appear to be amplified in matters that concern accountability for abuses by members of the National Intelligence Agency. The legal gap governing their conduct and, equally, sanctioning their abuses, and the public perception that the institution operates behind a veil of impunity and that, ultimately, it has the power to exercise unrestrained control over the lives of Gambian citizens, makes the lodging of complaints of misconduct by its agents all the more implausible. Citizens are reluctant to denounce abuses, engage legal services or seek redress, even for the most serious violations, including disappearances, torture or probable executions. Moreover, the secrecy in which most of its operations are conducted makes any potential investigation inoperable. Nonetheless, the Special Rapporteur received countless confidential complaints of excessive use of force and possible summary executions by members of the National Intelligence Agency which remain unaccounted for by Gambian judicial, administrative and police institutions.

72. Although the Special Rapporteur received information about a small number of prosecutions of security officers for the death of a suspect in their custody, it seems that not in a single case were the prosecutions successful.

73. The climate of impunity is compounded by a judiciary that lost its independence, being faced with the threat of dismissals, and by the reluctance of lawyers to take on human rights cases out of fear of reprisals against themselves or their families, thereby reducing the options for victims who wish to seek redress and exercise their rights. Although the National Agency for Legal Aid was established to assist persons charged with offences that carry the death sentence or a life sentence, the office is under-resourced and overstretched.¹⁰⁸

The final report of the UN Independent Investigation on Burundi, in which Special Rapporteur Heyns participated (see Chapter 2), was categorical about the failure of domestic accountability mechanisms in Burundi.

Report of the United Nations Independent Investigation on Burundi (A/HRC/33/37, 20 September 2016, ¶101)

101. The State is responsible to ensure accountability for human rights violations. The Government of Burundi is blatantly failing to meet its obligations to promptly, thoroughly, and impartially investigate and prosecute violations; to bring the alleged perpetrators to justice and sentence those who are found guilty to punishment commensurate with the seriousness of their actions, including those occupying positions of authority; to provide victims with effective remedies and to ensure adequate reparation; and to take steps to prevent recurrence.

1. Police investigations

Independent, well-resourced, and comprehensive police investigations are essential in every country. The Special Rapporteurs have observed common problems with police investigations related to training; recruitment; resourcing; corruption; lack of independence from other parts of government and/or the justice system; and issues of bias, discrimination, or lack of representativeness.

Many of the Special Rapporteurs' country mission reports illuminated how these factors can lead to impunity.

108 For further information about the National Agency for Legal Aid, see A/HRC/28/68/Add.4.

Report on Mission to Nigeria (E/CN.4/2006/53/Add.4, 7 January 2006, ¶¶39-41, 93-94)

39. The Nigeria Police have grown significantly under civilian rule to 325,000 in 2005. But the numbers are still inadequate, their level of training and funding insufficient, and their morale low. Although Nigeria suffers from high violent crime rates, the force is chronically under-resourced. All too often new recruits pay for their own uniforms, salaries are delayed for many months, equipment required in an emergency needs to be borrowed from other agencies,¹⁰⁹ and complainants (even those alleging murder) are asked to cover the costs of the police investigation including travel and accommodation. Where they cannot afford to do so, the investigation fizzles. In addition, corruption is widespread among police officers, in part due to very low salaries.¹¹⁰

40. For these reasons, and because police tactics are often marked by the arbitrary and unnecessary use of force, including high rates of extrajudicial killings, there is little public confidence in the police. Indeed, they are criticized by virtually all sectors of civil society.¹¹¹

41. Common complaints include the carrying of firearms in public by un-uniformed police, the wearing of uniforms by police when they are off-duty,¹¹² and the widespread practice of police requiring payment to ensure the safe delivery of goods. As a result, the overriding public attitude towards the police is one of fear and mistrust.

[...]

93. If the system worked, suspects would be brought before a court, charged and remanded. Instead the police consistently resort to a short cut by taking suspects before a magistrate who remands them indefinitely without formal charges while the police conduct their investigation. The result of this “holding charge” is that individuals can be jailed more or less indefinitely in a legal limbo based on little more than a suspicion of criminal activity, unsupported by any evidence. This practice continues despite a declaration of its unconstitutionality by the Court of Appeal.¹¹³ It has contributed significantly to the extremely high rates of individuals in Nigerian prisons who have not been formally charged, a situation which can endure for a decade and beyond. It is an insidious but pervasive practice which shields police inefficiency and severely punishes many innocent persons.

94. Proposals in Lagos State would limit the remand period to 100 days.¹¹⁴ This would constitute a vast improvement, although 100 days is still far too long.¹¹⁵

109 In responding to communal violence in Kano, for example, the police were loaned unmarked vehicles from the Governor's office, without which they would have been unable to respond. The use of unmarked vehicles makes it very difficult to identify alleged wrongdoers in any subsequent investigation of human rights violations.

110 Information provided to me by the Inspector-General of Police indicated that the entry level salary for a Nigerian Police officer is 65,700 Naira (approximately \$500 USD) per year. This figure, however, is misleading in that it does not include standard allowances that take the annual salary to around 100,000 Naira (\$760) per year.

111 The lead editorial in a security-focused magazine observed that the “[o]peratives of Nigeria Police are dreaded agents of death who decimate human lives at will.” The editorial continued: “Looking scruffy and ferocious in different shades of gear, operatives of Nigeria Police would storm the roads armed with guns, horsewhips and batons ... It is business time. And the road and its users no longer know peace. From [the police] standpoint, everybody is a criminal and every crime has a price.” W.A. Johnson, “A Memo to Mr Ehindero”, *Security and Safety*, 65, (2005), p.3.

112 Ibid. (“Hordes of policemen are seen engaged in illegal activities, using their uniforms and other official paraphernalia to confer legitimacy on their criminal pursuits.”)

113 *Bayo Johnson v. Olufadeju* (2002) 8NWLR Part 768, 192-222 (cited in Human Rights Law Service, *Travesty of Justice: An Advocacy Manual Against the Holding Charge* (2004)).

114 Thereafter the suspect would be entitled to release unless good cause is shown for a further 30-day remand. See *Travesty of Justice*, *supra* note 101, pp. 52-57.

115 For a similar criticism see *Travesty of Justice*, *supra* note 101, p. 55.

Report on Mission to Sri Lanka (E/CN.4/2006/53/Add.5, 27 March 2006, ¶37)

37. The police also lack sufficient linguistic ability and cultural sensitivity to interview witnesses and gather the information required to effectively investigate killings that occur within the Tamil and Muslim communities.¹¹⁶ The political killings have disproportionately affected these communities, both of which speak Tamil. The police force, however, is only 1.2 per cent Tamil and 1.5 per cent Muslim, and Sinhala officers seldom speak Tamil proficiently. The only practical way for the police to acquire a larger number of fluent Tamil speakers is to recruit Tamil and Muslim officers.¹¹⁷ While it was sometimes argued that the low proportion of Tamils in the police force was inevitable, given the fear that the LTTE would target Tamil officers, it was acknowledged by informed actors that if the Government made such recruitment a priority, it could be achieved with meaningful financial incentives and preferences for promotion.

Report on Mission to Guatemala (A/HRC/4/20/Add.2, 19 February 2007, ¶¶42-48, 53-60, 62)

42. Guatemala has a single-digit conviction rate for murder.¹¹⁸ The implication is obvious and disturbing: Guatemala is a good place to commit a murder, because you will almost certainly get away with it.

43. To understand the causes of this low conviction rate, I spoke with officials of the principal organs of Guatemala's criminal justice system, including the *Policía Nacional Civil* (PNC), the *Ministerio de Gobernación* (which oversees the PNC), the *Ministerio Público* (which prosecutes criminal cases), and the Supreme Court of Justice. These institutions are responsible for the various

116 Note also the finding of the National Human Rights Commission that the paucity of Tamil speaking officers "remains a major grievance [that] is linked to the deteriorating security situation". The Human Rights Situation in the Eastern Province: Update (April 2005), p. 24.

117 The IGP noted that there were already financial incentives for Sinhala officers to learn Tamil and that he had introduced a programme of three-months training in Tamil for new recruits. These measures have been inadequately implemented. The current financial incentives are based, not on demonstrating a high level of proficiency, but on completing a relatively short course. The language-training plan holds greater potential, but because there has been no regular recruitment since 2001, it remains a theoretical innovation.

118 Dividing the number of crimes recorded by the number of convictions achieved in a particular year does not provide an accurate calculation of the conviction rate, inasmuch as some convictions will be for earlier years, and some unresolved cases will result in convictions in later years. To accurately calculate the (current) conviction rate for a given year requires dividing the number of crimes recorded in that year by the number of convictions that have been achieved for those crimes today. This calculation cannot be performed in Guatemala, because the databases of the various institutions of justice are not integrated, making it impossible to trace individual cases as they move from a complaint to a final disposition. While this should be remedied, in the meantime a study tracing a random sample of murders through the system would be invaluable in clarifying both the extent of impunity and in more precisely identifying the bottlenecks in the system.

Some general insight may, nevertheless, be gleaned from the data that the *Ministerio Público* was able to provide. The *Ministerio Público* recorded 8,003 crimes against life (*delitos contra la vida*) in 2005. In that year, the *Ministerio Público* filed charges in 480 cases of crimes against life. In 97 cases involving 111 victims, the defendant was found guilty (*sentencia condenatoria*), and in 34 cases involving 34 victims the defendant was found not guilty (*sentencia absolutoria*). In an additional 55 cases involving 90 victims, a judgement was pending (*pendiente de dictarse sentencia*), and in 294 cases involving 349 victims, the charges remained in process (*acusaciones en trámite*).

Thus, convictions were reached for 1.4 per cent of the victims of crimes against life. If all pending judgements and outstanding charges should result in convictions, the conviction rate would still rise to only 6.9 per cent. It would seem quite unlikely that any reasonable measure of the conviction rate for crimes against life – or for that subset constituting homicides – would exceed a single digit.

phases of the criminal justice process, from crime detection and prevention, to investigation and prosecution, to the adjudication of individual criminal responsibility.

44. The PNC is responsible for crime detection and prevention, but with rising crime rates the public has little confidence in its efforts.¹¹⁹ In our discussion, the *Ministro de Gobernación* argued that the principal failings of the PNC were due to a lack of resources. Guatemala has 19,000 police officers, 5,000 of which participate in specialized units—largely devoted to protecting government buildings, foreign embassies, and individuals—rather than in general crime prevention. Of the remaining 14,000, approximately 7,000 are serving each day, and 3,500 during a given shift. A number of my interlocutors suggested that, for Guatemala to be in line with the policing levels achieved in El Salvador, it would require between 35,000 and 38,000 police—a doubling of the force. The Government has supplemented the number of police by instituting joint patrols between the PNC and the military. Several thousand soldiers are participating in these joint patrols, and a typical patrol will consist of 10 soldiers and 2 police officers. Notwithstanding the need to end the use of social cleansing by elements with the police, [...] there is no question but that Guatemala needs a far larger police force, but enlargement would need to be accompanied by thoroughgoing reform of existing arrangements. It is, however, far from clear that the use of large patrols comprising primarily persons untrained in policing techniques is beneficial even as a short-term measure; moreover, this remilitarization of policing marks a significant step back from the aspirations expressed in the Peace Accords.

45. The challenges of investigation and prosecution confront three key obstacles: a problematic division of responsibility, severely limited resources, and endemic corruption.

46. Responsibility for investigating crimes is shared by the PNC and the *Ministerio Público*, and the latter then prosecutes suspected perpetrators. The majority of investigative personnel are employed by the PNC. However, by law the PNC investigators must comply with the direction of those from the *Ministerio Público* in investigating crime scenes. This arrangement requires close cooperation between the investigators of the PNC and of the *Ministerio Público*. Despite an inter-institutional accord on improving criminal investigations reached by the two bodies in 2004, by all accounts the level of coordination and cooperation is often unsatisfactory, making many investigations inefficient and often unproductive in terms of successfully pursuing prosecution. While disappointing, the failure of a system in which a single function is divided between institutions with inevitably competing interests is unsurprising and deeper reforms should be considered. One possible model, from which much might be learned, is the approach taken by Chile in establishing a system of investigative prosecutors.

47. Limited resources are another cause of inefficient investigations that often produce insufficient evidence for effective prosecution. I was informed that there are roughly 350 investigators working for the PNC and roughly 100 working for the *Ministerio Público*. The latter receives 250,000 complaints each year, and while not all require the attention of an investigator, the gap between resources and requirements is enormous. It is understandable that government officials believe that at least 700 additional investigators are needed.

48. Another problem caused by a lack of resources, along with inadequate training, is that investigations rely overwhelmingly on testimonial rather than physical evidence. The provision of better forensic resources is vital, because, not only is testimonial evidence generally of less probative value than physical evidence, but reliance on the former produces the expected incentives for

119 In a survey conducted in the municipality of Antigua in August 2006 of a representative sample of 410 residents, only 10 per cent believed the actions of the PNC against crime to be “*adecuada*” or “*muy adecuada*” *Informe de un Estudio Cuantitativo de Victimización en el Municipio de Antigua Guatemala*, designed and executed by Aragón & Asociados a solicitud de l’Asociación para la Prevención del Delito (APREDE).

the police to coerce confessions and for criminals to intimidate witnesses. Congress has passed a bill to establish a National Forensics Institute, there is no guarantee that that institute will have adequate resources to make a difference. As one government official noted, Guatemala needs more laboratories, not more legislation.

[...]

The options for maintaining order and controlling crime

53. As I noted at the beginning of this report, Guatemala faces a choice: Realise the vision of the Peace Accords or employ the brutal tactics of the *mano dura* and never fully escape the armed confrontation of the past. This chapter briefly outlines the character and implications of those options and seeks to clarify that the only obstacle to completing the transition from the brutality of an earlier era to a criminal justice system based on the rule of law is the distinct lack of political will.

54. One approach to crime control that meets considerable support is that of the *mano dura*, cracking down on undesirable elements with an iron fist. In its more respectable forms, *mano dura* policy prioritizes harsh punishment and heavily-militarized sweeps over prevention, prosecution, and rehabilitation. In its more extreme forms—what one interlocutor termed “*super mano dura*”—it prioritizes force over legal process. There is a sense that a swift and brutal response to crime is more likely to be effective than the inherently more lengthy process of investigation, arrest, prosecution, trial, and punishment. Indeed, given the failings of the criminal justice system, turning to on-the-spot executions of suspected criminals appears to some as the only available option.

55. However, not only does the summary execution of criminal suspects and other “undesirables” violate international law, but Guatemala’s own recent history demonstrates the concrete danger of this approach to crime control. To the outside observer, the rhetoric of *mano dura* bears an uncanny resemblance to that of the “national security” doctrine that was implemented in many Latin American States in the 1970s and early 1980s and brought unqualified disaster. In concrete terms, moreover, the methods are difficult to distinguish from the tactics of counter-insurgency. The “selective killing” that swept Guatemala throughout the 1980s and early 1990s is notably similar to the “social cleansing” plaguing Guatemala today. Similarly, the lynchings taking place throughout the country today are strongly reminiscent of the counter-insurgency practices of the PACs during the armed confrontation. To the outside observer, it is difficult to understand why the continuing use of these practices is not a matter of universal concern. Unfortunately, however, it appears that even for many who suffered greatly during the armed confrontation, the methods of counter-insurgency remain the most obvious means of maintaining “order”. It would be prudent for all Guatemalans to carefully consider whether they want Guatemala to move fully beyond its legacy of armed confrontation or for it to, instead, remain in a permanent state of low-intensity lawless violence.

56. The other approach to crime control that Guatemala might choose is that pursued by other countries in the region to good effect and reflected in the Peace Accords and international human rights law: Guatemala can develop a working criminal justice system aimed at ensuring the rule of law. Almost all of the formal rhetoric of the political parties endorses this approach. The tragic reality, however, is that almost every component of the current system is radically under-funded, dysfunctional, or both. Congress bears an enormous responsibility for this state of affairs, but those in Government, civil society, and the private sector could also do far more.

57. Many in Government are genuinely committed to a system of criminal justice based on prevention, prosecution, and rehabilitation. Partly due to Congress’s failure to provide adequate resources and to enact necessary legislation, this commitment does not always bear fruit. In the domain in which government officials would appear to have the most potential to create change –

the reform of institutional structures, policies, and working methods – their efforts often appear tangential to the root problems. There are many institutions, round tables, and commissions developing plans, policies, studies, and frameworks, but too often these remain just words. Many of the concrete steps taken, such as establishing specialized units to deal with particular high-profile problems, are too often small projects that do more to assuage criticism than create results. In Government and in civil society there is a worrying tendency to avoid confronting vested interests that would impede the reform of existing institutions by conjuring up new institutions that are not (yet) occupied by vested interests. Those who reject the counterproductive brutality of the *mano dura* and believe in the rule of law must think more strategically and build the coalitions necessary to make that vision a reality.

58. There is, however, little political will to end impunity and implement a working justice system capable of ensuring the rule of law. There is diffidence among the elite and in Congress regarding the commitments made in the Peace Accords related to security and the criminal justice system. For the wealthy, effective policing and criminal justice is a low priority in part due to their reliance on private security guards. (There are roughly 100,000 private security guards in Guatemala, more than five times the number of police.) The lack of political will to establish a functioning criminal justice system in part reflects a sense that the State has very limited responsibilities to society, and that it is wholly appropriate for even security and justice to be private rather than public goods. There is a sense that the State has fulfilled its responsibilities so long as it protects the borders and refrains from killing innocent people. This understanding of State responsibility is incompatible with the content of that concept under international law[...].

59. The Congress has demonstrated little political will to establish a functioning criminal justice system, often allowing key legislation to linger for years. In addition, the inadequacy of the resources allocated to the institutions constituting the criminal justice is a justified complaint of nearly every interlocutor in and out of Government. This complaint is widely articulated by comparing the resources available in Guatemala to those available in other countries, especially El Salvador, a neighbouring country that also emerged from a devastating civil war in the recent past. As discussed above, Guatemala has, even after accounting for the difference in population, far fewer police officers, criminal investigators, prosecutors and judges than El Salvador. When government officials complain about a lack of resources, it serves in part as a convenient excuse: Yes, people get away with murder, but you cannot expect more when I have so few employees, such poor equipment, etc. As an excuse, it is indeed somewhat self-serving: one would imagine that Guatemala could do better than a single-digit conviction rate for murder without spending an additional dollar. Nevertheless, the resources provided to the PNC, the *Ministerio Público*, and the courts are woefully inadequate and place a harsh upper limit on how effective the criminal justice system will be.

60. It is important to emphasise that, while limited resources may provide some excuse for particular Government agencies, it provides no excuse at all for the State as a whole. Guatemala is not an exceptionally poor country, and it could readily afford a criminal justice system on par with that provided in other Central American countries. While Guatemala's per capita gross domestic product is significantly less than those of Belize, Costa Rica, and Panama, it is roughly equal to that of El Salvador, twice that of Honduras, and nearly three times that of Nicaragua.¹²⁰

[...]

62. It is precisely because Guatemala could so readily afford a far better criminal justice system that it is impossible to fully distinguish the issue of resources from the issue of political will. The lack

120 UNDP, *Human Development Report 2005*, table 14: GDP per capita expressed in US dollars: Costa Rica, 4,352; Panama, 4,319; Belize, 3,612; El Salvador, 2,277; Guatemala, 2,009; Honduras, 1,001; Nicaragua, 745.

of resources is due to a lack of political will: rather than funding a high-quality criminal justice system, Congress has decided to impose very low levels of taxation and, thus, to starve the criminal justice system and other parts of Government. Insofar as impunity is due to a lack of resources, it is also due to a lack of political will.

Report on Mission to the Philippines (A/HRC/8/3/Add.2, 16 April 2008, ¶50)

50. No one I spoke with questioned the PNP's [Philippines National Police] authority and duty to investigate crimes allegedly committed by the AFP [Armed Forces of the Philippines]. However, in practice, it does so in only a perfunctory manner. Plausible explanations for this reticence include fear, a tacit understanding that crimes by the AFP should not be investigated, the personal bonds felt among senior AFP and PNP officers, and the solidarity fostered by current cooperation in counterinsurgency operations.

Report on Mission to Brazil (A/HRC/11/2/Add.2, 23 March 2009, ¶¶51-53)

51. I received many allegations that Civil Police investigations, particularly of killings by police, are often grossly inadequate. I was informed by prosecutors that police investigations are often not recorded properly, and sometimes the only evidence would be a crime scene description and a police statement. The use of DNA and ballistics evidence is rare and technical and human resources are lacking.

52. These problems are exacerbated when the case is one in which members of the Military Police report the killing as a "resistance" death. [The resistance category, when used by police, is meant to imply that the deceased resisted lawful arrest and that the police use of force was lawful]. As detailed [earlier in the report on Brazil] a strong *esprit-de-corps* results in Civil Police poorly investigating such cases.¹²¹ I was repeatedly told by Civil Police that when a resistance case occurs, they assume that the Military Police were dealing with criminals, and acting in self-defence.

53. I was also given examples of police negligently or intentionally allowing cases to sit in police precincts, without passing them to prosecutors. For example, in Pernambuco, prosecutors found 2,000 cases where files had been left in police precincts and not passed on to the prosecution service. The files had been left for over 20 years—well past the period of prescription—so prosecutions are now impossible.

Report on Mission to Afghanistan (A/HRC/11/2/Add.4, 6 May 2009, ¶56-57)

56. In addition to the many killings of Afghan civilians which occur in the context of the armed conflict, Afghans also face insecurity from a general lack of law and order. Very few criminal murder cases are properly investigated or prosecuted and few perpetrators are convicted.¹²² This impunity is due to failings in the functioning of the criminal justice system. Although practice varies considerably, the criminal justice system's formal structure is similar to that of many civil

¹²¹ Although the Civil Police and Military Police are independent institutions, members of the respective forces in a given area will routinely cooperate on ordinary cases. The relationships that develop can impede effective investigations implicating the Military Police. This problem is ameliorated when a specialized Civil Police unit with broader geographical coverage, such as the Department of Homicides and Protection of the Person (*Departamento de Homicídios e Proteção à Pessoa* (DHPP)) in São Paulo, takes over a case involving a killing by police.

¹²² The Ministry of Interior provided statistics on the number of crimes that were detected by the ANP, that were delivered to a prosecutor, and that resulted in a judicial verdict. For all offences, the MoI reported that 100% of cases detected were referred to a prosecutor.

law countries.¹²³ Generally, police report crimes to the prosecutor, who investigates on his own or in collaboration with the police.¹²⁴ If the prosecutor finds sufficient evidence against the suspected perpetrator, he submits an indictment to the District Court.¹²⁵ The decision of the District Court may be appealed to the Provincial Court.¹²⁶ Recourse to the Supreme Court may be had if the lower court's decision involved legal error or was based on unlawfully collected evidence.¹²⁷ The Supreme Court may also appoint a committee to revise a decision based on newly discovered evidence.¹²⁸ Despite these formally appropriate procedures, I received many complaints that killings are not investigated, that prosecutions are not pursued, and that the judiciary corruptly exonerates many individuals.

57. Part of the problem at the early stages of crime detection and investigation is that there is a lack of cooperation between the police and the prosecutors. Constitutionally the police engage in “detection” and the prosecutors in “investigation”. This appears not to work well in practice. In the past, it has been suggested that the Minister of Interior (who can issue orders binding on the police) and the Attorney General (who can issue binding orders on the prosecutors) meet as part of a committee, agree on how to cooperate on the combined process of detection and investigation, and simultaneously issue the appropriate orders. This has not come to pass.

Report on Mission to Kenya (A/HRC/11/2/Add.6, 26 May 2009, ¶¶25-27, 73)

25. Police investigations of murders are generally inadequate, due in large part to resource, training, and capacity constraints. But investigations are especially poor when the police themselves are implicated in a death. The cause of this is in part institutional: there is no independent internal affairs

Offence	Year 1384 (21 March 2005-21 March 2006)		Year 1385 (21 March 2006-21 March 2007)		Year 1386 (21 March 2007- 21 March 2008)	
	Detected by ANP	Judicial verdict	Detected by ANP	Judicial verdict	Detected by ANP	Judicial verdict
Murder	1,547	25	1,431	45	1,359	11
Corpse found	38	0	51	0	58	0
Robbery	257	9	255	23	260	4
Theft	2,161	61	2,144	121	2,283	41
Armed theft	196	5	201	0	64	1
Abduction	260	7	252	10	218	3
Injury	2,171	157	2,201	129	4,115	56
Fire	97	3	107	31	101	9
Drug smuggling	265	0	235	0	163	0
Goods smuggling	59	0	133	0	336	0
Extortion	138	0	101	0	65	0
Embezzlement	74	0	103	0	47	0
Bribery	36	0	34	0	44	0

The figures given for judicial verdicts obtained were provided by the MoI rather than by the judiciary, and the true figures are likely higher. According to the MoI, “It’s worth mentioning that the continuous efforts of this organ to obtain the exact number of all three courts’ decisions about criminal cases have not ended with an acceptable result, due to a lack of coordination and interest of the judicial organs with police in most of the provinces. ... There are usually tangible mistakes in this regard.”

123 The system's formal structure is laid out in the Interim Criminal Procedure Code of 2004 (ICPC) together with other statutes and the Constitution. However, it is generally acknowledged that there is weak compliance with some of this code's detailed provisions. Moreover, many cases are dealt with in customary legal systems.

124 ICPC, *supra* note 111 arts. 21, 23.

125 *Ibid.*, art. 39.

126 *Ibid.*, arts. 25, 63.

127 *Ibid.*, art. 71.

128 *Ibid.*, arts. 81, 83.

unit within the police force. Such cases are generally investigated by the Criminal Investigations Division (CID) – the division responsible for all complex or serious investigations. But the problem is also one of will: those at the top of the force lack the determination to investigate themselves, or the will to institute the reforms that would improve transparency and accountability.

26. The police response to the KNCHR's [Kenya National Commission on Human Rights] report on extrajudicial executions is a typical example of police unwillingness to conduct serious investigations. The police report on the KNCHR investigations challenges the investigative capacity and skill of the KNCHR, criticizes the KNCHR for reporting the allegations to the President of Kenya and the UN, and concludes that there was "no" evidence of police complicity in the killings.¹²⁹ A similar response was given in response to the KNCHR's public release of the whistleblower testimony in February 2009. The police issued a statement challenging the reputation of the whistle blower, questioning why the KNCHR released the statement when it did, questioning the KNCHR's commitment to human rights, and intimating that KNCHR officers receive payments from the *Mungiki* [a sect/criminal gang].¹³⁰

27. During my visit, police officials throughout the country blocked my attempts to find detailed information on investigations and inquests. For instance, the response to my written request for the number of inquiries opened by the police in response to complaints received against the police, was simply to state that every "action against a police officer is preceded by an inquiry file which is guided by the following regulations", and then to quote the law. Nevertheless, particularly damning evidence of the quality of police investigations is revealed in communications between the police and the Attorney-General. The Attorney-General provided me a significant volume of correspondence between his office and police headquarters with respect to various cases in which police were alleged to have killed. The correspondence consisted of repeated letters from the Attorney-General directing the police to charge certain individuals or to conduct further investigations. In one matter, two police officers opened fire at a group of youths on 31 December 2001. One person was killed, and three were seriously wounded. In March 2002, the police forwarded the investigation file to the Attorney-General. In May 2002, the Attorney-General directed the police to charge two police officers with murder and unlawful wounding, once certain gaps in investigations were remedied. After a number of months and reminder letters from the Attorney-General, the two policemen were eventually charged. However, a Magistrate dismissed the murder case because of a lack of evidence. The police had failed to conduct the additional investigations requested. In another murder case, the Attorney-General, through the DPP, sent letters to no avail in April, June, August, and September 2008, and January 2009 requesting the police to conduct further investigations so that a trial could proceed.

[...]

73. [With respect specifically to investigations of violence following Kenya's 2007 election, the Special Rapporteur wrote the following:] At the direction of the Attorney-General, the Director of Public Prosecutions created a team of State Counsels to undertake a review of all 2007 post-election violence cases, together with officers from the Criminal Investigations Division.¹³¹ The team was to determine whether there was sufficient evidence in support of the charges, and recommend whether the case should proceed to trial or be withdrawn. The team found that inquest files in all the

129 "Kenya Police Preliminary Report by a Board of Inquiry to Investigate the Alleged Execution and Disappearance of Persons", sent to the KNCHR by the Permanent Secretary, Secretary to the Cabinet and the Head of the Public Service on 17 March 2008.

130 "Allegations by KNHRC", Statement by Kiraithe E.K., For Commissioner of Police, 24 February 2009.

131 "A Report to the Hon. Attorney-General by the Team on the Review of Post-Election Violence Related Cases in Western, Nyanza, Central, Rift Valley, Eastern, Coast and Nairobi Provinces" (February, 2009).

affected provinces” were “far from complete”.¹³² Their report notes that, across Kenya, “considering the high number of deaths reported there should have been more inquest files opened or murder files forwarded”.¹³³ Of 51 files of deaths in Nyanza received by the team, 44 files related to killings by police. Of those, 42 files were returned to the police for further investigations. The counsel review notes that the types of evidence missing from the files included such basic evidence as: eye witness statements, ballistics evidence, and statements from police officers involved in the operation. With respect to the Rift Valley, they found that “a very high number of cases” required further investigations. Most Rift Valley files only contained the statement of the complainant, with no further investigations whatsoever.¹³⁴ This report is clearly a damning indictment of investigations, and strongly suggests that serious prosecutions of police and officials are unlikely to take place within the criminal justice system.

Report on Mission to Mexico (A/HRC/26/36/Add.1, 28 April 2014, ¶¶42-50)

42. Civil society representatives reported extensive omissions in investigations by federal and state authorities into cases of alleged killings. In all too many cases where someone was killed, no serious investigation is conducted. The Special Rapporteur was concerned to learn that the increase in the rate of homicides recorded has not been followed by an increased ability of the criminal justice system to punish those responsible. In some cases a family member filed a report with police or other authorities regarding a case of homicide or disappearance resulting in death, and no serious investigation followed.

43. Numerous individuals informed the Special Rapporteur that relatives have had to play the role of investigator into the death of their loved ones, gathering evidence where authorities refused to take investigative action themselves. He was told that investigative police were often quick to close a case when there was a suspicion without adequate investigation that it resulted from ties to organized crime, as though no further action was necessary.

44. The Special Rapporteur is further concerned that inaccessibility of evidence to the parties involved may result in an improper judicial process. He heard about a number of cases in which the investigative authorities had failed to adequately preserve, classify and transfer biological and material remains, so that they were insufficient both for victim identification and court proceedings.

45. It was also brought to his attention that public officials may manipulate and in some cases even falsify the crime scene, especially when the unlawful use of force by a State actor is implicated. Multiple interlocutors informed the Special Rapporteur that guns and bullets had been planted on crime scenes after killings in order to implicate the victim or other actors. For example, in the city of Monterrey, the Special Rapporteur was briefed on the case of two college students who, after being shot to death by soldiers, were wrongly identified as members of organized criminal groups. He was informed that an independent investigation proved that both youths had been killed arbitrarily by military personnel; that the crime scene had been altered to make it appear that they had died in a shoot-out; and that weapons had been planted on the victims to try to show that the military had acted in legitimate defence and not in an act of disproportionate use of force in the vicinity of the campus. However, even official accounts admit that progress has not been made in the investigation of those responsible for the killing or the manipulation of the evidence.

46. Some protocols to investigate serious offences and search for missing vulnerable persons have been adopted in Mexico, which marks a positive step. The different protocols to investigate femicide in certain jurisdictions, and the Alba and Amber Protocols, show the value of standardizing

132 Ibid., p. 40.

133 Ibid.

134 Ibid.

specific polices. However, there is concern that for those protocols that do exist, safeguards are insufficient or they are not properly followed, for example by keeping proper logbooks. The Special Rapporteur was told that authorities often failed to take immediate action to search for missing or disappeared persons, frequently telling families that they had to wait 72 hours before making a formal report. Training on and implementation of appropriate standards for investigation should be urgently addressed.

47. The Special Rapporteur was impressed by the operations and services he witnessed at the Institute for Forensic Sciences in Mexico City, which is attached to the Superior Tribunal of Justice of the Federal District, and the forensic services in Chihuahua. However, he heard from institutional and civil society actors that the coordination of forensic services across states is insufficient, that certain state services are far inferior to the ones he saw and lack the capacity for proper analyses, and that some cases may also not be reviewed by forensic experts at all. In many instances the forensic services apparently do not retrieve bodies from crime scenes themselves. This can result in a situation where evidence is lost and prosecutions cannot take place.

48. The Special Rapporteur recalls that in both investigations and prosecutions, the powers of modern technology can enhance the efforts of the State to ensure greater accountability, thus reducing its reliance on the use of force. He recommends that Mexico make greater use of the superior access it has to intelligence networks and regional cooperation to counter organized crime and abuses by security forces which threaten the right to life.

49. He underlines that this should have two interlinked components. On the national level, databases should be created *inter alia* in the areas of fingerprinting, DNA, genetics, unidentified remains, and missing persons and should be made digital and linked. Moreover, Mexico should play an increasingly active role in linking up with other States, especially in Central America, to ensure that such information is also shared with the security services of those States.

50. The Special Rapporteur considers that violence in Mexico has an important regional component, in the sense that it spills over into surrounding countries, but also that it is fuelled by events elsewhere. He emphasizes that it is consequently important to seek collaboration in the region to address the issue, for example through the Central American Integration System.

Follow-up to Country Recommendations – Turkey (A/HRC/29/37/Add.4, 6 May 2015, ¶¶59-64)

59. The Special Rapporteur was concerned about the lack of clarity as to whether administrative permission was required from the relevant Governor in order to initiate legal proceedings against public officials in instances of unlawful killings. He recommended that, if no such administrative authorization was required, the Government should make that fact more widely known and that prosecutors should immediately cease the practice of waiting for such authorization before initiating proceedings (see A/HRC/23/47/Add.2, paras. 64, 65 and 123).

60. The Special Rapporteur was informed that initiation of investigations and prosecutions of law enforcement officials is still subject, in practice, to the requirement of administrative authorization.

61. The Special Rapporteur expressed concern about the unnecessarily slow pace of investigations and prosecutions of law enforcement officials, which seems to continue despite the concerns that have been raised.

62. The Special Rapporteur was informed that, in some cases, public officials suspected of having committed human rights violations have been promoted. He urged the Government to ensure that officials under investigation for a violation of the right to life are not allowed to remain on active

duty nor receive a promotion (*ibid.*, paras. 67 and 124). In its response, Turkey indicated that, under article 65 of the Personnel Law of the Turkish Armed Forces, military personnel suspended from duty or detained on remand may not be promoted, and further action is taken based on the outcome of the legal proceedings.¹³⁵ The Special Rapporteur is of the opinion that suspension of promotion and benefits should apply to all public officials suspected of having committed a violation of the right to life and should not be limited to those individuals who have been suspended from duty or detained on remand.

63. In his report, the Special Rapporteur highlighted the importance of creating an independent complaints mechanism to combat impunity among public officials. He acknowledged the Government's efforts to create such a mechanism, including the draft law on Law Enforcement Monitoring Mechanism 2012, but expressed concern about the organizational independence of the commission to be created pursuant to the draft law. He urged Turkey to ensure the organizational independence and the impartiality of the oversight commission to be created, and recommended that a similar monitoring mechanism be established to examine complaints regarding all acts of the Turkish Armed Forces and the military duties of the Gendarmerie (*ibid.*, paras. 62 and 125).

64. The Government of Turkey stated that the Boards of Inspection and Internal Monitoring Units attached to the General Command of the Gendarmerie examined complaints relating to the military duties of the Gendarmerie.¹³⁶ The Special Rapporteur welcomes the internal oversight procedures within the Gendarmerie, but again urges the Government of Turkey to establish a complaint mechanism that is both functionally and operationally independent to ensure accountability for the violations of the right to life. He notes that the Ministry of the Interior has taken some positive steps towards the establishment of an Independent Law Enforcement Complaints Commission in the context of the European Union pre-accession programme. However, concern remains regarding the independence of the Commission as it will be composed primarily of members from the Ministry of the Interior, as such close ties with the executive branch risks hampering the Commission's ability to execute effective oversight.¹³⁷

2. Forensic analysis

Forensic analysis is essential to effective investigations of suspected unlawful deaths. Without it, the necessary objective information to assess the cause of death and to convict a perpetrator is often lacking, and prosecutions are forced to rely on testimonial evidence. Because poor forensics often goes hand in hand with high levels of witness fear and inadequate witness protection programmes, these factors compound to increase impunity. A lack of strong forensics in a country can contribute to police abuses during attempts to force confessions, which—in the absence of forensics or witness testimony—are relied on as the primary evidence of guilt.

Forensic evidence is also crucial in cases of alleged killings by police. In many police killing cases, police claim that their use of lethal force was lawful because the suspect was violently resisting arrest or shooting at the police (Chapter 3 examined this type of killing in more detail). Forensic analysis can provide an important source of evidence corroborating or countering the police version of events. Information, for example, such as blood spatter patterns, bullet trajectory, location and number of bullet hole wounds, and stippling is essential evidence to assist in determining whether a killing was an extrajudicial execution or carried out in self-defence.

¹³⁵ State response, October 2014.

¹³⁶ State response, October 2014.

¹³⁷ See Biriz Berksoy, Military, 'Police and Intelligence in Turkey: Recent transformations and needs for reform,' TESEV Democratization Programme, Policy Report Series (June 2013), p. 24, available at: <http://www.tesev.org.tr/assets/publications/file/01082013160934.pdf>.

In his 2015 report to the General Assembly, Special Rapporteur Heyns discussed the central role forensic science plays in protecting the right to life.

Report to the General Assembly (A/70/304, 7 August 2015, ¶¶16-18, 34-56)

16. The modern concept of human rights is premised on the approach that the violation of human rights norms has consequences: human rights standards are not merely preferences or aspirations. In line with this approach, it has been a central tenet of the mandate holder that the protection of the right to life has two components: the prevention of arbitrary deprivations of life; and accountability, should such deprivations occur. A lack of accountability is in itself a violation of the right to life. Accountability plays a central role in affirming the norm against arbitrary deprivations of life. As such, it also plays a vital preventive role. These two components thus create a self-reinforcing virtuous circle.

17. Accountability is a broad concept that is not limited to the legal or other finding that a specific individual or institution is responsible for a particular taking of life or to the sanctions imposed. Before such conclusions can be reached, an investigation into the events that transpired may be required. The more grave the alleged violation, the greater the need for investigation. Investigations are thus an integral part of the concept of accountability.

18. Good forensic science, for its part, plays an instrumental role in credible investigations, both those conducted immediately after the event and those where evidence emerges years later. The Special Rapporteur on torture and cruel, inhuman or degrading treatment or punishment has observed that “scientific evidence obtained by thorough, impartial and independent forensic evaluations assists States to comply with their obligation systematically to investigate, prosecute and punish each incident of torture, and plays a major role in preventing future acts of torture by fighting impunity and holding perpetrators accountable” (see A/69/387, para. 20). The same is true of investigations into unlawful killings.

[...]

B. Practice of investigations

34. Effective investigations into suspicious deaths can involve contributions from a very wide range of expertise. This can include forensic anthropology, archaeology, pathology, ballistics, toxicology, latent print identification and many others. It is increasingly recognized that all relevant experts in the disciplines must be able to report on a scene in a holistic fashion and to comment on the reports of others.

1. Importance of the independence of forensic investigators

35. As with any other dimension of a credible investigation, it is vital that forensic investigators be meaningfully (functionally) independent of the persons or institution that they are investigating.

36. There is a debate about whether forensic science is best served by being based principally in the judicial mechanisms of law enforcement or rather in the medico-scientific realm of public health. In a report submitted to the United States Department of Justice, the National Academy of Sciences underlined that “forensic science serves more than just law enforcement; and when it does serve law enforcement, it must be equally available to law enforcement officers, prosecutors, and defendants in the criminal justice system”. It was argued that an entity established to govern the forensic science community “cannot be principally beholden to law enforcement. The potential

for conflicts of interest between the needs of law enforcement and the broader needs of forensic science are too great.”¹³⁸

37. A crucial element of functional independence is the right of access to salient information, which in the forensic context also includes the right to access to the scene(s) related to an incident. Another dimension or implication of this is that forensic investigators might sometimes require a privileged legal status, which can serve as a protection from personal or professional reprisal.

38. In certain contexts, it can be a valuable contribution towards independence, and credible independence, to have foreign specialists as part of an investigatory team. An ancillary benefit of such participation is the extent to which it can contribute towards capacity-building.

2. Role of ad hoc mechanisms, including international mechanisms

39. From time to time, with respect to violations that fall within the scope of this mandate, such as large-scale killing by law enforcement officials (for example, in the case of a public demonstration), the ordinary forensic investigatory body will likely be unable to complete a fully independent investigation. In such instances, there is a role for a specialized independent investigatory body that has full power of oversight over the organization or branch to be investigated, whether that is the police force, the army, the national intelligence agency or other.

40. In some circumstances, it is helpful for ad hoc mechanisms to have an international constituency. More generally, in view of the benefits of forensic expertise from around the world being able to interact and share best practices with each other, various forums have evolved to allow for such exchange. ICRC has established a forensics advisory board, which seeks to offer guidance to forensic practitioners, especially concerning their work in challenging humanitarian contexts. International non-governmental organizations such as Physicians for Human Rights can also meet this need.

41. In recognition of the salience of forensic expertise for human rights investigations, some United Nations special procedures mandate holders (most notably the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment) have developed the practice of taking a forensic expert with them on country missions.

42. At the level of international criminal investigation, the International Criminal Court has established a scientific advisory board to provide recommendations to the Prosecutor on the most recent developments in new and emerging technologies and scientific methods and procedures.¹³⁹

3. Importance of capacity-building

43. Capacity with respect to forensic investigations varies broadly around the world. While this is not unexpected, it is important to the extent that, given the discussion above, this implies that the level of protection of the right to life may vary commensurately. It is therefore important that forensic capacity be considered, among development priorities, as a crucial element of support to criminal justice systems.

44. For all of the technological developments that may have taken place over the past 25 years, many of the most important developments have in fact been in terms of process; capacity-building should therefore be as much about education as about equipment.

138 National Academy of Sciences, *Strengthening Forensic Science in the United States: A Path Forward* (Washington, D.C., 2009).

139 Available at: www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1022.aspx.

45. One such methodological focus could be the importance of documentation. For an investigation to be credible, it is necessary that an external expert be able to review the documentation of the case and arrive at the same conclusions. An investigation that, in other dimensions, meets best practice and arrives at likely the correct conclusions but which has failed to properly document its methodology and findings cannot be endorsed by a reviewer. This “independent reviewability” should be a core component of capacity-building.

46. The necessary capacity-building applies not only to forensic specialists themselves, but also to other fields of the criminal justice system and even to the wider public in order to inform them about the role that forensic investigation can play.

C. Role of new technology in investigations

47. Throughout his mandate, the Special Rapporteur has examined the impact of technological developments on the protection of the right to life. In his report to the Human Rights Council in 2015, he highlighted the potential use of information communications technologies to achieve accountability for violations of the right to life. Consultations surrounding the use of information and communications technologies made clear the salience of questions concerning the collection of digital evidence by specialists and the role that such evidence can play within investigations. Conversely, new technology is providing new ways for conventional evidence to be collected, analysed and presented.

48. In some cases, this has involved the more general proliferation of basic and necessary equipment or the lowering of cost barriers to their use. For example, the relatively widespread availability of digital cameras has transformed the way in which forensic investigators can document scenes. In some contexts, investigators have used mobile phones (sometimes coupled with specially designed applications) to take or to transmit and archive evidentiary photographs

49. In other cases, new equipment or techniques have enabled investigators to use fundamentally different tools. One such new technique is the digital reconstruction of the scene of the incident either by taking a laser scan at the scene or retrospectively reconstructing it from photographs or video footage. So-called photogrammetric reconstructions can range from the scale of a single object to the scale of large landscapes. Stereophotogrammetry is a kind of photogrammetry in which three-dimensional coordinates are made by taking measurements from two or more photographs taken from different positions. The result is a three-dimensional model of the object or area of land that can be combined with modelling software to produce accurate three-dimensional representations of structures, streets, towns or objects. Video motion tracking (currently used in surveillance, traffic control and human-computer interaction) can be used to analyse video evidence, identifying target objects in consecutive frames.

50. With respect to human rights investigations, this type of analysis can be invaluable in trying to draw conclusions from sometimes repurposed or partial evidence. For example, the experts involved in a Forensic Architecture project funded by the European Research Council collaborated on an investigation into the death of a 30-year-old man hit by a tear-gas canister during a peaceful protest in the village of Bil'in in the West Bank. A three-dimensional spatial analysis constructed from field measurements, videos, photographs and aerial images demonstrated that in order to travel with the trajectory shown in a video recorded by a passer-by, the canister had to have been fired at an almost direct angle, contrary to the Israeli army's regulations for the weapon's use. On the basis of this evidence, a judge ordered an official investigation into what soldiers had claimed was an accidental death.¹⁴⁰

140 Available at: www.situresearch.com/works/bilin-report.

51. Interestingly, similar techniques can also be applied to much older cases. For example, prosecutors have used digital reconstructions of Nazi concentration camps in order to demonstrate what it would have been possible to see from particular posts and thus to build cases against former camp guards.¹⁴¹

52. The Special Rapporteur welcomes the fact that those who work with such technology have offered support for his mandate and looks forward to engaging constructively with this field. It is important to highlight, as he did in his recent report to the Human Rights Council regarding the importance of information communications technologies, that the technological innovations are not, on their own, sufficient to ensure greater accountability for violations of the right to life: it is important both that human capacity be developed to take advantage of the technology and that pre-existing forums of accountability be open to new forms or presentations of evidence.

D. Importance of identification

53. One technological development that has revolutionized the forensic investigation of human remains over the past several decades is the development and continuing sophistication of techniques of DNA identification. This has had a number of impacts on the right to life.

54. One manner in which the mandate and DNA evidence intersect is the use of DNA evidence in exoneration proceedings on behalf of those convicted of capital crimes. While doubtless only the tip of the iceberg with respect to wrongful convictions, these cases underline the extent to which DNA can improve the accuracy of criminal investigations and, in several jurisdictions, has increased the threshold of the burden of proof.

55. In a similarly transformative fashion, DNA and the field of forensic genetics have been used to identify persons missing as a result of human rights violations or from multiple fatalities resulting from natural disasters or accidents. An awareness of the importance of this field for human rights, including the right to truth, led the High Commissioner for Human Rights to write a report on forensic genetics and human rights in 2010 (A/HRC/15/26). The report underlined the importance of establishing protocols for exhumation, ante mortem data collection, autopsies and identification based on scientifically valid and reliable methods and technologies; appropriate means of involving the communities and families concerned in the exhumation, autopsy and identification procedures; and procedures for handing over the human remains to the family. More generally, and along with Human Rights Council resolution 10/26, the report demonstrated that the use of forensic genetics, including the voluntary creation of genetic databanks, has a crucial role to play in identifying victims of serious violations of human rights and international humanitarian law.¹⁴² The Working Group on Enforced and Involuntary Disappearances has also stressed the need for expanded use of DNA testing in this connection (see A/HRC/27/49, para. 112).

56. Across all dimensions of the forensic investigatory process, it is important to guard against unrealistic expectations of what the science can reveal (expectations among non-experts, which can be influenced by portrayals of forensic investigations in popular culture). These expectations can be particularly problematic when they lead policymakers to impose unnecessarily high thresholds on the standards of proof for identification of historical remains, which can lead to traumatic bottlenecks and delays in the return of remains to families.

141 Melissa Eddy, "Chasing death camp guards with new tools", *New York Times*, 5 May 2014, available at: www.nytimes.com/2014/05/06/world/europe/chasing-death-camp-guards-with-virtual-tools.htm.

142 In addition to the work of OHCHR, the International Committee of the Red Cross also developed a helpful guidance publication entitled "Forensic identification of human remains" (Geneva, 2014). Available from www.icrc.org/eng/resources/documents/publication/p4154.htm.

This thematic focus (along with the process of updating the Minnesota Protocol) built upon a range of experiences the Special Rapporteurs had of examining forensic capacity in many country reports.

Report on Mission to Nigeria (E/CN.4/2006/53/Add.4, 7 January 2006, ¶¶89-91)

89. Only the Police are authorized to investigate killings, even where the principal suspects are police officers. But the police service is so under-funded that the family of the deceased are often requested to fund any investigation, an expense which is well beyond the capacity of most Nigerians. Notions such as sealing off a crime scene or allocating the best officers to investigate a particular crime are foreign to a force for whom the phrase “police investigation” has become an oxymoron. There is no tradition of systematic forensic investigation in Nigeria, there is a single ballisticsian in the entire country, only one police laboratory, and no fingerprint database. The result, unsurprisingly, is that the police rely heavily upon confessions which, on one estimate, are the basis for 60 per cent of prosecutions. The temptation to “extract” a confession by all available means seems hard to resist.

90. The Nigeria Police informed the Special Rapporteur that “[c]oronial inquiries [have] been conducted in all relevant cases, however records are not available ...”.¹⁴³ According to virtually every other source, however, coroners are an endangered species and inquiries a rarity. It is unsurprising that the records are unavailable.

91. In practice, unspecialized magistrates act as coroners. It is commonplace for pathologists to sign reports without examining the body and when police killings are involved, there is often no signature.

Follow-up Report on Mission to Nigeria (A/HRC/8/3/Add.3, 14 May 2008, ¶85)

85. There is only one police laboratory and only one ballisticsian in all of Nigeria, and no fingerprint database. Because forensic investigations are grossly inadequate, police must rely almost entirely on confessions to build cases. This reality has too often led police to force confessions by torturing prisoners.¹⁴⁴ The Special Rapporteur recommended that the Nigerian police increase its forensic capabilities by establishing properly equipped and staffed forensic laboratories in key centres throughout Nigeria. The Apo 6 commission of inquiry made similar recommendations, calling for enhanced police “intelligence gathering mechanisms”, including “a police science forensic laboratory” and the “immediate training of more ballisticsians”. But there have not been any improvements in this regard. As the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment observed during his March 2007 visit to Nigeria that, “[f]orensic medical examinations which could sustain complaints are non-existent even in cases of death in police custody”.

Report on Mission to Sri Lanka (E/CN.4/2006/53/Add.5, 27 March 2006, ¶56)

56. The lack of investigative capacity is due to a lack of police training and resources, ineffective forensics, and an unwillingness to ensure the security of witnesses. The Judicial Medical Officers (JMOs) who carry out most autopsies typically lack the requisite vehicles, equipment and specialized training. The range of obstacles to a prompt and effective examination means that too much evidence simply bleeds out onto the floor ... Inadequate investigations result in evidence insufficient to sustain a conviction. Various police and forensic training programmes have been

¹⁴³ Figures provided by the Inspector-General of Police, 2 July 2005, p.2.

¹⁴⁴ See also: Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, Mission to Nigeria, A/HRC/7/3/Add.4 (22 November 2007).

supported through development assistance initiatives. In the absence of any detailed evaluations, my impression is that they have been worthwhile but regrettably limited in scope.

Report on Mission to Guatemala (A/HRC/4/20/Add.2, 19 February 2007, ¶48)

48. Another problem caused by a lack of resources, along with inadequate training, is that investigations rely overwhelmingly on testimonial rather than physical evidence. The provision of better forensic resources is vital, because, not only is testimonial evidence generally of less probative value than physical evidence, but reliance on the former produces the expected incentives for the police to coerce confessions and for criminals to intimidate witnesses. Congress has passed a bill to establish a National Forensics Institute, there is no guarantee that that institute will have adequate resources to make a difference. As one government official noted, Guatemala needs more laboratories, not more legislation.

Report on Mission to the Philippines (A/HRC/8/3/Add.2, 16 April 2008, ¶55)

55. A greater capacity to use physical evidence would allow more cases to go forward without witness testimony. The information that I received from officials was that, while there are some forensic laboratories and experts in Manila, there is very limited access to these resources throughout most of the country.

Report on Mission to Brazil (A/HRC/11/2/Add.2, 23 March 2009, ¶¶12, 22-24, 54-56)

12. I received many credible allegations that police often failed to secure the scene of the incident adequately, making the gathering and assessment of reliable evidence very difficult. This was strongly denied by the police.¹⁴⁵ However, I received extensive evidence that crime scenes were routinely tampered with. This evidence included detailed accounts of police taking corpses to hospital, ostensibly for the purposes of “first aid”, but in circumstances in which the victim was clearly already deceased.

[...]

22. Nineteen were killed and at least 9 wounded during the 8 hour operation [a large-scale police operation in a Rio de Janeiro favela “Complexo do Alemão”, intended to counter gang control and violence].¹⁴⁶ All 19 deaths were recorded as “resistance” deaths [a police category, intended to convey that the victims were lawfully killed by police while resisting arrest]. But there is compelling evidence that at least some of those killed were extrajudicially executed. I received credible accounts from residents and family members of victims that victims were shot in the back whilst walking away from police, or dragged out of homes unarmed and executed, or disarmed and then shot in the head. [...]

23. Two independent studies strongly support the witness and victims’ families accounts of executions. One was by the Human Rights Commission of the Brazilian Bar Association (Rio de Janeiro division)¹⁴⁷ and the other by experts appointed by the Human Rights Special Secretary

145 São Paulo police representatives told me that of 3,600 homicides (which exclude resistance killings) from January to September 2007, there were no registered crime scene disturbances at all.

146 The numbers of killings by police registered as “autos de resistência” in Rio de Janeiro has risen sharply since 1997: 1997 (300), 1998 (397), 1999 (289), 2000 (427), 2001 (592), 2002 (900), 2003 (1195), 2004 (983), 2005 (1098), 2006 (1063), 2007 (1,330).

147 See Ordem dos Advogados do Brasil, Seção do Rio de Janeiro, Comissão de Direitos Humanos e Acesso à Justiça, Notitia Criminis, Exmo. Sr. Dr. Sub-Procurador Geral de Direitos Humanos do Ministério Público do Estado do Rio de Janeiro; and “Expert Report on the Complexo do Alemão Affair: Expert Opinion on the Reports of

of the Federal Government.¹⁴⁸ Both found that the original autopsy reports contained serious deficiencies and had not been carried out in accordance with international standards.¹⁴⁹

24. The expert reports found strong evidence of extrajudicial executions. Of 19 killed, 14 showed signs of 25 gunshot entry wounds in the back of their bodies. Six victims showed signs of 8 entry wounds in the head and face. Five victims showed signs of point-blank shots.¹⁵⁰ This information, together with the high number of shots per victim (over 3), the fact that different guns were used to shoot the same victim, and analysis of the sequence and trajectory of shots, led the experts to infer that a number of the victims had been executed. But, given the many deficiencies in the original forensic analysis, both reports stated that it was impossible to conclude definitively whether the victims were executed.

[...]

54. The state Institutes of Forensic Medicine in Brazil suffer from a lack of basic resources and are not sufficiently independent from police.¹⁵¹ For example, in Rio de Janeiro, the independent expert reports on the deaths during the Complexo do Alemão operation found, upon reviewing the relevant autopsy reports prepared by the state institutes, that they were grossly deficient: basic x-ray, blood, and gun powder analysis had simply not been carried out.

55. The use of forensic evidence is critical in some cases, especially when there are no witnesses or when those that exist are afraid to testify. For these reasons, forensic evidence is especially important in killings alleged by the police to have been proportionate responses to “resistance”. The only testimony available may be that of the police officer responsible for the shooting, but where reliable physical evidence is available, it may nevertheless be possible to determine that a particular shooting was an extrajudicial execution.

56. Presently, in most states, the Institute of Forensic Medicine is responsible to the state Public Security Secretariat. Given that Institutes of Forensic Medicine are intended to provide expert advice rather than to carry out government policy, their institutional autonomy and independence and the tenure of their staff should be guaranteed. Doing so would, moreover, ensure that their reports on police killings would be—and appear to be—impartial, expert determinations.

Report on Mission to Colombia (A/HRC/14/24/Add.2, 31 March 2010, ¶¶31-32)

31. When a military unit reports a killing in combat, the initial inspection of the scene and the corpse is now generally undertaken by the Fiscalía’s Technical Investigation Unit (Cuerpo Técnico de Investigación, CTI).¹⁵² To the Government’s credit, it ensures a CTI presence at combat death

Corpse Examinations issued by the Legal Medicine Institute (IML), as a result of the 19 deaths at the “Complexo do Alemão” on June 27, 2007” (10 July 2007).

148 Presidência da República, Secretaria Especial dos Direitos Humanos, Comissão Permanente de Combate à Tortura e à Violência Institucional, “Encaminha relatório sobre mortes violentas no Morro do Alemão” (14 November de 2007) and “Relatório Técnico Visita de Cooperação Técnica – Rio de Janeiro (RJ) Julho de 2007”.

149 Especially the 1989 UN Principles, *supra* note 2. The original reports were poorly prepared, and failed to describe injuries adequately. The victims had arrived at the forensics institute naked. Thus their clothing could not be examined nor gun powder analysis carried out. X-rays had not been taken to locate the bullets still in victims’ bodies, and the crime scenes were not preserved.

150 A “tattooing” or “stippling” effect on the skin around a bullet entry wound is caused by gunpowder residue on the skin, and can be used to analyse the muzzle to target distance.

151 Positively, Brazil made investment in equipment in 2007; however, there remains a serious lack of basic resources in many state institutes.

152 Under the Military Criminal Code, the military prosecutor has the duty to examine the corpse. Law No. 522 (1999), art. 472. However, by an agreement between the Minister of Defence and the *Fiscalia* dated 14 June 2006, deaths

sites in most cases, even at considerable expense and practical difficulty.¹⁵³ Within 36 hours, CTI officials must report to the relevant prosecutor on their investigation.¹⁵⁴ However, as of July 2009, CTI had 1,800 cases that it had held for more than six months without turning them over to the Fiscalía, resulting in significant case delays.¹⁵⁵

32. The presence of external investigators reduces opportunities for the military to cover up unlawful killings, and promotes transparency. It does not, however, prevent members of the military from interfering with the scene before CTI arrives.

Follow-up Report on Mission to Colombia (A/HRC/20/22/Add.2, 15 May 2012, ¶¶33-39)

33. In 2009, the Special Rapporteur noted the importance of the Technical Investigation Unit of the Attorney General's Office (CTI), as external investigators reduce opportunities for the military to cover up unlawful killings and promote transparency. When a military unit reports a killing in combat, the initial inspection of the scene should be undertaken by the CTI; within 36 hours, CTI officials must report to the relevant prosecutor on their investigation.

34. In September 2010, OHCHR issued a report on the La Macarena Cemetery, Meta.¹⁵⁶ The report explored allegations which were made public in 2009 regarding a mass grave site with hundreds of unidentified bodies. The department of Meta has the second highest rate of reported extrajudicial executions in Colombia, according to 2010 statistics of the Attorney General's Office. The cemetery is located next to a military base of the Joint Task Force Omega and it was alleged that many of the unidentified bodies were of civilians who had been killed in combat by the military and buried clandestinely since 2002.

35. In the report, OHCHR noted that it was unclear how many of the unidentified cadavers were of persons who had been killed in combat. This was reportedly due to a lack of military and judicial control, and procedural lapses by the authorities, including flawed forensic investigations and omissions in the official registering of the deaths. A principal concern raised was that, routinely, corpses had been examined only after having been moved by the military, and without an examination of the scene where they were reported as having died. OHCHR reiterated that it was particularly important that the examination of corpses be performed by personnel from CTI at the site where the deaths occurred.

36. OHCHR concluded that the existence of a large number of unidentified bodies buried in other cemeteries around the country posed significant challenges for the Attorney General's Office with regard to undertaking proper investigations, in view of resource restrictions. In the preparation of the present follow-up report, the Special Rapporteur received information indicating that the scarcity of adequate human and technical resources for the CTI continues to restrict the exercise of

in combat must first be inspected by CTI. A standing directive also requires commanding officers of military units to "exhaust all available resources" to ensure that CTI can carry out its investigations. See Ministry of Defence, Standing Directive No. 19 (2007), instruction No. 5; see also Ministry of Defence, Standing Directive No. 10 (2007), instruction No. 5.

153 The Ministry of Defence informed me that, while it does not have records on operations that CTI inspected, CTI attends the "great majority". CTI officials stated they were able to attend 95 per cent of crime scenes. CTI was unable to attend the other 5 per cent because of a lack of transportation, danger (e.g., ongoing conflict) or difficulty in reaching the site because of terrain and geography. According to the military, its facilitation of CTI investigations can cost US\$ 8,000 per case.

154 Criminal Procedure Code, art. 205.

155 Ministry of Defence, written response to requests from Special Rapporteur, annex 3.

156 OHCHR-Colombia report on the La Macarena Cemetery, Meta department, 7 September 2010 (available from www.hchr.org.co/publico/comunicados/2010/cp1029.pdf); Report of the High Commissioner for Human Rights on the situation of human rights in Colombia, A/HRC/16/22, 3 February 2011, para. 89.

its work. He calls on the State to publicly report on the results of exhumations and investigations undertaken in response to the OHCHR report on the La Macarena Cemetery.

37. The Special Rapporteur is concerned by reports indicating that agents previously assigned to the former intelligence agency—the Department of National Security (Departamento Administrativo de Seguridad, DAS), which was dismantled in 2011 due to its involvement in human rights violations—have been reassigned to the CTI without any vetting process. The Special Rapporteur furthermore regrets the lack of criminal investigations into the responsibility of former DAS agents for human rights violations, and that files containing related evidence remain classified.

38. Furthermore, the Special Rapporteur is concerned that, in February 2012, the Ministry of Defence announced the creation of a System for Assistance with Criminal Investigations for the Armed Forces.¹⁵⁷ According to this initiative, staff of the National Police's Directorate for Criminal Investigation (Dirección de Investigación Criminal, DIJIN), which administratively is under the Ministry of Defence, would undertake the initial investigations of deaths in combat. The staff of the DIJIN reside within military installations.

39. The Special Rapporteur emphasizes the requirement that forensic examinations be undertaken in an independent manner, and observes that the DIJIN may not comply with this criterion.

Follow-up to Country Recommendations – Turkey (A/HRC/29/37/Add.4, 6 May 2015, ¶¶54-58)

54. The Special Rapporteur stated that impunity for killings manifested itself in slow or inadequate investigations and prosecutions and was widely believed to be due to lack of political will, exacerbated by a deferential approach to the executive by prosecutors, as well as shortcomings in the independent and effective functioning of the judiciary, inadequate forensic services and lack of an independent complaints mechanism regarding law enforcement officials. He recommended that crime scene investigation procedures be improved and monitored so that violations by State actors are investigated independently and that the Forensic Medicine Institute be endowed with independence, and its capacity increased to conduct forensic and autopsy procedures in a swift, effective, impartial and transparent manner (see A/HRC/23/47/Add.2, paras. 58, 118 and 119).

55. The Government indicated that the Forensic Medicine Institute was subordinate to the Ministry of Justice, and that it carried out its work impartially. The participation of impartial experts assigned by parties was permitted and the Institute is a member of the European Network of Forensic Science Institutes (ENFSI). The Government explained that prosecutors tasked the Gendarmerie to conduct preliminary investigations where the crime is alleged to have been perpetrated by the Police, and vice versa. It stated that, in instances where both the Police and Gendarmerie are jointly implicated, the prosecutor would carry out the investigation and collect all the evidence (see A/HRC/23/47/Add.6, paras. 18 and 19). However, the Special Rapporteur was informed that, in practice, the same police or gendarmerie units alleged to have committed the violation often undertake the collection and recording of forensic evidence.

56. The Special Rapporteur notes that no reform has been undertaken in relation to the functioning of the Forensic Medicine Institute.

57. The Special Rapporteur expressed concern that the application of the statute of limitations for unlawful killings further aggravated the climate of impunity. He recommended that the statute of limitations be removed for all violations of the right to life (see A/HRC/23/47/Add.2, paras. 62

¹⁵⁷ Colombia, Ministry of Defence webpage, public statement posted 8 February 2012. Available from www.mindefensa.gov.co/irj/portal/Mindefensa?NavigationTarget=navurl://8f236e5b981d4883edd932a81308cc2e.

and 117). The Special Rapporteur welcomes the fact that the statute of limitations, due to a recent amendment, no longer applies to the crime of torture.

58. The Special Rapporteur was concerned that the provision removing the statute of limitations for prosecution of torture would not be applied retrospectively, thereby limiting access to justice for thousands of killings and enforced disappearances that occurred in the 1990s. In its comment, Turkey indicated that prosecutors and judges, in accordance with the principles established in the jurisprudence of the European Court of Human Rights, were required to interpret the provision in a broad manner, which would ensure that the interpretation precludes the application of the provisions on statutory limitations for all acts considered as crimes against humanity, genocide and torture (see A/HRC/23/47/Add.6, para. 22). In the light of that information, the Special Rapporteur was concerned to learn that a military prosecutor had handed down the decision to close a case concerning the aerial bombardment by the Turkish Air Force in 1994 of two villages in the southeast, in which dozens of villagers were killed, on the grounds that the statute of limitations had been exceeded, despite the ruling by the European Court, which found violations of the right to life, and lack of an effective investigation.¹⁵⁸

An example of drawing attention to forensic failure is an investigation that the two Special Rapporteurs conducted into videos strongly suggesting violations in Sri Lanka (the technical element of which will be discussed further in Chapter 10). In his Technical Note on the evidence, Special Rapporteur Heyns highlighted that the superficial, pseudo-scientific rejection by the State of relevant evidence could not amount to the discharge of the its duty to investigate.¹⁵⁹

Summary of information, including individual cases, transmitted to Governments and replies received (A/HRC/17/28/Add.1, 27 May 2011, Appendix I, §§42-44)

A. Technical Note by the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr. Christof Heyns, in relation to the authenticity of the second, extended Channel 4 videotape regarding Sri Lanka

[...]

42. As has been pointed out in correspondence with the Government, it is the primary duty of the State to investigate this compelling evidence of horrendous crimes – crimes which the international community cannot allow to go unpunished. This is stated in clear terms in paragraphs 9 and 10 of the United Nations Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, adopted on 24 May 1989, with provides under the heading ‘Investigations’ as follows:

9. There shall be thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions, including cases where complaints by relatives or other reliable reports suggest unnatural death in the above circumstances. Governments shall maintain investigative offices and procedures to undertake such inquiries. The purpose of the investigation shall be to determine the cause, manner and time of death, the person responsible, and any pattern or practice which may have brought about that death. It shall include an adequate autopsy, collection and analysis of all physical and documentary evidence and statements from

¹⁵⁸ ECtHR, *Benzer & Others v. Turkey* (Application no. 23502/06), judgement of 12 November 2013.

¹⁵⁹ For further discussion of the role of the mandate in pursuing accountability in this case, see Thomas Probert ‘The role of the UN Human Rights Council Special Procedures in protecting the right to life in armed conflicts’ in Dan Kuwali & Frans Viljoen (eds.) *By all means necessary: Protecting civilians and preventing mass atrocities in Africa* (Pretoria University Law Press, 2017). The British broadcaster Chane 4 also produced a feature-length documentary on the events and the investigation, *Sri Lanka’s Killing Fields* (dir. Callum Macrae, 2011).

witnesses. The investigation shall distinguish between natural death, accidental death, suicide and homicide.

10. The investigative authority shall have the power to obtain all the information necessary to the inquiry. Those persons conducting the investigation shall have at their disposal all the necessary budgetary and technical resources for effective investigation. They shall also have the authority to oblige officials allegedly involved in any such executions to appear and testify. The same shall apply to any witness. To this end, they shall be entitled to issue summonses to witnesses, including the officials allegedly involved and to demand the production of evidence.

43. This obligation on the State to investigate cannot be discharged by simply denying that anything untoward has happened. It can also not be discharged by assembling a group of people tied in one way or another to the government under question who are asked to comment on the videos, and expecting the international community to accept their expertise in all matters ranging from forensic analysis of videos to pathology to ballistics, without even seeing the full text of their reports or establishing their expertise in these fields. Denials based on such evidence are not credible.

44. The mandate of the domestic mechanism that the Government of Sri Lanka has created does not require a fact-finding investigation into violations of international law and international humanitarian law, and its modus operandi so far does not indicate that it is doing this. In addition to whatever steps can be taken to rectify the domestic process, an international investigation by an independent team with full investigative powers and capabilities should be initiated. It should make recommendations on any possible prosecutions or other measures to be taken.

3. Investigative mechanisms

The Minnesota Protocol makes clear that there is no particular investigative mechanism that will be automatically appropriate for a given circumstance, and that the State's duty to investigate can be fulfilled by several different types of mechanism, provided that certain standards are met.

The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016): The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (2017, ¶¶38-40)

D. Elements and Principles of Investigations

[...]

4. Investigative mechanisms

38. The duty to investigate does not necessarily call for one particular investigative mechanism in preference to another. States may use a wide range of mechanisms consistent with domestic law and practice, provided those mechanisms meet the international law requirements of the duty to investigate. Whether a police investigation, a coronial inquest, an investigation by an independent police oversight body, an investigation by a judge, special prosecutor or national human rights institution, or any other investigation, complies with the duty to investigate, is a matter to be determined in the light of the international legal obligations and commitments of the State. Whichever mechanisms are used, however, they must, as a whole, meet the minimum requirements set out in these Guidelines.

39. In specific circumstances a State may establish a special mechanism such as a commission of inquiry or another transitional justice mechanism. An international investigation mechanism with the expertise and capacity to conduct an independent and objective investigation may be

appropriate. The requirements of promptness, effectiveness and thoroughness, independence and impartiality, and transparency apply equally to investigations undertaken by these mechanisms.¹⁶⁰

40. States must ensure that special mechanisms do not undermine accountability by, for example, unduly delaying or avoiding criminal prosecutions. The effective conduct of a special investigative mechanism – designed, for example, to investigate the systemic causes of rights violations or to secure historical memory – does not in itself satisfy a state's obligation to prosecute and punish, through judicial processes, those responsible for an unlawful death. Accordingly, while special mechanisms may play a valuable role in conducting investigations in certain circumstances, they are unlikely on their own to fulfil the State's duty to investigate. Fulfilment of that duty may require a combination of mechanisms.

(i) Public prosecution services

The prosecution of alleged offenders is a crucial element in promoting accountability for violations of the right to life, both to ensure justice for past wrongs and to deter future abuse. In a number of country missions, the Special Rapporteurs found the country's prosecution service to be one of the strongest justice institutions. Where the service was robust, it was generally because its independence was guaranteed in law (and respected in principle and practice), it was well-funded, appointments were made through highly competitive examinations, and the it was headed by a strong, scrupulous, and independent prosecutor-general.

However, the Special Rapporteurs also frequently encountered weak prosecution services and observed the follow problems contributing to impunity:

- Lack of resources to investigate all cases, to investigate cases sufficiently, or to set up specialized prosecution units to target specific types of crime (e.g. organised crime, police killings);
- In many countries, police and prosecutors share, to varying degrees, investigation responsibilities. When cooperation is poor, cases do not move through the system;
- Where killings are committed by illegal armed groups, such as powerful crime syndicates, gangs, and drug traffickers, impunity can result from simplistic prosecution strategies that target individuals, but fail to address the group as a whole;
- Corruption and lack of independence, leading to prosecutors agreeing to shelve or manipulate cases. This particularly affects prosecutions of police and senior government officials;
- Poor training, and appointments and promotions based on connections or allegiances rather than merit, leading to low-quality prosecutors;
- Prosecutor beliefs that certain types of cases (e.g. killings of suspected criminals or gang members) are not worthy of serious prosecution;
- Where local prosecutors have a fear of retribution or lack independence from powerful local actors, it can be important for federal or national level prosecutors to be able to take on local cases. Impunity can result where national prosecutors are unable or unwilling to do so.

¹⁶⁰ In designing such mechanisms, States should have regard to the principles relating to commissions of inquiry contained in the Set of Principles to Combat Impunity, the OHCHR's Commissions of Inquiry and Fact-Finding Missions Guidance and Practice and the Siracusa Guidelines for International, Regional and National Fact-Finding Bodies.

Report on Mission to Nigeria (E/CN.4/2006/53/Add.4, 7 January 2006, ¶¶6, 95)

6. A leading Nigerian NGO, the Legal Defence and Assistance Project, recorded 997 cases of extrajudicial killing in 2003, of which 19 resulted in a prosecution. For 2004 there were 2,987 cases and not a single prosecution.¹⁶¹

[...]

95. Public Prosecutors have no control over police investigations, nor can they demand that individuals be produced in court. As a result, most police killings are never referred to the DPP and the latter cannot initiate a prosecution. Moreover, a police officer must be dismissed from the police force before being prosecuted.

Report on Mission to Philippines (A/HRC/8/3/Add.2, 16 April 2008, ¶51)

51. The current system so discourages cooperation between prosecutors and police that each is tempted to simply blame the other for failing to achieve convictions. Prosecutors rather than judges make the determination whether the evidence provides probable cause for the charges to be brought. During this preliminary hearing, prosecutors are expected to show absolute impartiality. Prosecutors thus perceive themselves unable to guide the police with respect to the testimony and physical evidence that must be obtained to make a case. Even when prosecutors find the evidence presented by the police at the preliminary hearing insufficient, they seldom provide a reasoned explanation for that insufficiency for fear of appearing biased. Police thus lack expert guidance in building cases. While this problem is deeply embedded in the culture of the criminal justice system, changes in the role of the prosecutor could be effected by amending the Rules of Criminal Procedure, which are promulgated by the Supreme Court.¹⁶² The Supreme Court should use this power to require prosecutors to provide reasoned decisions for probable cause determinations and to insist that prosecutors take a more proactive role in the ensuring the proper investigation of criminal cases.

Report on Mission to Kenya (A/HRC/11/2/Add.6, 26 May 2009, ¶¶28-30)

28. The Attorney-General is a constitutional office-holder, a member of the National Assembly, a member of the Judicial Service Commission, the principal legal advisor to the Government, and has the constitutional power to conduct or stop prosecutions.¹⁶³ For offences which can be heard in Magistrate's Courts (including, for example, robbery), prosecutorial functions are delegated by the Attorney-General to the police. For offences over which only the High Court has jurisdiction (such

161 'Extra-Judicial Killings on the Increase in Nigeria,' *This Day* (Lagos), 31 Oct. 2005.

162 See Constitution of the Republic of the Philippines (1987), art. VIII, section 5: "The Supreme Court shall have the following powers: ... Promulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts, the admission to the practice of law, the integrated bar, and legal assistance to the under-privileged. Such rules shall provide a simplified and inexpensive procedure for the speedy disposition of cases, shall be uniform for all courts of the same grade, and shall not diminish, increase, or modify substantive rights. Rules of procedure of special courts and quasi-judicial bodies shall remain effective unless disapproved by the Supreme Court."

The Government has also informed me that the President has recently promulgated an administrative order to "ensure proper coordination and cooperation between the prosecutors and the police". (Letter from the Philippine Mission to the United Nations, dated 18 October 2007.) That order provides that, in cases falling under the jurisdiction of the special courts established by the Supreme Court to deal with extrajudicial executions (see Part X(H)), that the PNP and NBI are directed to cooperate with the NPS "by, among other things, consulting with public prosecutors at all stages of the criminal investigation". (Administrative Order No. 181 (3 July 2007).)

163 Constitution of Kenya, Arts 26, 36, 68.

as murder), prosecutorial functions are delegated to the Director of Public Prosecutions (DPP). The DPP has no security of tenure. His is a department of the office of the Attorney-General, not an independent office.

29. The Attorney-General has security of tenure, for life, and has been in office since 1991. He has overseen, for nearly two decades, a system that clearly does not work. The Attorney-General has the constitutional power to “require” the Police Commissioner to investigate any matter relating to an alleged offence.¹⁶⁴ As documents provided by the Attorney-General clearly indicate, he is all too aware of the grave deficiencies in police investigations. But instead of using his constitutional powers to force individual investigations, and to promote essential institutional reforms, letters simply go back and forth for years, with cases neither investigated sufficiently, nor prosecuted. In addition, the repeated failure to prosecute any senior officials for their role in large-scale election violence over a period of many years [...] has led to a complete loss of faith in the commitment of his office to prosecute those in Government with responsibility for crimes.

30. The Attorney-General and successive police commissioners have engaged in a game in which each insists the ball is in the court of the other, while both know that it has in fact been hidden so that no outcome can ever be declared. The Attorney-General then presents himself as the helpless victim of the intransigence or malfeasance of others. But this is a complete misrepresentation of the situation of an individual who has wielded immense power through a succession of government. In fact, his unrelenting failure to prosecute any senior officials implicated in extrajudicial executions renders him not just complicit in, but absolutely indispensable to, a system which has institutionalized impunity in Kenya. In order to restore the integrity of the office, the current Attorney-General should resign or be required to leave office. In future, prosecutions should be undertaken by a constitutionally entrenched and independent Department of Public Prosecutions. The powers to prosecute and to intervene in prosecutions should not be held by a political office-holder.

Report on Mission to Brazil (A/HRC/11/2/Add.2, 23 March 2009, ¶¶57-60)

57. The Public Prosecutor’s Office (*Ministério Público*) is a widely-respected institution in Brazil, and I was told of many examples of prosecutors who had taken action to hold to account offending police officers. The independence of the Public Prosecutor’s Office from both the executive and the judiciary is provided by the Constitution, and the employment guarantees provided to individual prosecutors ensure that they have a high-level of independence in practice.¹⁶⁵

58. In areas in which progress has been made against police impunity, prosecutors have generally played a key role both in pursuing criminal proceedings and ensuring evidence gathering. In some instances, prosecutors have cooperated closely with Civil Police investigations; in others, prosecutors have re-interviewed witnesses and gathered evidence on their own initiative.

59. In practice, the prosecutors’ investigative role has often been discouraged by Civil Police and impeded by legal controversy over prosecutorial powers. First, Civil Police show little awareness of the value of consulting with prosecutors to make sure that the evidence they are gathering will suffice to sustain criminal charges. For this reason, they seldom inform prosecutors until they reach a stage at which the law requires them to do so. This will typically not be until 30 days after the crime took place, by when the crime scene will almost certainly be destroyed, bodies are likely to have been buried, and witnesses may have fled. Second, some have challenged the legal power

¹⁶⁴ Ibid., Art. 26.

¹⁶⁵ It is also worth noting that the Public Prosecutor’s Office has a broad range of other, non-prosecutorial powers and responsibilities with respect to protecting individual rights and exercising external control over police activities: Constitution of Brazil, Arts. 127-129.

of prosecutors to gather evidence, arguing that only the Civil Police have the right to conduct investigations. While this argument appears to be motivated more by institutional jealousies than constitutional analysis, the courts have not provided a definitive answer, meaning that prosecutors who gather evidence cannot be certain that it will prove admissible at trial.

60. From the perspective of combating impunity for violations of the right to life, it would be a significant step forward if Civil Police routinely consulted with prosecutors from the beginning of homicide investigations. Moreover—while it goes without saying that the Civil Police will and should remain the main institution carrying out criminal investigations—in cases in which the police are implicated, prosecutors should routinely conduct their own independent inquiries to ensure the appearance and reality of justice. The practice of the Public Prosecutor’s Office in São Paulo of having all “resistance” cases handled by a specialist prosecutor is notable in this regard.

Follow-up Report on Mission to Brazil (A/HRC/14/24/Add.4, 28 May 2010, ¶¶48-49)

48. Today, the Civil Police continue to delay notification of police killings to prosecutors for 30 days, and sometimes even longer,¹⁶⁶ seriously undermining the ability of prosecutors to gather important evidence. Disputes over the legal power of prosecutors to investigate are ongoing at the time of this report, although the Special Rapporteur welcomes comments by the Government that “today the majority of Court decisions favours” investigations by prosecutors.¹⁶⁷

49. There is currently no specialized prosecution unit dedicated to police killings in either Rio de Janeiro or São Paulo. Instead, police killings are assigned to prosecutors on a geographic basis, together with other killings.¹⁶⁸ In São Paulo, the State Prosecutor’s office has a Special Action Group of External Control of Police Activities (GECEP), which has a mandate for police oversight, but cannot currently cover police intentional killings, or any abuses by the military police.¹⁶⁹ The Special Rapporteur was informed that the Attorney-General for São Paulo has proposed that the GECEP be given the authority to investigate police killings, including “resistance killings” in the greater São Paulo region. This would be a key step in addressing police impunity for killings. It is important that the proposal be approved by the college of appellate-level prosecutors, and that it have the mandate to investigate off-duty police killings (including those by militias and death squads), and killings by both civil and military police. It is also essential that it be given the necessary resources and staff to function effectively.

Report on Mission to Colombia (A/HRC/14/24/Add.2, 31 March 2010, ¶¶41, 70-73, 78-79)

41. Resource constraints also inhibit effective prosecutions. The Fiscalía [public prosecutor] has a specialized human rights unit, including a sub-unit for extrajudicial executions (established in 2007). In 2008, the numbers of prosecutors focusing on executions more than doubled (from 8 to 20). However, the Fiscalía continues to suffer from a lack of staff and funding, which prevents it from investigating and prosecuting all of the cases reported to it. I met, for example, with families of victims who were told that they would have to wait for the Soacha cases [a set of high-profile cases which soldiers allegedly murdered civilians] to finish before their own cases could be examined. Of

166 See, e.g., Human Rights Watch, *Lethal Force: Police Violence and Public Security in Rio de Janeiro and São Paulo* (December 2009), pp. 101-102.

167 Information provided by Brazil to the Special Rapporteur in the preparation of this follow-up report, para. 52.

168 Human Rights Watch, *supra* note 166, p. 102.

169 *Ibid.* p. 103.

the 1,056 cases of killings by Armed Forces that were assigned to the Fiscalía's Human Rights Unit through to the end of April 2009, only 16 have resulted in convictions.¹⁷⁰

[...]

70. Investigations of IAGs [illegal armed groups, including groups involved in arms and drug trafficking, ex-paramilitaries] are largely conducted by the local office of the National Police, with prosecutions conducted by the local Fiscalía. While many do commendable work under difficult circumstances, senior Fiscalía officials expressed scepticism about the likelihood of successful prosecution in some parts of Colombia because, in the words of one, IAGs "are very economically powerful and they have infiltrated the military and political establishment who help them by providing cover" for their activities and "a lot of money changes hands to prevent justice".

71. Institutional barriers also compromise the Government's ability to shut down IAGs or prosecute their leaders. The fiscales are separate from the police, who do the investigation and arrest and both are separate from the National Reparation Fund, which manages seized assets. Fiscales indicated that this often results in failures to cooperate and coordinate.

72. Another institutional weakness is that local fiscales generally approach the prosecution of each defendant as an individual case. They may not have the sophistication or resources to oversee the kind of complex investigation and multiple prosecutions necessary to target the leadership of an IAG and economic structure and the sources of its support among local elites.

73. To address these problems the Fiscal General should create a national unit dedicated to complex prosecutions that would seek to shut down all the major actors in and sources of support for particular IAGs (which could be prioritized by the extent of their organization and illegal activity). Teams of prosecutors from the unit could be assigned to cover different parts of the country, thus avoiding the pressures to which local fiscales can be subjected. Donor country agencies with experience in such complex litigation could provide training and support. In addition, the Government should consider seconding police, investigators, and asset confiscation and management experts to such a unit so that all investigation and prosecution activities are strategically coordinated.

[...]

78. [...] Various interlocutors, including within the Fiscalía, also identified the need for better internal management of the Fiscalía in order to maximise the effective use and deployment of attorneys and investigators. Technical assistance from donor countries may be helpful in this regard.

79. As an example, the Fiscal General should establish more control mechanisms over fiscales in the different jurisdictions. An internal audit could identify cases in each office that have stalled, identify the reason (such as security concerns or lack of resources) and take appropriate action to address them. The Fiscal General should also impose time limits for cases to be assigned to a prosecutor and investigations to be opened. Statistics on the number of cases pending investigation, under investigation, at the preliminary hearings stage and at trial stage, broken down by each regional or thematic office of the Fiscalía, should be made publicly available and updated on a frequent and regular basis.

170 Another important cause of impunity is fear on the part of witnesses (as discussed below).

Follow-up to Country Recommendations – Turkey (A/HRC/29/37/Add.4, 6 May 2015, ¶¶68-70)

68. Problems with accountability in Turkey are sometimes exacerbated by the inappropriate exercise of prosecutorial and judicial discretion. The Special Rapporteur made recommendations aimed at overcoming some of those challenges and strengthening accountability measures, including that, in cases of unlawful killing, the prosecutor should always bring charges for killing and never for a lesser crime and should not misuse certain arguments to reduce sentences [...].

69. The Special Rapporteur welcomes the clarification by the Government that prosecutors are required to act in accordance with the duties and powers entrusted by the Code of Criminal Procedure, and that it is not possible to bring charges for a lesser crime in instances of killing.¹⁷¹ However, he is still concerned about reports received that public officials often receive lighter sentences when found guilty of torture, ill-treatment or even fatal shootings.¹⁷²

70. The Special Rapporteur was informed that the practice of misusing arguments of mitigating factors continues, especially in relation to lesbian, gay, bisexual and transgender victims. The broad framing of article 29 of the Criminal Code without a definition or guidelines on the meaning of “unjust act” could allow for a subjective interpretation and abuse of the provisions of the article. With regard to lesbian, gay, bisexual and transgender persons, the courts sometimes reduce the sentence of the perpetrator by deciding that the victim’s sexual orientation or gender identity itself constitutes an “unjust act”.

(ii) Courts and the judiciary

Going hand-in-glove with effective police investigations and public prosecutions is an effective court system. Trials are necessary to test the evidence of the prosecution, establish the legal guilt or innocence of the accused, and ensure an appropriate sentence. Trials can also be important truth-telling opportunities and give victims a chance to tell their stories in a public forum. In the Special Rapporteurs’ investigating and reporting, some of the more frequent reported problems in the judiciary and courts were:

- Slowness;
- Corruption;
- Lack of independence and judicial links to powerful officials;
- Appointment procedures that fail to guarantee the appointment of judges based on merit;
- Lack of mechanisms to discipline judges (such as a judicial oversight commission);
- In some countries, courts and judges lack basic resources critical to their functioning, such as courthouses, computers, vehicles etc.

Report on Mission to Nigeria (E/CN.4/2006/53/Add.4, 7 January 2006, ¶98)

98. The judiciary cannot absolve itself of responsibility for the unconscionable amount of time taken to resolve serious criminal charges, the adjournments handed out with reckless abandon (the Special Rapporteur met accused persons who had endured more than 50 adjournments), and the subsequent long-term rotting in prison of thousands charged with capital offences. There seem to have been remarkably few efforts to develop alternative dispute resolution mechanisms or more efficient methods of resolving criminal charges.

171 State response, October 2014.

172 See Amnesty International “Turkey: Ali Ismail Korkmaz convictions fail to bring justice”, 21 January 2015.

Report on Mission to Philippines (A/HRC/8/3/Add.2, 16 April 2008, ¶59)

59. When most cases stall at the investigation or prosecution stage, it is difficult to evaluate the effectiveness of the judiciary. Two issues specific to the judiciary were, however, raised by my interlocutors. First, trials are routinely delayed and are generally not held on consecutive days, increasing the opportunities for witness intimidation. If fully implemented, the Supreme Court's decision to establish "special courts" for "cases involving killings of political activists and members of the media" should remedy this problem for those cases.¹⁷³ Second, witnesses often relocate to avoid retaliation, but judges seldom grant a change of venue on that basis.¹⁷⁴ The judiciary should ensure that docket management and venue decisions facilitate witness participation and protection.

Report on Mission to Brazil (A/HRC/11/2/Add.2, 23 March 2009, ¶¶64-67, 98)

64. All intentional homicides are tried by juries in regular, civilian courts.¹⁷⁵ But few convictions against police are achieved. I received many complaints from victims, families, police, prosecutors, and Government officials that the judicial system in Brazil is overburdened and slow.

65. The period of prescription for intentional homicide is, depending on whether there are aggravating factors, either 12 or 20 years.¹⁷⁶ The period of prescription continues to run until all appeals have been completed. (Appeals may be made to higher state courts, to the federal Superior Tribunal de Justiça and, if there is a constitutional issue, ultimately to the Supremo Tribunal Federal.) In the context of a very slow justice system, this creates impunity for serious crimes. This problem is exacerbated by the tendency of some judges to put off dealing with cases implicating the police and other powerful actors, and to manage their dockets so as to prioritise civil cases over criminal cases.

66. Recent reforms have allowed crimes implicating the State's international human rights obligations to be investigated by the Federal Police and, at the request of the Prosecutor-General,

173 Chief Justice Reynato Puno informed me of this initiative when we met, and he announced it shortly thereafter. Concretely, the establishment of "special courts" means that particular trial courts are designated either to only hear such cases or to prioritise them in their trial calendars: "The cases referred to herein shall undergo mandatory continuous trial and shall be terminated within sixty (60) days from the commencement of trial. Judgment thereon shall be rendered within thirty (30) days from submission for decision unless a shorter period is provided by law or otherwise directed by this Court. ... No postponement or continuation of trial shall be allowed except for clearly meritorious reasons. Pleadings or motions found to have been filed for dilatory purposes shall constitute direct contempt and shall be punished accordingly." (Administrative Order No. 25-2007, "Designation of Special Courts to Hear, Try and Decide Cases Involving Killings of Political Activists and Members of Media" (1 March 2007).

174 I also interviewed a witness who encountered the same problem in filing a *habeas corpus* petition when her brother was detained in an AFP "safe house" (a euphemism for secret detention facility).

175 This represents significant progress: Prior to a 1996 statute, homicide cases against members of the Military Police were tried by special military courts. Now, jury trials are used, but only in cases involving intentional crimes against life. Law 9.299 (adopted 7 August 1996) amended Art. 9 of the *Código Penal Militar* and Art. 82 of the *Código de Processo Penal Militar* so as to remove "intentional crimes against life committed against a civilian" from the military justice system. The system used for jury selection is not designed to produce a "jury of one's peers" as in common law systems. Instead, each year, a judge selects several hundred individuals to compose the jury pool based on his "personal knowledge or reliable information" with the assistance of lists provided by local authorities and professional guilds. The jury for a particular trial is chosen at random from this list. (*Código de Processo Penal*, Arts. 74, 427, 439.)

176 *Código Penal*, Art. 109.

transferred from the state to the federal courts.¹⁷⁷ While these reforms hold promise,¹⁷⁸ the criteria for jurisdiction to be transferred have been narrowly construed by the courts, and, up to the time of my visit, only one case has actually been transferred.

67. The National Council of Justice was recently established to provide external oversight of the judiciary, and it has the power to propose reforms, monitor judicial activity, and to remove a judge or impose other sanctions. The Council should consider how its rulemaking powers could be used to improve the judiciary's response to impunity. Useful measures would include designating judges who would handle solely cases involving killings by on- or off-duty police ...

[...]

98. The National Council of Justice and other appropriate bodies should take measures to ensure that:

- a) In making docket management decisions, judges do not put off dealing with cases involving killings by powerful actors, including the police, or prioritise civil above criminal cases [...]

Report on Mission to Kenya (A/HRC/11/2/Add.6, 26 May 2009, ¶¶31-32, 95)

31. The judiciary in Kenya is an obstacle in the path to a well-functioning criminal justice system.¹⁷⁹ Its central problems are crony opaque appointments, and extraordinary levels of corruption. I received considerable evidence of judges and magistrates being paid to slow the progress of cases, to "lose" files, or to decide a case in a particular manner. Many reports over the last decade have documented this, and significant structural reforms have repeatedly been proposed to increase the transparency and accountability of the judiciary.¹⁸⁰ The Kibaki Government botched its 2003 "radical surgery" strategy,¹⁸¹ and has done little since, despite the strongly proclaimed views of the Prime Minister and the former Minister of Justice that drastic reforms are required. The Chief Justice is of the view that the courts generally function well, and that corruption and discipline are being adequately dealt with by the Judicial Service Commission (JSC). In fact the JSC has done precious little to improve the functioning of the courts, and they are in need of radical reform.

177 Pursuant to a constitutional amendment made in 2004, Art. 109 of the Constitution provides for the involvement of the Prosecutor-General of the Republic and the jurisdiction of the federal courts "[i]n the case of grave violations of human rights ... with the purpose of ensuring compliance with obligations under international human rights treaties to which Brazil is party". Similarly, the law permits the Federal Police to investigate "criminal offences ... related to the violation of human rights, that the Federative Republic of Brazil is obligated to repress as a result of international treaties to which it is a party" (Law 10.446 (adopted 8 May 2002), Art. 1; see also Constitution of Brazil, Art. 144(1)).

178 Following her visit in 2003, my predecessor observed that the anticipated amendment would be a "welcome step forward to combat impunity". Report of the Special Rapporteur, Asma Jahangir, E/CN.4/2004/7/Add.3, 28 January 2004.

179 The structure and powers are set out in the Constitution of Kenya, Chapter IV; the Judicature Act; the Magistrates Courts Act.

180 See, "Report of the Committee on the Administration of Justice" (1998) (the Kwach report) (detailing allegations that there was "actual payment of money to judges and magistrates to influence their decisions."); Constitution of Kenya Review Commission, "Report of the Advisory Panel of Eminent Commonwealth Judicial Experts" (2002) (concluding that "the Kenyan judicial system suffers from a serious lack of public confidence and is generally perceived as being in need of fundamental structural reform."). Also see yearly reports on Kenya by Transparency International (reporting the judiciary as one of the most corrupt institutions in Kenya).

181 The Government set up an "Integrity and Anti-Corruption Committee of the Judiciary in Kenya", which released its report (the Ringera Report) in 2003. The report implicated 5 (out of 9) Court of Appeal justices, and 18 (out of 36) High Court justices, and 82 (out of 254) magistrates in corruption. Many of the named justices and magistrates resigned, others challenged the report's findings. See International Commission of Jurists, "Kenya: Judicial Independence, Corruption and Reform" (April 2005).

32. It is essential that the judicial appointments procedure, and oversight of discipline of judges and magistrates is reformed. To this end, the JSC should be transformed so that its membership is representative; judicial officials are transparently vetted before appointment; merit-based criteria are met by appointees; and the Commission should have a more significant and transparent role in monitoring and removing judges. It should also establish an independent complaints procedure in relation to judicial behaviour.

[...]

95. To reduce corruption and incompetence in the judiciary:

- a) Radical surgery needs to be undertaken to terminate the tenure of the majority of the existing judges and replace them with competent and non-corrupt appointees; (b) Judicial appointment procedures should be made more transparent, and all appointments made following a merits-based review of the appointee;
- b) Judicial appointment procedures should be made more transparent, and all appointments made following a merits-based review of the appointee;
- c) The Judicial Service Commission should be reformed so that its membership is representative; and its role in appointments, discipline and dismissal of judicial officers be clarified and strengthened;
- d) The Judicial Service Commission should create a complaints procedure on judicial conduct.

Report on Mission to the Central African Republic (A/HRC/11/2/Add.3, 27 May 2009, ¶¶56-57, 59-61)

56. The criminal justice system is widely condemned as dysfunctional. A senior Government official told the Special Rapporteur that it had reached “rock bottom” and that no one trusted it – neither the citizens of the Central African Republic, nor the Government or the international community.

57. Three different judicial organs are involved in the initial investigative process: the judicial police, the public prosecutor and the investigative judge. The public prosecutor receives complaints and decides whether to proceed with an investigation. The judicial police gather information on crimes, under the supervision of the public prosecutor and the investigative judge. The investigative judge can investigate following an indictment by the prosecutor or following a complaint by a civil party.

[...]

59. The justice system is plagued by a lack of resources, severely limiting its capacity to address impunity. Human resources are minimal in the capital, and nearly non-existent in the rest of the country. In Bangui, the public prosecutor’s office has just two prosecutors for criminal cases. In Paoua, the justice system barely functions. It is composed of one magistrate, who is simultaneously president of the tribunal, prosecutor and investigative judge. Across the country, there are not enough buildings to house courtrooms and offices of judges and key personnel. Basic equipment is in short supply. In Paoua, the magistrate had his files destroyed and typewriter stolen during an attack by the APRD in January 2007. A year later he had not yet been provided with new equipment.

60. Recent proposals to reform the justice system as part of the Central African Republic’s security sector reform programme are promising. Proposals to address staffing and equipment supply deficiencies, to improve courthouse infrastructure, and to revise training programmes are appropriate. Donors and the international community should support these reform efforts, which are essential to address impunity.

61. However, while the lack of resources is one significant cause of impunity, even when the capacity to investigate and prosecute does exist, there is little effort made to respond to killings by the security forces. The criminal justice system theoretically has jurisdiction over all persons in the Central African Republic, including members of the security forces, but the latter jurisdiction is rarely exercised. The Special Rapporteur received information in Bangui on one incident in which police were being tried in the criminal justice system for alleged killings. But no information on the criminal prosecution of members of the FACA could be obtained. Several interlocutors working in conflict-affected areas noted that the local prosecutors took no action whatsoever with respect to alleged crimes by the military, whether committed in connection to the armed conflict or otherwise. The preference is apparently to leave cases involving soldiers to the military justice system.

Press Statement on Mission to the Democratic Republic of the Congo (Kinshasa, 15 October 2009)

Across the country, endemic corruption and political interference ensure that anyone with money or connections can escape investigation, prosecution, and judgment. In meetings with magistrates, I was told of threats they have received in the course of their work, attempts to bribe them, and their crippling lack of resources. Judges' appointments, removals and promotions are subjected to frequent political interference. The new Operational Military Court for Kinshasa II has made some progress in prosecuting a small number of low-ranking perpetrators. But it does not have adequate staff, the ability to conduct its own independent investigations, or the power to undertake high-level prosecutions.

Report on Mission to India (A/HRC/23/47/Add.1, 26 April 2013, ¶¶66-70)

66. The burden of initiating civil, criminal or writ proceedings in cases of unlawful killings is frequently placed on the victim's family. Their vulnerable status often cripples their ability to seek and secure accountability. Families of victims are not always aware of their rights in respect of the investigation of the death of the victim. The lack of knowledge of such rights forecloses the very opportunity to enjoy these rights themselves.

67. Delay in judicial proceedings constitutes one of India's most serious challenges and has clear implications for accountability. For example, lengthy and ineffective proceedings exist in Punjab where large-scale enforced disappearances and mass cremations occurred between the mid-1980s and 1990s. The lack of political will to address these disappearances is evident in a context where steps to ensure accountability have been reportedly inconclusive.

68. The slow pace of proceedings is another feature of the various public commissions created to investigate violations of the right to life. The slow progress of the Nanavati Mehta Commission of Inquiry in Gujarat [...] is a vivid example of the challenge. The Commission has been functioning for more than 10 years without reaching any conclusive results.

69. The Special Rapporteur is concerned with the obstacles to hold public servants, including members of the security forces, accountable, particularly due to statutory immunities provisions. Section 197 of the [Criminal Procedure Code] requires prior sanction from the concerned government before cognizance can be taken of any offence by a public servant for criminal prosecution. This provision effectively renders a public servant immune from criminal prosecution. It has led to a context where public officers evade liability as a matter of course, which encourages a culture of impunity and further recurrence of violations.

70. The situation is aggravated by the fact that security officers who committed human rights violations are frequently promoted rather than brought to justice. The Special Rapporteur has heard of the case of Mr. Sumedh Singh Saini, accused of human rights violations committed in Punjab in the 1990s, who was promoted in March 2012 to Director General of Police in Punjab. Promoting rather than prosecuting perpetrators of human rights violations is not unique to Punjab. The Special Rapporteur heard this complaint from families of victims throughout the country.

Report on Mission to Papua New Guinea (A/HRC/29/37/Add.1, 30 March 2015, ¶¶75-78)

75. Legal proceedings take a long time, and it can take up to three years for some serious cases to reach the court. There are allegedly over 4,000 arrest warrants currently outstanding, some of which date back to the 1980s.

76. The Special Rapporteur was concerned about the lack of public awareness of human rights and the mechanisms in place to protect them. It is imperative that human rights awareness and education be carried out throughout the country in schools, for law enforcement officers and especially for the public, so that they know what mechanisms are available to them.

77. The Special Rapporteur was informed that it was very difficult to file civil claims against the State as documents have to be served in person within six months on designated State officials¹⁸² whose offices are in Port Moresby, and that some people have abandoned their claims against the State because they were unable to serve documents on government officials. It has been suggested that the State should accept documents served by post; however, some people have stated that claims have been struck down due to incorrect service.¹⁸³ Even if the State has, on occasion, not raised objections to service by post, it is merely an unwritten practice and the rule can be prohibitive.

78. With the establishment of the Human Rights Track in 2011, the issue of servicing claims in person might to some extent be circumvented. In terms of section 57 of the Constitution, human rights contained in the Constitution are enforceable through the National and Supreme Courts. The Human Rights Track deals with court cases relating to the rights contained in the Constitution. Rule 6 of the Rules of the Courts elaborate upon section 57 of the Constitution and establish standing before the court in respect of a broad range of actors, including any person or body with an interest in protecting and enforcing human rights and international organizations, such as the United Nations. The Human Rights Track is user-friendly and enables anyone to bring human rights cases to court. However, awareness-raising will be needed for the initiative to reach those who most need it.

(iii) Police internal and external oversight

To prevent and remedy abuses by the police, states must implement effective and complementary internal and external oversight mechanisms. In 2010, Special Rapporteur Alston dedicated an entire report to the issue of police oversight mechanisms.

¹⁸² See Claims By and Against the State Act, 1996, section 5.

¹⁸³ Human Rights Watch, "Making their own rules: Police beatings, rape, and torture of children in Papua New Guinea", September 2005, p. 102, available at: www.hrw.org/sites/default/files/reports/png0905.pdf.

Report to the Human Rights Council (A/HRC/14/24/Add.8, 28 May 2010, ¶¶2-4, 16-17, 24-32, 46, 48-52, 61-62, 65, 68)

2. In his many country fact-finding investigations, the Special Rapporteur has observed the numerous factors that contribute to the commission of [police] killings. One of the most important is impunity for past police killings. Common measures aimed at curbing police killings, such as increased police training, will be insufficient if they are not implemented in conjunction with attempts to secure accountability. Impunity can result from poorly structured and ineffective police internal affairs mechanisms, non-existent forensic capacity, inadequate witness protection programmes for those reporting abuse, inept criminal justice systems, and deficient commissions of inquiry. One crucial factor contributing to impunity that stands out from the Special Rapporteur's many investigations is the lack of any, or any effective, dedicated external civilian oversight of the police force.

3. Without external oversight, police are essentially left to police themselves. Victims are often reluctant even to report abuse directly to police, for fear of reprisals, or simply because they do not believe a serious investigation will result. Especially in cases of intentional unlawful killings, purely internal complaint and investigation avenues make it all too easy for the police to cover up wrongdoing, to claim that killings were lawful, to fail to refer cases for criminal prosecution, or to hand down only minor disciplinary measures for serious offences. Importantly, external oversight also plays a role in increasing community trust of the police service, and can thereby increase public-police cooperation and improve the effectiveness of the police force's ability to address crime.

4. Recently, increasing numbers of countries have created specialized external police oversight mechanisms to address the deficiencies inherent in purely internal investigations and discipline. While this is an important development, it is not enough that such agencies are created. In theory, they are set-up to reduce impunity where the existing system of accountability is inadequate. In practice, however, far too many external mechanisms are not given the investigatory powers, political support, human and financial resources, powers of recommendation and follow-up, and financial and operational independence from the executive and police necessary to truly be effective. Without these basic elements, an external agency will be little more than a paper tiger – set up as a buffer to civilian complaints, but with no real impact on police violence.

[...]

16. In the Special Rapporteur's many country fact-finding missions, he has observed that one of the most important causes of police killings worldwide is impunity – the failure to properly investigate, prosecute, convict and punish police responsible for extrajudicial executions or other human rights abuses. There are often many cumulative causes of impunity, and they are generally mutually reinforcing and extraordinarily difficult to break without addressing them together in a coordinated, system-wide reform approach. Impunity can often begin with the police perpetrators covering up the incident, often claiming that the killing was conducted lawfully (e.g. in self-defence) against a threatening criminal.¹⁸⁴ Weak or unobserved crimes scene and incident reporting procedures police can make it easy for police to make false claims.¹⁸⁵ Corrupted, under-resourced, or insufficiently independent police internal affairs office result in failures to appropriately investigate potential police wrong-doing.¹⁸⁶ A lack of independent forensic analysis offices can also

184 A/HRC/11/2/Add.2, *supra* note 373.

185 Ibid., paras. 51-53; A/HRC/4/20/Add.2, *supra* note 307 paras. 47-48; E/CN.4/2006/53/Add.5, *supra* note 92, para. 56.

186 E/CN.4/2006/53/Add.5, *supra* note 92, para. 57.

contribute to failures to investigate available physical evidence.¹⁸⁷ No existing, or weak external oversight or complaint mechanisms mean that there will be no check on internal mechanisms (discussed in detail below). Where prosecutors are in a position to prosecute police crimes, they may be too reliant on internal police investigations, or to under-resourced, susceptible to bias or threats, or lack sufficient legal power to successfully prosecute.¹⁸⁸ Police impunity can also result from corrupt or inept criminal justice systems.¹⁸⁹ Inadequate witness protection programmes for those reporting and testifying against police abuse can contribute significantly to impunity for police killings.¹⁹⁰ Victims are often reluctant to report abuse directly to police for fear of reprisals, or because they do not believe that a serious investigation will result.¹⁹¹

III. The need for accountability and external civilian oversight

17. International human rights law requires that police killings are thoroughly investigated, and that the police responsible for unlawful actions are prosecuted and convicted.[] This is required both to: (a) fulfil the state's obligations to provide accountability in the individual case and justice for the victim and their family; (b) as well as to fulfil the state's due diligence obligations to prevent future violations: if violations are left unpunished, a culture of impunity forms, which in turn encourages further violations.¹⁹²

[...]

24. Police investigations and police internal affairs offices, together with the criminal justice system are essential parts of the system of accountability that a state must put in place to meet its obligations to effectively investigate. Police internal investigations and discipline are essential to foster an internal culture of accountability, discipline and respect for laws within the police force. It can also offer swift resolution for complainants, and offer expertise and resources at the investigatory stage.¹⁹³ In addition, officers may be more likely to cooperate with other police officers during internal investigations.¹⁹⁴

25. However, alone, these measures will often be insufficient to meet the state's international obligations. Internal police disciplinary mechanisms can be inadequate, not just because they might be poorly structured or under-resourced, but because by their nature they are susceptible to bias.¹⁹⁵ Where police are allowed to effectively police themselves, as in any system of purely internal accountability, there is a strong temptation to "look after one's own". Police internal review is vulnerable to bias in all countries, but especially where there is minimal respect for the rule of law, where senior officers fail to push the importance of accountability, and where corruption is rampant. In cases of alleged unlawful killings, purely internal complaint mechanisms may make

187 Report of the Special Rapporteur, Philip Alston, Mission to Brazil, A/HRC/11/2/Add.2, 23 March 2009 para. 54.

188 Report of the Special Rapporteur, Philip Alston, Mission to Nigeria, E/CN.4/2006/53/Add.4, 7 January 2006, para. 96; E/CN.4/2006/53/Add.5, *supra* note 92, para. 58.

189 See, for example, Amnesty International, "Poverty and the Death Penalty in Nigeria" (21 October 2008); Human Rights Watch, *Systemic Injustice: Torture, "Disappearance" and Extrajudicial Execution in Mexico* (January 1999)

190 Report of the Special Rapporteur, Philip Alston, A/63/313, 20 August 2008, paras. 12-47.

191 *Ibid.*

192 The Inter-American Court of Human Rights noted this danger in *Myrna Mack-Chang v. Guatemala*: "In cases of extra-legal executions, it is essential for the States to effectively investigate deprivation of the right to life and to punish all those responsible, especially when State agents are involved, as not doing so would create, within the environment of impunity, conditions for this type of facts to occur again, which is contrary to the duty to respect and ensure the right to life." Judgment, 25 November 2003, para. 156.

193 Niels Uildriks and Piet van Reenen, "Human Rights Violations by Police", *Human Rights Review* (January – March 2001), p. 75.

194 Madeline L. England, *Security Sector Governance and Oversight: A Note on Current Practice* (2009).

195 Eduardo Diaz, "Police Oversight" in Joseph de Rivera (ed), *Handbook on Building Cultures of Peace* (2009), p. 288.

it all too easy for police to cover up wrongdoing,¹⁹⁶ to claim that killings were lawful,¹⁹⁷ to fail to refer cases for criminal prosecution,¹⁹⁸ or to hand down only minor disciplinary measures for serious offences.¹⁹⁹ Victims and marginalised groups also often have deep mistrust of internal police disciplinary processes, and so many incidents may go unreported for fear of retribution or simply non-action. Criminal justice systems can be overly reliant on police internal investigations, particularly where, as is often the case, prosecutors have insufficient powers to conduct their own primary investigations. Legislative oversight, while also important, can depend too heavily on the political climate and political will.

26. External civilian oversight of the police can, where set up appropriately, be an important complement to these other mechanisms, and can help fill the gaps in a country's system of accountability by avoiding some of the inherent or likely inadequacies of other mechanisms. External civilian oversight mechanisms can take numerous forms, but broadly speaking can be divided into two categories: (a) agencies exclusively dedicated to police oversight (e.g. a police ombudsman, or a police complaints body, or a police oversight agency); or (b) those which oversee police activities as part of a broader mandate (e.g. general ombudsmen, usually established to investigate human rights violations or cases of government maladministration; or national human rights commissions or institutions; in some countries, public prosecutors may have some police oversight powers). Where countries have established dedicated police complaints mechanisms, they have often been set up in response to protracted and serious police abuses or following periods of violence, as seen in Northern Ireland, South Africa, Trinidad and Tobago, and Guyana.²⁰⁰

27. Independent mechanisms can be given a range of powers (discussed in detail in part IV). Depending on the country, they may be able to receive complaints about police abuse, investigate allegations of police abuse, refer cases for internal police discipline, refer cases to the public prosecutor, impose disciplinary measures, conduct broader studies on police conduct, and/or propose police service reforms to the police or the government.

28. As a complement to internal disciplinary mechanisms, external oversight can provide an important, independent check on purely internal accounts. In providing an alternative forum to which affected citizens may complain about police abuses, external oversight gives individuals access to justice that otherwise would often be unavailable to them. It can improve the relationship between the police and public, increasing community trust in the police force.²⁰¹ It can also provide the sort of independent and unbiased investigations into allegations that would otherwise be unlikely.²⁰² External mechanisms can also be important in exposing harmful police practices and

196 See, for example, evidence that police in Brazil have engaged in false 'rescues' in order to deliberately destroy a crime-scene, intimidate witnesses and plant evidence in order to cover up their responsibility for a fatal shooting or other killing: see E/CN.4/2004/7/Add.3, *supra* note 178, para. 57; A/HRC/11/2/Add.2, *supra* note 187, para. 59; Report of the Special Rapporteur, Philip Alston, Follow Up to Country Recommendations, E/CN.4/2006/53/Add.2, 27 March 2006, para. 52. See also Human Rights Watch, *supra* note 166, pp. 52-70.

197 See, for example, the explanation given by Bangladesh's Rapid Action Battalion (RAB) for the killings of numerous civilians. According to RAB, most of them were caught in "crossfire" shootings. Human Rights Watch, Judge, Jury and Executioner: Torture and Extrajudicial Killings by Bangladesh's Elite Security Force (December 2006), pp. 26-49.

198 See, for example, the failure to discipline or prosecute police killings in Jamaica: E/CN.4/2004/7/Add.2 paras. 70-74; E/CN.4/2006/53/Add.2, *supra* note 196, para. 51. See also Amnesty International, *Jamaica, Killings and Violence by the Police: How Many More Victims?* (9 April 2001) pp. 67-68.

199 Ibid.

200 Commonwealth Human Rights Initiative, *Police Accountability: Too Important to Neglect, Too Urgent to Delay* (2005).

201 Gareth Newham, Local Level Civilian Oversight of the Metropolitan Police Departments in South Africa, Research Report written for the Centre for the Study of Violence and Reconciliation, 2004.

202 Principle 11 of the 1989 UN Principles, *supra* note 2, provides that where "established investigative procedures are

in highlighting the shortcomings of internal regulation. Through this they can contribute to efforts aimed at the improvement of internal disciplinary measures, as well as influence broader reforms in police policy that encourage respect for human rights.²⁰³ As explained by the Council of Europe Commissioner for Human Rights:²⁰⁴

An independent and effective complaints system is essential for securing and maintaining public trust and confidence in the police, and will serve as fundamental protection against ill-treatment and misconduct. An independent police complaints body (IPCB) should form a pivotal part of such a system.

IV. Principles to guide police external oversight and obstacles to effective oversight

30. While states are not required to adopt any one particular model of external oversight, the Special Rapporteur's experience indicates that if oversight is to be effective, it should be created and should operate according to certain general principles. The most successful external mechanisms will have adequate powers to carry out comprehensive investigations of police abuses, will be sufficiently independent from the police and the government, will be adequately resourced, will operate transparently and report regularly, will have the support of the public and the government, and will involve civil society in its work. This section explores the varieties of oversight mechanisms in many different countries, examines the various obstacles to their effectiveness, and sets out what a mechanism needs to be most effective.

A. Powers

31. An external oversight mechanism should be provided sufficient powers to actually be able to effectively reduce impunity for police abuses. Without adequate mandated power, such mechanisms risk being used as mere a buffer against civilian concern and anger, rather than as effective agents for accountability.

32. At its most basic, an external mechanism is authorised to receive complaints about police abuses. This is generally seen as a necessary first step to overcome blocks in police internal affairs, and to provide witnesses and others an alternative avenue to which to direct complaints. It should be clear in the organisation's mandate that it can receive complaints from any relevant person, including witnesses, victim's family members, police themselves or other officials. It may be in important in some contexts that police are either legally permitted or required to report serious matters (such as all deaths in police custody or due to police action). For reporting requirements to be effective, there will normally need to be a penalty for officers who fail or delay to refer or report cases to the external agency.

[...]

inadequate because of lack of expertise or impartiality, because of the importance of the matter or because of the apparent existence of a pattern of abuse, and in cases where there are complaints from the family of the victim about these inadequacies or other substantial reasons" Governments shall pursue investigations through other methods.

203 Peter Finn, *Citizen Review of Police: approaches and implementation* (2001), p. xi.

204 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). See also the European Code of Police Ethics, Article 59 which states: "The police shall be accountable to the state, the citizens and their representatives. They shall be subject to efficient external control". The commentary to Article 59 states that "... state control over the police must, in an open democratic society, be complemented by the means for the police to be answerable to the public, that is the citizens and their representatives. Police accountability vis-à-vis the public is a crucial condition for making co-operation between the police and the public a reality. There are several means of rendering the police accountable to the public. Accountability can be direct or channeled through bodies representing the public. Generally, openness and transparency of the police are, however, basic requirements for accountability/control to be effective".

B. Resources

46. An external agency must be adequately resourced and funded. There should be sufficient resources to employ skilled investigators, and the agency should have the financial capacity to undertake serious investigations.²⁰⁵ Adequate resources are essential to allowing an agency to fulfil its mandate, and can impact upon the independence of the body which, if under-resourced, may be forced to rely on the police for investigative services.²⁰⁶

[...]

48. Because of the role that external agencies can play in tackling impunity, they are a worthwhile investment of state resources. However, external review can be an expensive undertaking, particularly where oversight mechanisms operate completely independently of the police by employing professional investigators and conducting inquiries separate from internal police processes. In weighing up the costs and benefits, countries should also bear in mind not only the importance of the rights at stake, but that the financial cost of continued police violence is also high. For example, between 1995 and 1998, 1,489 civil claims were brought against the South African Police Service on the basis of excessive use of force, and the police service disbursed over 50 million Rand in settlement and remedies.²⁰⁷ Where the funding of oversight mechanisms is difficult because of the country's limited financial resources (e.g. in the context of developing, post conflict, or fragile states) the international community can play an important supporting role.

49. One way in which limited resources can be used more efficiently by an agency is through selective oversight. Some agencies limit their work by dealing only with the most serious cases of police misconduct, such as extrajudicial executions, and otherwise act as a watchdog over internal reviews, conducting their own investigations only where internal review is deemed to have failed. The Independent Police Complaints Commission in the United Kingdom, for example, only investigates the most serious complaints and allegations of misconduct against the police, and automatically investigates death or serious injury. An agency may also be to divert certain types of complaint, such as those which do not involve the use of force, for mediation, which offers a more expeditious and less expensive means of dispute resolution.²⁰⁸

50. Human resources have proved to be as important as financial resources in allowing oversight bodies to fulfil their mandates. Skilled investigators and support staff are essential if an agency is to provide effective oversight. Highly skilled and dedicated staff in the Kenya National Commission on Human Rights, for example, have been able to undertake detailed and effective investigations that exposed police killings and police death squads in Nairobi.²⁰⁹ In contrast, the Salvadoran ombudsman has indicated that their investigations have been impeded by "the office's shortage of qualified personnel and total lack of staff with expertise in policing."²¹⁰ In the hiring of external oversight mechanisms staff, expertise and professionalism should be encouraged. However, in some countries – where, for example, the country is newly emerging from conflict – skilled investigators

205 Commonwealth Human Rights Initiative, *Police Accountability*, *supra* note 200, p. 67.

206 Tim Prenzler, "Civilian Oversight of Police: A Test of Capture Theory", *British Journal of Criminology* 40 (2000) p. 659.

207 Julie Berg, *Police Accountability in Southern African Commonwealth Countries* (2005), p. 16.

208 Emma Philips and Jennifer Trone, *Building Public Confidence in Police Through Civilian Oversight*, Vera Institute of Justice (September 2002), p. 5.

209 A/HRC/11/2/Add.6, *supra* note 92; see also Kenyan National Commission on Human Rights (KNCHR), *The Cry of Blood: Report on Extrajudicial Killings and Disappearances* (September 2008) and KNCHR, *Preliminary Report on Alleged Executions and Disappearance of Persons between June and October 2007* (November 2007).

210 Rachel Neild, "Confronting a Culture of Impunity: The Promise and Pitfalls of Civilian Review of Police in Latin America", in Andrew J Goldsmith and Colleen Lewis (eds.), *Civilian Oversight of Policing* (Oxford: Hart, 2000) p. 240.

and managers may not be readily available. In such cases, a lack of civilian expertise can severely hamper the operation of an oversight agency. External oversight agencies can work to overcome this by providing professional education and training for staff. In South Africa, the ICD sought to address the lack of investigative skills among its staff through training, with help from the US Department of Justice International Criminal Investigation Training Assistance Program.²¹¹ Civil society members may also provide a pool of expertise for oversight agencies, either by providing training or as staffing candidates with experience of human rights investigation.²¹² While foreign aid targeted towards improving policing is usually directed at the police force itself (e.g. in providing technology, expertise and training, as seen in Colombia²¹³ and Haiti²¹⁴), the international community can also improve police accountability by extending assistance programmes to external oversight agencies. International actors can play a much-needed role by providing training, experts or other external agency development assistance.

C. Independence

51. The independence of a civilian oversight mechanism is essential to its successful functioning. Without full operational and hierarchical independence from the police, an external mechanism is vulnerable to the same dangers of bias and corruption inherent in police internal investigations. Similarly, effectiveness also depends on the agency's freedom from executive or political interference.

52. Independence from the police has a number of different aspects. To avoid the risk and appearance of potential bias, the membership of an external agency should not include any members of the police force. Where it is necessary in a particular context for a police investigator to be seconded to an external agency or otherwise provide investigation expertise, extra precautions should be taken to ensure that this does not undermine the agency's independence or collapse the separation between external oversight and police internal affairs. The agency's offices should also be physically separated from the police. Until August 2004, the Jamaican Police Public Complaints Authority was housed within a police department, which may have deterred complainants and hampered its ability to act independently.²¹⁵

[...]

D. Transparency and reporting

61. Transparency and public reporting are of vital importance to the long-term success of an external civilian oversight agency.

62. Regular and comprehensive reporting serves both to help make the agency accountable to the public, and also can have a significant impact on the accountability of security forces for extrajudicial killings. Reporting requirements should be set out in the legislation setting up the external agency, so that performance is less tied to personality. Regular reports should be provided by the agency on its activities to its responsible minister or to the government's legislative organ, and also made

211 Bronwen Manby, "The South African Independent Complaints Directorate", in Goldsmith and Lewis, *Civilian Oversight of Policing*, *supra* note 210, p 218.

212 See, for example, National Association for Civilian Oversight of Law Enforcement (NACOLE), Professional Standards for Oversight Agencies (February 2009) which sets out qualification standards for investigators, and lists civil society partners which can play a role in oversight training.

213 Andrew Goldsmith, "Police Accountability Reform in Colombia: The Civilian Oversight Experiment" in Goldsmith and Lewis, *Civilian Oversight of Policing*, *supra* note 210, p. 168.

214 Washington Office on Latin America and National Coalition for Haitian Rights, *Can Haiti's Police Reforms be Sustained* (1998).

215 International Commission of Jurists, *Attacks on Justice – Jamaica* (2005), p. 7.

publicly available. The agency should also maintain a website with easily accessible information for the public on the work of the agency, how to make complaints, and data on police abuses or other relevant studies. The ouvidoria of São Paulo has been especially successful in maintaining detailed, disaggregated annual data on police abuses, which has been helpful in providing more accurate information on police involvement in organized crime.²¹⁶ This information, in turn, can facilitate policymaking and generate public demand for a more accountable police force.²¹⁷ In general, police violations should be as publicly reported as possible, taking into account the need for confidentiality and witness protection.

[...]

E. Community and political support and civil society involvement

65. An external oversight mechanism will be more successful where it has community and political support, and where it involves civil society in its work.

[...]

68. At a more straightforward level, the external agency will often need to conduct significant community outreach so that citizens are aware of its role. Where an agency is unknown or not trusted, complaints will be reported to the police or often not at all; at best this contributes to inefficiency in the accountability system, and at worst it potentially enhances opportunities for police corruption and bias in the handling of the complaint.²¹⁸ External oversight agencies should also ensure that they conduct outreach to and seek support from communities affected by police killings, in particular those which are marginalised. In Brazil, for example, several of the ouvidoria offices were found to be failing to reach out to poorer members of the community (who are especially affected by violent policing in favelas), and in India, complaints have been directed at the Human Rights Commissions for giving less attention to complaints individuals perceived to be of “lower caste”.²¹⁹ This undermines the work of oversight agencies and limits their success in providing accountability. External oversight mechanisms should work to ensure that minority groups, women and other sidelined communities are included in the work of the agency, and ensure their representation within agency staff.

Special Rapporteur Heyns also addressed internal and external oversight as part of his report on the use of force in law enforcement in his 2014 report to the Council:

Report to the Human Rights Council (A/HRC/26/36, 1 April 2014, ¶¶81-4)

81. To enable investigations, accountability and redress for the victims, important measures, including the following must be put in place: States are obliged to provide a system of reporting

216 See Fiona Macaulay, “Problems of police oversight in Brazil” (working paper), Centre for Brazilian Studies/University of Oxford (July 2002), p. 15. Julita Lemgruber, “Civilian Oversight of the Police in Brazil: the case of the ombudsman’s offices” Center for Studies on Public Security and Citizenship/Candido Mendes University (2002), p. 16 (noting the lack of common standards for recording and analyzing data).

217 Ignacio Cano, “Police Oversight in Brazil” p. 5: “The Ombudsman’s Office publishes reports periodically and has served as an element to mobilise the debate and arouse public awareness on the matter.”). See also Macaulay, “Problems of police oversight in Brazil”, *supra* note 216, p. 17.

218 Neil Sammonds, *Need to Know: The Struggle for Democratic, Civilian Oversight of the Security Sector in Commonwealth Countries – A Study of the Accountability of the Military, Police and Intelligence Services in Commonwealth Countries, with a Focus on Sri Lanka, Nigeria, South Africa, Barbados and St Lucia and a Special Survey of the Role of Committees in 37 Commonwealth Parliaments* (2000), pp. 19-21.

219 Phillips and Trone, *Building Public Confidence in Police*, *supra* note 208, p. 11.

for whenever firearms are used by law enforcement officials²²⁰; investigations should also seek to establish command responsibility; and law enforcement officials must promptly report incidents where the use of force or firearms results in injury or death, to their superiors.²²¹

82. This framework must include criminal, administrative and disciplinary sanctions. Modes of criminal accountability must include command or superior responsibility. The general existence of laws is not enough to ensure accountability of State officials – special measures are needed to ensure that those in office are held responsible. Many States lack such mechanisms.

83. An effective remedy is dependent on an effective investigation. The General Assembly has addressed the obligation of all States “to conduct exhaustive and impartial investigations... to identify and bring to justice those responsible... and to adopt all necessary measures... to put an end to impunity.”²²²

84. Independent, external oversight of police is a best practice.²²³ However, mere establishment of an external oversight body itself is insufficient. An effective external police oversight agency requires the necessary powers, resources, independence, transparency and reporting, community and political support, and civil society involvement.²²⁴ In addition, a high degree of transparency is also required to ensure the long-term success of the oversight agency.²²⁵

Prior to publishing his dedicated study on police oversight mechanisms, Special Rapporteur Alston raised serious accountability failures in relation to the Sri Lanka police in a 2005 communication to that state.

Allegation letter sent to the Government of Sri Lanka (22 November 2005)

[...]

In the annex to this letter, I list the cases of alleged death in police custody brought to the attention of your Excellency’s Government by my predecessor and myself in the course of the last five years. I further attach information received with regard to two recent cases of death in custody.

All the cases mentioned in the annex share certain elements: persons placed under arrest by the police were allegedly subjected to severe ill-treatment and died as a result of that treatment, either in custody or shortly after release. In a majority of the cases, the ill-treatment appears to have been motivated by the intention to extract a confession from a criminal suspect. A further common aspect of these cases is that, on the basis of both information provided by your Excellency’s Government and by other sources, it would appear that none of the police officers responsible have been held criminally accountable. Even disciplinary sanctions against the perpetrators appear to constitute an exception.

In this context, I would like to assure your Excellency that I am aware of significant steps taken by your Excellency’s Government in recent years to address this problem. In 1997, the Human Rights Commission (HRC) was established. It enjoys the power to launch investigations into cases of police conduct violating human rights. Reportedly, in the course of the present year the

220 *Basic Principles*, *supra* note 2, Principle 11(f); and *Code of Conduct for Law Enforcement Officials* (1979), Commentary to Art. 3.

221 *Basic Principles*, *supra* note 2, Principle 6.

222 General Assembly resolution 63/182.

223 Report of the Special Rapporteur, Philip Alston, A/HRC/14/24/Add.8, 28 May 2010, para 73. Also, African Commission on Human and Peoples’ Rights, Resolution on police reform, accountability and civilian police oversight in Africa (2006).

224 A/HRC/14/24/Add.8, *supra* note 223, para. 74.

225 *Ibid.*, paras. 61-63.

HRC has become considerably more pro-active and increased the use of its powers vis-à-vis the Attorney General and the Inspector General of Police. Furthermore, in 2002, the Seventeenth Amendment to the Constitution of Sri Lanka established the National Police Commission (NPC), an independent body with vast powers regarding appointments, promotions, and disciplinary measures, the investigation of allegations of police misconduct, as well as recruitment, training, and codes of conduct for the police. A Disappearances Investigation Unit (DIU) and a Prosecution of Torture Perpetrators Unit (PTPU) were established in the Attorney General's Office (AG). The Attorney General has recently become more active in prosecuting torture cases, resulting in forty torture prosecutions currently pending and two convictions. The Supreme Court, finally, hears fundamental rights cases brought by victims and has awarded compensation to the families of persons who died as a result of ill-treatment suffered in police custody.

On the basis of the information I have received, it would appear that various shortcomings in the system continue to lead to the prevalence of severe ill-treatment of detainees in police custody and – as a consequence – a high incidence of deaths in custody. In particular, reports indicate that:

- HRC officers are empowered to pay unannounced visits to police stations. Ill treatment of detainees, however, often takes place not in the police station itself but in adjoining buildings, such as garages or barracks. HRC officers are allowed to visit these facilities only with the prior agreement of the Attorney General and the Inspector General of Police, which considerably reduces the effectiveness of this oversight mechanism.
- The central register of detainees was either never established or is not in function.
- Support for effective prevention and monitoring at the political level is ambiguous. The Inspector General of Police in many instances has justified police ill treatment of detainees as necessary under the circumstances, and a senior cabinet member has recently proposed weakening the independence of the NPC vis-à-vis the Inspector General of Police.
- Disciplinary procedures for the police, as established in the Sri Lankan Establishment Code, do not contain sufficient safeguards of impartiality to inspire trust in victims and the public. All parties to inquiries into police conduct are police officers, and the hearings take place in police premises. Sometimes civilian observers are invited, but they are not allowed to intervene in the inquiry proceedings. Disciplinary inquiries take many years and less than ten percent are actually ever completed. Neither the victim nor the public is informed of the outcome.
- The NPC has been unable to assert its constitutional prerogatives concerning transfers, promotions, and disciplinary measures. The NPC is so severely understaffed and underfunded that it cannot carry out its own investigations into allegations of torture or killings by the police. As a result, it has to rely on investigations by police of the same district or even the same police station as those alleged to have engaged in torture.
- While disciplinary or criminal proceedings regarding torture (whether with or without lethal outcome) are pending against a police officer, the officer generally remains in service at the same police station. This situation, coupled with the absence of a witness protection program, exposes victims, witnesses and family members to intimidation by the alleged perpetrators.
- Notwithstanding the progress noted above, prosecution of torture in police custody and of cases of death in custody remains the exception. Judicial medical officers are scarce and all too ready to accept the explanations of the police regarding cases of death in custody. Prosecutors have to rely on the police, often the unit accused of torture or killing, to investigate the crime. The year-long delays in bringing cases to trial, the absence of a witness protection program, and the failure to obtain the attendance of witnesses in court mean there have been relatively few convictions of police officers on charges of torture and killings.
- Finally, there appears to be unwillingness to hold police officers with command responsibility accountable for torture and killings engaged in by their subordinates.

In connection with these allegations, I would like to refer Your Excellency's Government to the fundamental principles applicable to such incidents under international law. Article 6 of the International Covenant on Civil and Political Rights provides that no one shall be arbitrarily deprived of his or her life. The obligations arising for State Parties from Article 6 with regard to incidents of death in custody have been spelled out by the UN Economic and Social Council in resolution 1989/65 of 24 May 1989, recommending the adoption of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions. They include preventive measures, such as

- ensuring strict control, including a clear chain of command, over all officials responsible for apprehension, arrest, and custody (Principle 2);
- holding detainees in officially recognized places of custody, and making accurate information on their custody and whereabouts promptly available to their relatives and lawyer (Principle 6);
- inspections to places of custody by qualified inspectors, including medical personnel, on a regular basis but including unannounced inspections, with full guarantees of independence and unrestricted access to all persons in such places of custody, as well as to all their records (Principle 7).

Shortly after sending this communication, Special Rapporteur Alston visited Sri Lanka and he addressed the same theme in his subsequent report:

Report on Mission to Sri Lanka (E/CN.4/2006/53/Add.5, 27 March 2006, ¶57)

57. The frequent failure to prosecute police accused of responsibility for deaths in custody is due partly to deficiencies in internal investigation. Complaints about police misconduct are received by the Inspector General of Police (IGP), who selects either the Special Investigations Unit (SIU) or the Criminal Investigation Department (CID) to carry out an internal investigation. Internal investigations into serious incidents typically last from two to four years, and it seems likely that by no means all such complaints are investigated at all. When grave misconduct, such as torture or murder, has been alleged, the investigation is generally conducted by CID. The primary role of CID is assisting local police, and for it to also conduct internal investigations undermines both their actual effectiveness and outside perceptions of impartiality. Reform is needed, and it may be hoped that this can be spearheaded by a strong National Police Commission.²²⁶

The Special Rapporteurs addressed similar challenges to effective independent police oversight in other country reports:

Report on Mission to Nigeria (E/CN.4/2006/53/Add.4, 7 January 2006, ¶¶52, 55-59)

52. On paper, the system for investigating police misconduct is impressive. In practice, it is too often a charade. The outcome of investigations usually seems to justify inaction or to ensure that complaints are dealt with internally through "orderly-room hearings" or the like.²²⁷ While police

²²⁶ Notably, the police disciplinary process is least effective when dealing with more senior officers. Statistics relating to "departmental lapses" show that disciplinary proceedings are almost exclusively initiated against low-ranking officers. There is a determined unwillingness to hold police officers with command responsibility accountable for torture and killings engaged in by their subordinates, whether at the disciplinary or at the criminal level. This applies to both internal and external accountability mechanisms. In 2001, constables were found responsible for 86% of "departmental lapses"; superintendents were found responsible for only 0.04% of such lapses. (*Sri Lanka Administration Report*, 2001, Appendix 1, Table 6.)

²²⁷ For a detailed analysis of these issues see Human Rights Watch, *"Rest in Pieces": Police Torture and Deaths in Custody in Nigeria*, July 2005, Chapter X.

officers are certainly disciplined and some dismissed, the system has rarely worked in cases in which police are accused of extrajudicial executions. In these instances genuine investigations are rare and referral to the DPP for prosecution are even rarer. It is also not uncommon for the primary accused police officer to escape, for charges to be brought against others, and for the latter to be acquitted on the grounds either of insufficient evidence or of prosecution of the wrong officers. The result gives the appearance of a functioning investigative system, while in fact promoting the goal of de facto police impunity.

[...]

55. In 2005 the acting Inspector-General of Police (IGP) announced that “the days of extra-judiciary killings” and of “corruption in the service” must end.²²⁸ The question for Nigeria is how to introduce some notion of accountability. While no single country can provide a model, efforts to promote democratic policing²²⁹ in South Africa are of major relevance.²³⁰ It is generally accepted that three different levels of control are needed: internal, governmental, and societal.

56. In terms of internal accountability the Nigeria Police system is weak. What few statistics were made available to the Special Rapporteur in response to repeated requests indicate that few serious disciplinary measures are taken except against rogue individuals. Indeed the single greatest impediment to bringing police officers to justice for their crimes is the Nigeria Police force itself. Evidence indicates that it systematically blocks or hampers investigations and allows suspects to flee. In order to break this cycle of impunity, a new investigation and prosecution mechanism is required.

57. A ten-point police reform plan put forward by the acting IGP includes reviewing and strengthening mechanisms for public complaints of police misconduct, introducing a zero-tolerance policy on corruption, particularly in relation to roadblocks, and efforts to ensure that police obey court orders.²³¹ The initiative is encouraging, but it needs to be implemented and monitored.²³² The Police Complaints Bureaux and the Human Rights Desks set up within the Police structures since 2003 have yielded little. The offices that the Special Rapporteur saw in various states looked forlorn and determinedly unavailable and he received evidence that they had achieved little of substance. The internal vacuum must be filled since external accountability procedures can “only be effective if they complement well developed internal forms of control”.²³³

58. In terms of governmental accountability, the Police Service Commission is charged with police discipline, but has opted to refer all complaints of extrajudicial police killings back to the police for investigation. The Commission’s mandate is potentially empowering. But despite efforts by one or two excellent commissioners, its performance has been dismal and self-restraining.²³⁴ Its Quarterly

228 Quoted in Johnson, “Memo to Mr Ehindero”, *supra* note 99, p.3.

229 Democratic policing is characterized by: respectful conduct, effective performance and transparency and accountability to the different clients or consumers of policing. D.H. Bayley, *Democratising the Police Abroad: What to Do and How to Do it*, (Washington DC, National Institute of Justice, US Department of Justice, 2001).

230 See Open Society Foundation for South Africa, *Strengthening oversight of police in South Africa*. Report on the workshop on police accountability held on May 10th 2004 in Cape Town, available at: <http://www.policeaccountability.co.za/Publications/Pub-Categories.asp?PubCatID=23>.

231 <http://www.nigeriapolice.org/10pointprogramme.html>.

232 A proposal pending in 2005 is to establish a new Police Public Complaints Bureau for the purpose of receiving public complaints lodged against police officers. The Bureau would be granted independent powers of investigation and prosecution and have its own investigative department staffed by a permanent police squad and security service. It is unclear whether this initiative will be adopted or will be pursued independently and funded adequately. See, *The Police Public Complaints Bureau (Establishment) Bill 2005*, in particular, Sections 6 and 12.

233 T. Jones, “The Governance and Accountability of Policing” in Tim Newburn (ed.), *The Handbook of Policing*, (Devon, Willan Publishing, 2003) p. 603.

234 Some of its members are alleged to have accepted official cars provided by the Police Force whose behaviour they

Reports to the President are not published and present a dismal chronicle of rubber-stamping decisions taken by the police, coupled with inaction in relation to pressing concerns. A radical overhaul of its procedures and composition is warranted.

59. In terms of societal accountability there are various initiatives to promote community policing and reinvigorate the Police-Community Relations Committees that exist in some states.²³⁵ But these efforts fall far short of the need. Some external authority needs to be equipped and empowered to monitor police abuses, including instances of illegal checkpoints, demands for bribes and other forms of corruption and abuse.

Report on Mission to Brazil (A/HRC/11/2/Add.2, 23 March 2009, ¶¶68-72)

68. An effective system of police accountability requires both internal and external oversight mechanisms. In Brazil, both sets of mechanisms should be improved so that they might better play their complementary roles.

69. In each state, the Military Police and the Civil Police each have an Internal Affairs Department (Corregedoria) responsible for conducting administrative proceedings and recommending disciplinary sanctions. (In some states, the two police forces share a single Internal Affairs Department.) In the case of a crime, such as homicide, this internal affairs process will run in parallel to the criminal investigation. However, few police are sanctioned or disciplined, even for serious crimes. And many police accused of serious crimes not only remain free from detention during the course of an investigation but remain on active duty. This permits police to intimidate witnesses and increases community perceptions that impunity exists for police murderers, in turn decreasing the willingness of witnesses to report crimes.

70. According to prosecutors and other informed interlocutors, the quality of work done by Internal Affairs Departments varies widely. Some conduct careful investigations and recommend appropriate sanctions. Others uncritically accept the accounts given by implicated police or simply stall the process. When the new government took office in Pernambuco they found over 300 proceedings against police stalled in Internal Affairs – waiting for the head of department to authorise the continuance of proceedings.

71. One factor contributing to poor performance is that Internal Affairs Departments are not independent of the police chain of command. Thus their effectiveness largely depends on the individual head of department. Reforms are, however, complicated. After all, the principal role of an internal affairs service is to ensure the accountability of police to their chain of command. Nevertheless, such departments should conduct investigations and recommend sanctions in an autonomous and professional manner. Various interlocutors proposed a separate career path for those working in internal affairs. Presently, officers can work in internal affairs investigating allegations of police misconduct and then return to work alongside the officers whom they had previously investigated. Clear procedures and time limits for investigations should also be followed. Another key step would be for the disciplinary sanctions recommended by internal affairs services, including recommendations of expulsion which require the governor's consent to take effect, be fully accessible to Ombudsman Offices and made public by them.

72. In addition, those police implicated in crimes constituting extrajudicial executions must be removed from active duty for the entire period of all internal affairs and criminal investigations.²³⁶

are supposed to monitor.

235 For a detailed analysis of many of these arrangements see Human Rights Watch *Rest in Pieces*, *supra* note 227 above.

236 1989 UN Principles, *supra* note 2, Principle 15.

Report on Mission to Papua New Guinea (HRC/29/37/Add.1, 30 March 2015, ¶¶69-72)

69. The Special Rapporteur was informed that complaints against the police were dealt with by the Internal Investigation Unit (IIU), which is independent of police stations. However, in practice, complaints must be lodged at a police station, which dissuades victims of police abuse from lodging complaints as they would have to do so to the same body that carried out the abuse. The Special Rapporteur was informed of a case where the victim was too afraid to go to the police to lodge a complaint because he had received threats. A similar internal investigation process also exists for correctional services staff; however, it seems that correctional services officers are rarely, if ever, prosecuted or convicted.

70. In general, an investigation can only be initiated after a person lodges a complaint to the police. However, allegedly the police do not wear identification badges and, in some instances, they do not even wear uniforms, which makes it difficult for a victim of police violence to lodge a complaint since he or she cannot prove that the perpetrator is a police officer. When complaints have been lodged, they have not always been followed up as police officers are often unwilling to investigate or testify against their colleagues. The Special Rapporteur emphasizes that allegations of serious misuse of force by police officers must be properly investigated. While it is important to strengthen the internal investigative system, improving discipline within the police force and improving the command and control structure are equally important

71. In 2007, a Memorandum of Agreement was concluded between the RPNGC and the Ombudsman Commission for the Ombudsman to oversee internal investigations into complaints against police officers.

72. The Special Rapporteur was informed that a process is under way to adapt the Memorandum of Agreement into legislation so as to formalise the relationship between the IIU and the Ombudsman Commission. That would offer an opportunity to strengthen the system, and the authorities should also consider enhancing the independence of the Unit Head, for example, conferring special powers and requiring that the Head report directly to the Police Commissioner.

(iv) Commissions of inquiry

Another way in which states can fulfil their obligations to investigate unlawful killings is to hold a commission of inquiry. Special Rapporteur Alston's 2008 study on commissions of inquiry addressed the topic in-depth.

Report to the Human Rights Council (A/HRC/8/3, 2 May 2008, ¶¶12-58)

A. Role of national commissions of inquiry in impunity for extrajudicial executions

12. The duty arising under international human rights law to respect and protect life imposes an obligation upon Governments to hold an independent inquiry into deaths where an extrajudicial execution may have taken place.²³⁷ While an independent police investigation will often suffice for this purpose, the creation of an official commission of inquiry with a human rights mandate is a time-honoured and oft-repeated response, especially to incidents involving multiple killings or a high-profile killing. These commissions vary greatly as to the terminology used, and their composition, terms of reference, time frames and powers. Even elementary Internet research provides the details of a plethora of examples of royal commissions, independent commissions, judicial commissions, parliamentary commissions and the like. While such inquiries are by definition established at the initiative of the government authorities, they are most often a result of concerted demands by civil society and sometimes also by the international community.

237 *McCann v. United Kingdom*, *supra* note 48.

Indeed it is now almost standard practice for a commission to be demanded in the aftermath of major incidents in which the authorities which would normally be relied upon to investigate and prosecute are feared to be reluctant or unlikely to do so adequately.

13. In historical terms, the technique of creating inquiries can be traced back to many examples in the early part of the twentieth century, including in colonial and immediately post-colonial contexts. More recently, the number and range of inquiries has been expanded significantly by two relatively new phenomena. The first is the considerable increase in internationally mandated inquiries, set up by bodies like the Human Rights Council or its predecessor. The second is the proliferation of transitional justice commissions, including truth and reconciliation commissions, designed to review historical injustices and help map a balanced response. The focus in the present analysis, however, is upon nationally mandated inquiries.

14. The thrust of the analysis is that the mere setting up of a commission of inquiry and even its formal completion will often not be adequate to satisfy the obligation to undertake an independent inquiry. Empirical inquiry, based on the many examples that have come to the attention of the Special Rapporteur and his predecessors, indicates that such inquiries are frequently used primarily as a way of avoiding meaningful accountability. The international human rights community needs to scrutinise such initiatives far more carefully in the future and to develop a mechanism for monitoring and evaluating their adequacy.

1. Reasons to establish inquiries

15. Whenever an arbitrary deprivation of life occurs, States are obligated to undertake a thorough, prompt and impartial investigation, to prosecute and punish the perpetrators and to ensure that adequate compensation is provided to the relatives of victims.²³⁸ This would normally be assured through the regular functioning of the criminal justice system, including police, public prosecutors, courts and oversight mechanisms, such as ombudsmen. All too often, however, and especially in the case of large-scale or politically-charged killings, the system in place is unable to function effectively and extraordinary measures are needed in order to bring justice.

16. Such failings can occur in a variety of situations. First, the police may lack the necessary investigative capacities. The investigation required may be complex, far-reaching or require scientific and forensic resources that may not be available. Second, those charged with investigating the events might themselves be suspected, or closely connected to suspects. Relations between the police and the military or paramilitary groups are of particular relevance in this regard. Third, victims, relatives and witnesses might lack confidence in the police or other investigating authorities and be unprepared to cooperate with them. Fourth, political interference at the local, State or federal levels might be hindering an effective investigation. Fifth, the killings might be part of a broader phenomenon which needs to be investigated more broadly and not confined to a criminal investigation. Sixth, a solution to the problem, including the punishment of those responsible, might require the mobilization of a degree of public pressure and political will which require more than a regular investigation.

17. Whatever the reason for the shortcomings of the established system for carrying out investigations and prosecutions, States are obliged to take positive steps to ensure that their administrative and judicial institutions do in fact operate effectively, and to take measures to avoid the recurrence of violations. This may require the State to make changes to its institutions, laws or practices.²³⁹

238 Commission on Human Rights resolution 2005/34; Human Rights Committee, General comment No. 31, *supra* note 5.

239 *Ibid.*, para. 17.

18. National commissions of inquiry are a common response in such situations. The inquiry will often be set up to address the victim-specific violation by being tasked to investigate the alleged abuses, give a detailed account of a particular incident or series of abuses, or recommend individuals for prosecution. In an effort by the State to prevent future violations or to strengthen the criminal justice system, a commission may also be given a broader mandate to report on the causes of the violation and to propose recommendations for institutional reform. Use of this technique is by no means confined to any particular group or type of countries, but takes place in a great many countries regardless of their level of development or their legal system.

19. Paradoxically, the circumstances that lead to the creation of such inquiries very often carry with them the seeds of the initiative's subsequent failure. In other words, Governments are pressured by the momentum of events, diplomatic pressures or for other reasons to do something which they perceive to be contrary to their own interests. Thus the initiative may, from the outset, be pursued in ways designed to minimise its ultimate impact.

20. The procedures and results of these inquiries have been a recurring concern throughout the 26 years of the Special Rapporteur's mandate. Governments have frequently replied to a communication from the Special Rapporteur in relation to an alleged extrajudicial execution by Specific national commissions have also been studied in depth in a great many of the country reports of the Special Rapporteurs following in situ visits indicating that a special commission of inquiry has been set up to investigate the matter.²⁴⁰ The Special Rapporteur has frequently welcomed this measure,²⁴¹ and in many cases where a State has not yet signalled its intention to create a commission, the Special Rapporteur has called on the State to do so.²⁴² Specific national commissions have also been studied in depth in a great many of the country reports of the Special Rapporteurs following in situ visits.²⁴³ All too often, however, the commissions of inquiry are found wanting, and successive Special Rapporteurs have expressed the concern that commissions are frequently designed to deflect criticism by international actors of the Government rather than to address impunity.²⁴⁴ Once the establishment of a commission has been announced, the State, in

240 E.g. Report of the Special Rapporteur, Asma Jahanhir, Summary of cases transmitted to Governments and replies received, E/CN.4/2003/3/Add.1, 12 February 2003, paras. 301 and 331; Report of the Special Rapporteur, Bacre Waly Ndiaye, Country Situations, E/CN.4/1997/60/Add.1, 23 December 1996, para. 225; Report of the Special Rapporteur, Bacre Waly Ndiaye, Country Situations E/CN.4/1995/61, 14 December 1994, paras. 135 and 164; Report of the Special Rapporteur, Bacre Waly Ndiaye, Country Situations, E/CN.4/1996/4, 25 January 1996, paras. 188-91; Report of the Special Rapporteur, Bacre Waly Ndiaye, Country Situations, E/CN.4/1994/7, 7 December 1993, para. 199; Report of the Special Rapporteur, Bacre Waly Ndiaye, Country Situations, E/CN.4/1993/46, 23 December 1992, paras. 115-18, 348; Report of the Special Rapporteur, S. Amos Wako, E/CN.4/1991/36, February 1991, paras. 124, 290-96; Report of the Special Rapporteur, S. Amos Wako, E/CN.4/1992/30, 31 January 1992, paras. 502 and 543.

241 E.g., E/CN.4/1992/30, *supra* note 240, para. 281.

242 E.g. Report of the Special Rapporteur, Philip Alston, Summary of cases transmitted to Governments and replies received, E/CN.4/2005/7/Add.1, 17 March 2005, p. 291; Report of the Special Rapporteur, S. Amos Wako, E/CN.4/1990/22, 23 January 1990, para. 378; E/CN.4/1991/36, *supra* note 240, para. 455.

243 E/CN.4/2006/53/Add.5 *supra* note 92; E/CN.4/2006/53/Add.4, *supra* note 188; Report of the Special Rapporteur, Asma Jahanhir, Mission to Sudan, E/CN.4/2005/7/Add.2, 6 August 2004; Report of the Special Rapporteur, Asma Jahanhir, Mission to Jamaica, E/CN.4/2004/7/Add.2, 26 September, 2003; Report of the Special Rapporteur, Asma Jahanhir, Mission to Democratic Republic of Congo, E/CN.4/2003/3/Add.3, 4 November 2002; Report of the Special Rapporteur, Bacre Waly Ndiaye, Mission to Burundi, E/CN.4/1996/4/Add.1, 24 July 1995; Report of the Special Rapporteur, Bacre Waly Ndiaye, Mission to Indonesia and East Timor, E/CN.4/1995/61/Add.1, 1 November 1994; Report of the Special Rapporteur, Bacre Waly Ndiaye, Mission to Peru E/CN.4/1994/7/Add.2, 15 November 1993; Report of the Special Rapporteur, S. Amos Wako, Mission to Zaire, E/CN.4/1992/30/Add.1, 28 April 1992; Report of the Special Rapporteur, S. Amos Wako, Mission to Colombia, E/CN.4/1990/22/Add.1, 24 January 1990; Report of the Special Rapporteur, S. Amos Wako, E/CN.4/1987/20, 22 January 1987.

244 Report of the Special Rapporteur, Philip Alston, A/62/265, 16 August 2007, para. 11; E/CN.4/2006/53/Add.4, *supra* note 188, para. 103; Report of the Special Rapporteur, Asma Jahanhir, E/CN.4/2003/3, 13 January 2003, para. 31;

response to criticisms from the international community, often uses the special inquiry as evidence that it is currently taking action to address impunity. This often succeeds in defusing domestic or international criticism and preventing strong advocacy by international actors to promote accountability within the State; however, given that commissions of inquiry are often deficient and that attempts to use commissions to avoid rather than advance accountability often succeed, the international community must find more effective ways of engaging with them.

21. Thus, in my 2006 report to the Commission on Human Rights,²⁴⁵ I signalled my intention to report to the Human Rights Council on the principal problems that had been experienced in relation to commissions of inquiry and to make recommendations in that regard.²⁴⁶ To that end, the present analysis: (a) discusses the positive role that commissions of inquiry can play; (b) outlines the established guiding principles for a national commission of inquiry; (c) examines the principal problems that have been encountered in this regard in the work of the Special Rapporteur; and (d) proposes conclusions and recommendations based on lessons learned.

2. Positive role of commissions of inquiry in addressing impunity

22. In principle, commissions of inquiry can play an important role in combating impunity. First, the commission may be tasked with carrying out some of the functions normally performed by criminal justice institutions. A commission will often be established to provide an independent investigation where the criminal justice institutions are seen to be biased or incompetent. This is often the case where key government agents, such as the police or military, are themselves involved in abuses and where there is no reliable system of police or military oversight.²⁴⁷ It is also the case where there is long history of repeated abuses that police fail to investigate, public prosecutors fail to prosecute, or courts fail to punish due to incompetence, bias, or lack of expertise.²⁴⁸ A commission may also be seen as desirable where one incident is particularly complex and significant, requiring sustained and focused investigation in order to be understood.²⁴⁹ In such cases, a commission can help to explain or analyse a complex situation, and thus perform important functions normally beyond the scope of police investigations or judicial procedures.

23. Second, a commission can provide informed advice to the Government on the institutional reforms necessary to prevent similar incidents from occurring in the future. It can perform an essential function that is generally unsuitable to police, prosecutors or courts, and explain the underlying causes for serious human rights abuses or the causes of impunity for those abuses. In addressing the causes of the abuses, a commission can be the first step in a Government's effort to take measures to prevent the recurrence of violations and to ensure that its institutions, policies, and practices ensure the right to life as effectively as possible.²⁵⁰ Importantly, where it appears that

Report of the Special Rapporteur, Asma Jahangir, E/CN.4/1999/39, 6 January 1999, para. 67; Report of the Special Rapporteur, Bacre Waly Ndiaye, E/CN.4/1998/68, 23 December 1997, para. 97; Report of the Special Rapporteur, Bacre Waly Ndiaye, E/CN.4/1997/60, 24 December 1996, para. 97; Report of the Special Rapporteur, Bacre Waly Ndiaye, A/51/457, 7 October 1996, para. 124; E/CN.4/1995/61, *supra* note 240, para. 402; E/CN.4/1994/7, *supra* note 240, para. 695.

245 Report of the Special Rapporteur, Philip Alston, E/CN.4/2006/53, 8 March 2006, paras. 25 and 61-62.

246 This report focuses on national, rather than international commissions of inquiry. For reporting on international commissions of inquiry, see Report of the Secretary General, E/CN.4/2006/89, 15 February 2006, examining the international commissions for East Timor (1999), Togo (2000), the Occupied Palestinian Territory (2001), Côte d'Ivoire (2004), and the Darfur region of the Sudan (2004).

247 Report of the Special Rapporteur, Asma Jahangir, Mission to Nepal, E/CN.4/2001/9/Add.2, 9 August 2000, para. 60; and E/CN.4/1990/22, *supra* note 242, para. 11.

248 E/CN.4/1994/7, *supra* note 240, para. 148; E/CN.4/1990/22, *supra* note 242, para. 378; E/CN.4/1991/36, *supra* note 240, para. 448; E/CN.4/1994/7/Add.2, *supra* note 243, para. 108.

249 E/CN.4/1993/46, *supra* note 240, para. 139; and E/CN.4/1994/7, *supra* note 240, para. 695.

250 E/CN.4/2006/53, *supra* note 245, para. 41.

the regular institutions are incapable of combating impunity, a commission can propose structural or long-term reforms to address criminal justice institutional deficiencies. When used in this way, and when the commission's recommendations are followed up by the Government, a commission can be an effective way for the State to reform its criminal justice institutions so that it will meet its obligation to investigate, prosecute and punish violations of human rights in the future.²⁵¹

3. Guiding principles for a national commission of inquiry

24. The basic question that must guide an assessment of a commission is whether it can, in fact, address impunity. In Special Rapporteur Wako's first report in 1983 for the extrajudicial executions mandate, he recommended that "[m]inimum standards of investigation need to be laid down to show whether a Government has genuinely investigated a case reported to it and that those responsible are fully accountable".²⁵² Since then, and due in part to the work of successive Special Rapporteurs, the general standards which govern how a commission of inquiry should be conducted are now clear and well established.²⁵³ I will not detail in full those standards again here, except to highlight the following.

25. In order for a commission to address impunity, it must be independent, impartial and competent. The commission's mandate should give the necessary power to the commission to obtain all information necessary to the inquiry but it should not suggest a predetermined outcome. Commission members must have the requisite expertise and competence to effectively investigate the matter and be independent from suspected perpetrators and from institutions with an interest in the outcome of the inquiry. Commissions should be provided transparent funding and sufficient resources to carry out their mandate. Effective protection from intimidation and violence needs to be provided to witnesses and commission members. When it establishes the commission, the Government should undertake to give due consideration to the commission's recommendations; when the report is completed, the Government should reply publicly to the commission's report or indicate what it intends to do in response to the report. The commission's report should be made public in full and disseminated widely.

26. As the examination below of the problems encountered in relation to commissions indicates, these standards are more than just desirable best practice. Experience shows that conformity with them is essential if a commission is to be effective.

4. Problems encountered in relation to commissions of inquiry

27. A comprehensive review of the work of the Special Rapporteur since 1982 indicates that many commissions have achieved very little. They are often set up to show domestic constituents and the international community that the Government has the will and capability to address impunity. Subsequent assessments undertaken by the Special Rapporteurs, however, indicate that many of them have in fact done little other than deflect criticism. A review of the specific commissions reported on by the Special Rapporteurs indicates that they have consistently failed to meet the basic standards set out above. In order to understand more fully where commissions commonly

251 Ibid., para. 41; Report of the Special Rapporteur, S. Amos Wako, E/CN.4/1986/21, 7 February 1986, paras. 80-81.

252 Report of the Special Rapporteur, S. Amos Wako, E/CN.4/1983/16, 31 January 1983, para. 230.4. See also Report of the Special Rapporteur, S. Amos Wako, E/CN.4/1985/17, 12 February 1985, paras. 59-60; Report of the Special Rapporteur, S. Amos Wako, E/CN.4/1988/22, 19 January 1988, para. 189.

253 1989 UN Principles, *supra* note 2, especially Principle 11; Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Assembly resolution 55/89, 4 December 2000, Annex, especially Principle 5; Updated Principles to combat impunity, *supra* note 13, especially Principles 6-13; United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, Model Protocol for a Legal Investigation of Extra-Legal Arbitrary and Summary Executions ("Minnesota Protocol"), E/ST/CSDHA/12 (1991); E/CN.4/2006/89, *supra* note 246, para. 2.

fail and how international actors should engage with them, this section details the main problems encountered in relation to the conduct or outcomes of commissions of inquiry.

(a) Inquiry fails to take place

28. Sometimes, commissions are announced with great fanfare, but an inquiry never actually begins its work.²⁵⁴ Self evidently, in such cases, a commission is simply put forward to appease Government critics, but there is no actual Government will to use the institution to address impunity.

(b) Limited mandate

29. A commission may be limited in its effectiveness by the terms of its mandate. The mandate may be unduly narrow or restricted in a way that undermines its credibility or usefulness. This is particularly the case where the mandate preempts the outcome of the inquiry or where a mandate restricts who a commission may investigate (for example, by prohibiting it from investigating Government actors).²⁵⁵

(c) Insufficient funding or resources

30. In some cases, the lack of funding or provision of basic resources to a commission have been extremely detrimental to the ability of the commission to function, even where its members have the will to conduct investigations. This is more than simply a technical matter; the adequacy of resources provided to a commission upon its establishment can be a useful indicator of the good faith of the Government and perhaps also of its potential effectiveness.

31. In his 1987 report, for example, Special Rapporteur Amos Wako reported on his visit to Uganda.²⁵⁶ In 1984 and 1985, the Special Rapporteur had sent allegation letters to Uganda, and in March 1986, Uganda promised the Commission on Human Rights that it would establish a commission to investigate violations of human rights. In August 1986, the Special Rapporteur visited Uganda to follow up the allegations he had received and to report on the work of the commission.²⁵⁷ He reported that the commission was urgently in need of (a) basic human rights materials; (b) logistical support (vehicles and transport); and (c) stationery and office machinery.²⁵⁸ He noted that strengthening United Nations support to the commission could “minimise its logistical problems and enhance its efficiency”.²⁵⁹

(d) Lack of expertise

32. A commission needs the appropriate expertise to carry out the mandated investigations. For instance, in his mission report on Indonesia and East Timor, Special Rapporteur Bacre Waly Ndiaye observed that “[n]one of the members of the [commission] had the necessary technical expertise to correct the shortcomings found in the investigations carried out by the police”.²⁶⁰ Similarly, in his

254 E/CN.4/1994/7, *supra* note 240, para. 202; E/CN.4/1996/4/Add.1, *supra* note 243, para. 38.

255 E/CN.4/2005/7/Add.2, *supra* note 243, para. 43.

256 E/CN.4/1987/20 *supra* note 243.

257 *Ibid.*, paras. 62-65, and 226-234.

258 *Ibid.*, para. 8. He stated that “[N]o progress whatsoever could be achieved unless certain clearly essential requirements were met. For example, the investigative functions of the Commission of Inquiry were paralysed without transport and office supplies, including photographic equipment.” (para. 13).

259 *Ibid.*, para. 16.

260 E/CN.4/1995/61/Add.1, *supra* note 243, para. 54.

report on Uganda, Rapporteur Wako noted that the commission “needed expert advice on several aspects of its work, particularly in regard to the definition of offences against human rights”.²⁶¹

(e) Lack of independence

33. Where a commission is not independent from the parties to a conflict or from any institution or person with an interest in the outcome of the inquiry, its inquiry is unlikely to be capable of providing an unbiased assessment of the incident. Just as importantly, where the commission is not perceived to be independent, its work will lack credibility and its conclusions are unlikely to be trusted. Independence has often been a central concern of assessments of commissions made by special rapporteurs. It has three important aspects.

34. First, independence must be structurally guaranteed so that the commission is set up as a separate institution from the Government. This formal independence can often be assessed by examining the terms of the mandate before the commission begins its work, or through an examination of the early investigatory practices of the commission. For instance, a major Sri Lankan commission, established in November 2006, the progress of which I have followed closely,²⁶² has been criticized for its failure to secure formal independence. The commission was appointed by the President of Sri Lanka to, *inter alia*, investigate incidents of human rights abuses committed since August 2005, to report on the prior investigations into the abuses and to recommend measures to prevent abuses in the future.²⁶³ Sri Lanka also invited the formation of an International Independent Group of Eminent Persons to monitor the work of the national commission and to report on its conformity with international standards.²⁶⁴ But following a year of public statements by the Group expressing concern about the functioning of the commission,²⁶⁵ on 6 March 2008, the Group announced that it was terminating its functions because of the serious shortcomings in the work of the national inquiry and because of the lack of institutional support for the commission’s work.²⁶⁶ The Group stated that the national inquiry had “fallen far short of the transparency and compliance with basic international norms and standards pertaining to investigations and inquiries”.²⁶⁷ It noted that one of the many flaws in the commission was that there were structural conflicts of interest which seriously compromised the independence of the commission. The State Attorney-General’s Department provided legal counsel to the commission, playing a leading role in the panel of counsel to the commission. Given that the Attorney-General’s Department is also the chief legal adviser to the Government of Sri Lanka and had been involved in the original investigations into some of the cases being investigated by the commission, the Department was potentially going to be investigating itself.²⁶⁸ In addition, Department members could be potential witnesses to the commission. As the Group noted, this is a serious conflict of interest. A later assessment by the Group indicated that the formal conflict did in fact have a serious negative impact on the quality of the commission’s investigations.²⁶⁹

261 E/CN.4/1987/20 *supra* note 243, para. 12.

262 E/CN.4/2006/53/Add.5, *supra* note 92.

263 The Presidential Commission of Inquiry to Investigate and Inquire into Alleged Serious Violations of Human Rights was established in a Presidential Warrant by his Excellency Mahinda Rajapaksa, President of the Democratic Socialist Republic of Sri Lanka, P.O. No: CSA/10/3/8.

264 The IIGEP is composed of 11 international law and human rights experts from 11 different countries, and was formally established in February 2007.

265 See International Independent Group of Eminent Persons, Public Statements dated 11 June 2007, 15 June 2007, 19 September 2007, and 19 December 2007.

266 *Ibid.*, Public Statement of 6 March 2008.

267 *Ibid.*

268 *Ibid.*, Public Statement of 11 June 2007.

269 *Ibid.*, Public Statement of 15 June 2007.

35. In some cases, it will be virtually impossible for the State to assure its citizens and the international community that a government-established commission can ever be truly independent. This may be the case where a commission is set up to investigate human rights abuses in the context of an internal armed conflict.²⁷⁰ In such cases, it has been the experience of the Special Rapporteur that an international commission of inquiry may be necessary.

36. Second, where formal independence has been established, actual independence may still be lacking. It is essential to look beyond the formal independence of the commission from the Government, and to assess whether the commission is capable in practice of carrying out its work independently. This may require the work of the commission to be monitored for the entire period of its operation. As Special Rapporteur Amos Wako noted in 1987, “in a number of countries, the investigating body, which was given an independent or quasi-independent status ... did not, in reality, secure its independence.”²⁷¹

37. An extreme example of Government interference is that of a commission established by Ethiopia in 2006 to investigate excessive force by Government forces in 2005 during anti-government demonstrations. It reportedly found initially that excessive force had in fact been used. However, government officials reportedly requested commission members to change their votes. The final report found that excessive force had not been used.²⁷² Another is provided in the report of Special Rapporteur Wako’s mission to Zaire in May 1991. Following allegations of a massacre between 8 and 12 May 1991, the Shaba Regional Assembly established a commission. It operated for one month, but “as its report was about to be presented, it was seized, reportedly on orders of the central authorities, and quashed.”²⁷³

38. Third, a commission’s members must also be judged to be individually independent and not be seen to have a vested interest in the outcome.²⁷⁴ Where members are not in fact or are not perceived to be independent, the commission lacks legitimacy in the eyes of the public and its findings are unlikely to be accepted.²⁷⁵ In addition, witnesses may be too afraid to come forward to the Commission for fear of bias by commission members.²⁷⁶

(f) Inadequate provision of witness protection

39. Inadequate protection provided to commission members or to witnesses appearing before the commission has severely hampered the work of some commissions.²⁷⁷ The Sri Lankan national commission, ongoing at the time of the present report, has been strongly criticized by the International Independent Group of Eminent Persons for failing to have an effective witness-protection programme.²⁷⁸ Witness protection within the commission was so poor that the possible whereabouts of witnesses was reported in a news article, which cited a commission member as the source of the confidential information.²⁷⁹ The international independent group noted that this, together with the lack of a comprehensive witness-protection programme, would discourage critical witnesses coming forward which would inhibit “any effective future pursuit of the filing

270 E/CN.4/2005/7/Add.2, *supra* note 243, para. 60.

271 E/CN.4/1987/20, *supra* note 243, para. 178.

272 *Amnesty International Report 2007*, at <http://thereport.amnesty.org/eng/Regions/Africa/Ethiopia>.

273 E/CN.4/1992/30/Add.1, *supra* note 243, para. 222.

274 E/CN.4/1990/22, *supra* note 242, para. 11.

275 E/CN.4/1995/61/Add.1, *supra* note 243, para. 54.

276 *Ibid.*

277 Report of the Special Rapporteur, Asma Jahangir, E/CN.4/2001/9/Add.1, 17 January 2001, para. 263; E/CN.4/1994/7/Add.2, *supra* note 243, para. 109; E/CN.4/1993/46, *supra* note 240, para. 527; E/CN.4/1990/22/Add.1, *supra* note 243, para. 37.

278 International Independent Group of Eminent Persons, Public Statements of 6 March 2008 and 19 September 2007.

279 *Ibid.*, Public Statement of 6 March 2008.

of indictments, convictions, and appropriate accountability for the alleged grave human rights violations under review”.

40. In some circumstances, it will be necessary to provide security to all members of the commission for it to function independently, or for it to function at all. An extreme example was provided in Special Rapporteur Wako’s report on his visit to Colombia in October 1989, in which he detailed the massacre of 12 of the 15 members of a commission on 18 January 1989.²⁸⁰ The commission was said to have succeeded in identifying those responsible for a massacre in October 1987. Even after the massacre of most of the commission members, proper protection was not provided to the three surviving members or to the witnesses to the attacks.²⁸¹ The Special Rapporteur noted that this “[c]ontributes to the phenomena known as impunity. Witnesses cannot come forward to give evidence and even if they make statements, they are later retracted because of intimidation and fear of being killed. Proper investigations cannot be carried out and, therefore, many files are closed for lack of evidence.”²⁸²

(g) Lack of power to have access to important evidence

41. Some commissions have been refused access to evidence necessary for the inquiry.²⁸³ A commission needs to have the authority to obtain all information necessary to form fully informed conclusions, and this will often mean that a commission needs the power to compel the production of documents and witness testimony.²⁸⁴ In my country report on Nigeria, for example, a commission was established to investigate alleged killings by the army, but the army did not acknowledge or reply to the commission’s correspondence.²⁸⁵ A similar problem was experienced with the Sri Lankan commission, in which State authorities refused to fully cooperate with investigations.²⁸⁶

(h) Failure to make public, respond to or follow up on commission findings

42. One of the most common problems encountered with a commission of inquiry is that, even where it has carried out its work effectively and submitted a timely report to the Government, the findings of the commission are simply never made public.²⁸⁷ This has, for example, been the trend in Nigeria.²⁸⁸ In a report on my visit to that country, I noted that there was a consistent pattern: violations are alleged; a commission is established; the reports are never published or are ignored.²⁸⁹ After my visit, I reported that the “Apo 6” inquiry, set up to investigate killings by police, appeared to be exemplary. At the time of reporting in 2005, it was only slightly delayed, and I called for it to be made public immediately.²⁹⁰ Unfortunately, nearly three years later, it has reportedly still yet to be made officially public.

43. Crucially, when a commission report is not made public, Government failure to officially respond to the report or to follow up on the commission’s recommendations usually follows. Lack of Government follow-up to completed commission reports has been a notable feature of cases

280 E/CN.4/1990/22/Add.1, *supra* note 243.

281 *Ibid.*, para. 37.

282 *Ibid.*, para. 68.

283 E/CN.4/1994/7/Add.2, *supra* note 243, para. 44.

284 E/CN.4/1990/22, *supra* note 242, para. 11; E/CN.4/1988/22, *supra* note 252 para. 194.

285 E/CN.4/2006/53/Add.4, *supra* note 188, para. 67.

286 The IIGEP noted that, “In fact, state officials have refused to render the required answers to relevant questions”: International Independent Group of Eminent Persons, Public Statement of 19 December 2007.

287 E/CN.4/2003/3/Add.1, *supra* note 240, para. 573; E/CN.4/1995/61, *supra* note 240, para. 65, 402; E/CN.4/1991/36, *supra* note 240, para. 26 (c).

288 E/CN.4/2006/53/Add.4, *supra* note 188, para. 62.

289 *Ibid.*, para. 64.

290 *Ibid.*, para. 103.

observed by the Special Rapporteur.²⁹¹ During my mission to Nigeria, for example, although a commission recommended in 2004 that compensation be paid to the victims of violence, at the time of my visit in mid-2005, none had been paid.²⁹²

(i) Inadequate prosecutions follow commission report

44. Frequently, one of the central purposes of establishing a commission is to investigate and report on the responsibility for alleged abuses. When a commission carries out an effective investigation, it will often be able to recommend directly the prosecution of individuals or to submit evidence to prosecutors for the same purpose. In some cases, arrests follow the submission of a commission report, but the suspects will later be released without being prosecuted.²⁹³ Alternatively, prosecutions may follow the commission report, but the sentences handed down are grossly inadequate.²⁹⁴ In other cases, those recommended for prosecution by the commission are never successfully prosecuted, or sometimes never even charged.²⁹⁵ A State attorney-general in Nigeria, for example, told me during my country visit in 2005 that he could recall “no case of prosecutions” following an inquiry in that country, and that their main purpose was just to facilitate a “cooling of the political temperature.”²⁹⁶ In one case, although the Nigerian commission had reported in detail on the identities of those security personnel responsible for serious human rights abuses, not one soldier was subsequently charged or disciplined in any way.²⁹⁷

45. In such cases, all that the commission achieves is a delay, often of many years, of the prospect of adequate prosecution of human rights abuses. In practice, this means that the international community has been deterred from pushing for prosecutions or from calling for the strengthening of regular criminal justice institutions, while the results of the commission are awaited. Once the commission has reported, it will usually be too late for meaningful pressure to be brought and the impetus or incentive for doing so will have greatly diminished in the meantime.

46. A related problem is that evidence is gathered by a commission in such a way as to compromise the possibility of successful subsequent prosecution. In a communication to Israel in September 2005, I wrote that there was no doubt that the Government commission had investigated at length whether the use of lethal force in question had been proportionate. The commission carried out its work for three years and produced an 800-page report, which concluded that, in some cases, the lethal force used had not been justified. During most of the period of the commission’s investigations, those undertaken by the Police Investigations Department were halted by the State prosecutor so that witnesses could testify before the commission without fear of criminal investigation. However, after the commission’s report was released, it was disavowed by the Department on the basis that it was no longer possible to “determine whether the use of lethal force was disproportionate and, if so, who is responsible for that disproportionate use of lethal force.”²⁹⁸ The Department did not issue indictments. As I noted in the communication, this “outcome – and particularly the way in which

291 E/CN.4/1997/60/Add.1, *supra* note 240 para. 64; A/51/457, *supra* note 244, para. 124; E/CN.4/1996/4/Add.1, *supra* note 243, para. 41; E/CN.4/1994/7, *supra* note 240, para. 202; E/CN.4/1994/7/Add.2, *supra* note 243, para. 46; E/CN.4/1995/61, *supra* note 240, para. 402; Report of the Special Rapporteur, Philip Alston, E/CN.4/1984/29, 21 February 1984, para. 114; E/CN.4/1991/36, *supra* note 240, para. 437.

292 E/CN.4/2006/53/Add.4, *supra* note 188, para. 66.

293 E/CN.4/1996/4, *supra* note 240, para. 425.

294 Report of the Special Rapporteur, Philip Alston, Cases transmitted to Governments and replies received, E/CN.4/2006/53/Add.1, 27 March 2006, para. 242; E/CN.4/1993/46, *supra* note 240, paras. 350-353.

295 E/CN.4/2006/53/Add.1, *supra* note 294, pp. 223-224.

296 E/CN.4/2006/53/Add.4, *supra* note 188, para. 103.

297 *Ibid.*, para. 67.

298 E/CN.4/2006/53/Add.1, *supra* note 294, pp. 127-128.

the interplay of the commission inquiry and Police Investigations Department investigation have produced it – would appear to fall short of the international standards”.²⁹⁹

(j) The inquiry’s final report fails to adequately justify its conclusions

47. Some commissions appear on their face to be appropriately established, but a close review of the substance of the final report reveals a failure to conduct a meaningful inquiry.³⁰⁰ Its conclusions may be untenable in the face of the available evidence. The commission may simply accept the Government version of events without explanation or analysis. It may reach conclusions without any apparent investigation having taken place to support them.

48. During my visit to Nigeria, for example, I reviewed a commission report into a “sectarian crisis” in Kano state in 2004. Credible and detailed civil society reports put the number killed at between 200 and 250; the commission, however, without providing any evidence whatsoever that it had conducted independent investigations into the number killed, recommended that the police figure of 84 be taken as the “official position”.³⁰¹ The commission, again without having undertaken any adequate investigation, also accepted the Government’s assessment of the overall damage caused by the crisis. In recommending the compensation that should be paid, the commission arrived at figures without any explanation or argument.³⁰²

(k) Lack of information about the conduct of or response to the commission

49. One significant problem encountered in the work of the Special Rapporteur in seeking to address widespread impunity for extrajudicial executions is a dearth of information on the conduct of established commissions of inquiry and of the Government response to the final commission report.³⁰³ Rarely is the progress of most national commissions carefully monitored by the international community. Commissions often take many months or years to produce their reports, and it can take as long again before the Government issues an official response to the inquiry’s conclusions. Long-term monitoring is thus necessary in order to determine whether a particular commission was, at the end of the day, effective. But there is no centralized monitoring of commissions of inquiry worldwide accessible to view the progress of a commission or to judge its effectiveness.

5. Lessons learned from 26 years of reporting on commissions of inquiry

50. Experience demonstrates that, while commissions of inquiry tasked with examining alleged extrajudicial executions have much to recommend them in principle, in practice the balance sheet is often much less positive. Far too many of the commissions dealt with by the Special Rapporteur over the past 26 years have resulted in de facto impunity for all those implicated.

51. In essence, the problem is that commissions can be used very effectively by Governments for the wrong purposes: to defuse a crisis, to purport to be upholding notions of accountability and to promote impunity. The mere announcement by a Government of a commission is often taken at face value to mean that the Government is “doing something” to address impunity. Because a commission creates the appearance of government action, its announcement often prevents or delays international and civil society advocacy around the human rights abuses alleged. Moreover, an ineffective commission can be more than just a waste of time and resources; it can contribute to

299 Ibid.

300 E/CN.4/2003/3/Add.3, *supra* note 243, paras. 32 and 41; E/CN.4/2004/7/Add.2, *supra* note 243, paras. 43-44.

301 E/CN.4/2006/53/Add.4, *supra* note 188, para. 65.

302 Ibid., paras. 65-66.

303 E/CN.4/1996/4/Add.1, *supra* note 243, para. 41.

impunity by deterring other initiatives, monopolizing available resources and making subsequent endeavours to prosecute difficult or impossible.

52. These conclusions raise an important issue for the international community. How should international actors respond to announcements that commissions of inquiry are to be established?

53. The principal answer is that the international community should not, solely because a commission of inquiry has been established, suspend its engagement with the relevant Government when serious violations of human rights are alleged. International actors should assess from the outset whether the commission has been given the tools it would need to be able to address impunity effectively. The commission's mandate, its membership, the process by which it was selected, its terms of appointment, the availability of effective witness-protection programmes and the provision of adequate staffing and funding should all be examined to ascertain whether the commission meets the relevant international standards. Experience demonstrates that the standards are more than just best practice guidelines: they are necessary preconditions for an investigation capable of addressing impunity. If they are not met in practice, a commission is highly unlikely to be effective.

54. If a commission is not established in accordance with international standards, the international community should not adopt a "wait and see" approach. Rather, it should promptly draw attention to the inadequacies and advocate implementation of necessary reforms. Where a Government appears to have a genuine will to establish an effective commission, but lacks the necessary expertise, funding or resources, international assistance will be appropriate.

55. A commission is not a substitute for a criminal prosecution.³⁰⁴ It does not have the powers of a court to declare the guilt or innocence of a person. It usually cannot order punishment for a wrongdoer. A commission's role in terms of the State's obligation to prosecute and punish is to gather evidence for a subsequent prosecution, identify perpetrators or recommend individuals for prosecution. If the commission's mandate overlaps significantly with that of the regular criminal justice institutions (for example, where it is tasked with investigating and identifying perpetrators, duties normally performed by police and public prosecutors), a sound rationale needs to be provided by the Government to justify the creation of the commission. Without such justification, the commission is likely to be a tool to delay prosecutions or deflect the international community's attention from advocating for prosecutions.

56. If there is no sound rationale for the commission or if the commission's mandate is inadequate to achieve its purpose, international actors should continue to focus on the need for prosecutions to progress through the regular criminal justice system and for reforms to that system to be made where necessary. Experience shows that, where the regular criminal justice institutions are biased, or lack expertise or competence, or are the subject of Government interference, it is unlikely that a commission of inquiry will be able to achieve the independence needed to address impunity effectively. Furthermore, even if the commission defies the odds and does its work effectively, there is no reason to expect the criminal justice system to do its part by way of follow-up. It might thus be better for the international community to insist from the outset that the system itself be reformed.

57. Where the international community determines that a commission of inquiry is an appropriate response, it should then track its progress closely. Failures to meet international standards in the functioning of the commission should be noted and appropriate steps taken in response. Inordinate delays and failures to publish reports should be matters of comment. Once a commission has reported, the Government should be pressed to respond formally and address the recommendations. Finally, the Government's actual follow-up to those recommendations should be carefully monitored.

304 E/CN.4/2004/7/Add.2, *supra* note 243, para. 86.

58. In sum, the announcement or establishment of a commission should not take the pressure off a Government to address impunity, and it should not silence international actors. Instead, the international community should monitor commissions actively, push for their compliance with international standards, offer assistance where appropriate and insist that a commission does not distract from the need to maintain strong criminal justice institutions. Governments and international actors should never lose sight of the substance of what a commission of inquiry is supposed to achieve: accountability for serious human rights abuses and underlying reform to prevent the recurrence of violations.

In 2004, Special Rapporteur Alston engaged with the United Kingdom in an allegation letter regarding a potential inquiry into the 1989 murder of an Irish lawyer, which allegedly occurred in collusion with the British security services.

Allegation letter sent to the Government of the United Kingdom and Northern Ireland (23 September 2004) (with the Special Rapporteur on the independence of judges and lawyers)

[...]

The [Special Rapporteur] welcomed the Government's action in April 2004 to publish the 4 reports submitted by Justice Cory in October 2003 concerning the murders of Patrick Finucane, Rosemary Nelson and others.

The [Special Rapporteur] brought to the attention of the Government information concerning recent developments in the Patrick Finucane case whereby Mr. Ken Barrett pled guilty and was sentenced on 16 September for admitting to the murder of solicitor Patrick Finucane. Since the criminal proceedings in this case have now concluded, the [Special Rapporteur] would like to take this opportunity to encourage the Government to commence a public inquiry without delay and liberally apply the terms of reference referred to in Justice Cory's report so there can be a full and open investigation into the allegations of state collusion regarding the death of Mr. Finucane. The Government made the decision to postpone the establishment of an inquiry due to ongoing criminal proceedings. However, in the case of Mr. Finucane the proceedings are now exhausted. The [Special Rapporteur] asked the Government whether it intended to hold a public inquiry pursuant to the 1921 Tribunals of Inquiry (Evidence) Act and what was the expected date of commencement.

Response of the Government of Great Britain and Northern Ireland (26 January 2005)

On 23 September 2004, the Secretary of State of Northern Ireland announced that the Government had concluded that steps should be taken to enable the establishment of an inquiry into the death of Patrick Finucane.

The Government is determined that where there are allegations of collusion the truth should emerge, and the inquiry into the death of Patrick Finucane will be given all the powers necessary to uncover the full facts of what happened. In order that the enquiry can take place speedily and effectively and in a way that takes into account the public interest, including the requirements of national security, new legislation is required.

The Government believes that the Inquiries Bill, which was introduced to the House of Lords on 25 September and is currently in its Grand Committee stage, would provide a suitable framework for the inquiry to take place. Statement by Secretary of State Paul Murphy MIP on Finucane Inquiry

As I said when publishing Justice Cory's reports, the Government is determined that where there are allegations of collusion the truth should emerge. The Government has consistently made clear that in the case of the murder of Patrick Finucane, as well as in the other cases investigated by Justice Cory, it stands by the commitment made at Weston Park.

However, in the Finucane case, an individual was being prosecuted for the murder. The police investigation by Sir John Stevens and his team continued and it was not possible to say whether further prosecutions might follow. For that reason, the Government committed to set out the way ahead at the conclusion of prosecutions.

The prosecution of Ken Barrett has now been completed, with Barrett sentenced to life imprisonment for the murder of Patrick Finucane. It is still possible that further prosecutions might result from the Stevens investigation into the murder of Patrick Finucane. Nevertheless, with the Barrett trial now concluded, and following consultation with the Attorney General, who is responsible for the prosecutorial process, the Government has considered carefully the case for proceeding to an inquiry. In doing so, the Government has taken into account the exceptional concern about this case. Against that background, the Government has concluded that steps should now be taken to enable the establishment of an inquiry into the death of Patrick Finucane.

As in any inquiry, the tribunal will be tasked with uncovering the full facts of what happened, and will be given all of the powers and resources necessary to fulfil that task. In order that the inquiry can take place speedily and effectively and in a way that takes into account the public interest, including the requirements of national security, it will be necessary to hold the inquiry on the basis of new legislation which will be introduced shortly.

In 2016, Special Rapporteur Heyns (as one of the independent experts carrying out the investigation on Burundi) reported not on a lack of commissions of inquiry in Burundi, but rather on a proliferation of sham commissions.

Report of the United Nations Independent Investigation on Burundi (A/HRC/33/37, 20 September 2016, ¶¶112-115)

National Commissions of Inquiry

112. Since the beginning of the crises, the Prosecutor General's Office has set up three commissions of inquiry into human rights abuses.

113. For example, the report of the Commission "charged with shedding light on the insurrectionary movement triggered on 26 April 2015" only established responsibilities of individuals and organisations involved in organising the demonstrations, while ignoring the human rights violations committed by the security forces.

114. Another Commission, set up to "shed light on the deaths of 11 and 12 December 2015 and on the allegations of the existence of mass graves", concluded that allegations of the existence of mass graves and the occurrence of extra-judicial executions were unfounded. These findings contradict the results of the investigations carried out by UNIIB.

115. UNIIB regrets that the practice of setting up commissions of inquiry appears to be a means for the Burundian authorities to circumvent accountability for State perpetrators of grave violations of human rights.

4. Witness protection

In countries with serious unlawful killings problems, a strong witness protection programme is essential. One of the most significant causes of impunity in many countries is the justifiable fear of witnesses in coming forward to provide testimony that could result in threats, attacks, or death. The Special Rapporteurs have met with hundreds of witnesses with valuable information about killings, but who could not agree to testify in court because their lives were at risk and their country had no, or no reliable or trusted, witness protection programme.

The Minnesota Protocol included a dedicated section on witness interviews which included reference to the importance of an effective witness protection programme.

The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016): The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (2017, ¶¶84-89)

IV. CONDUCT OF AN INVESTIGATION

C. Interviews and Witness Protection

1. General principles

84. Interviews form an integral part of almost any investigation. If conducted well, they can obtain accurate, reliable and complete information from victims, witnesses, suspects and others. Poorly conducted interviews can undermine an investigation and place people at risk. The Detailed Guidelines on Interviews provide more thorough guidance on how to conduct an interview effectively and appropriately, and investigators should also refer to other relevant documents.³⁰⁵

85. Interviews should be conducted in a way that maximizes access to justice for affected individuals and minimizes as much as possible any negative impact the investigation may have on interviewees. Special care should be taken when interviewing the bereaved or those who have witnessed a crime, in order to prevent their retraumatization.³⁰⁶ Interviews should be conducted by trained individuals who apply the highest professional and ethical standards in order to obtain accurate information while respecting the rights and well-being of the interviewee. It is particularly important, in interviews gathering ante-mortem data which might be used later for identification purposes, that both the interviewer and the interviewee fully appreciate the uses to which the data might be put.

³⁰⁵ See, e.g., OHCHR, Manual on Human Rights Monitoring, chap. 11, available at: <http://www.ohchr.org/Documents/Publications/Chapter11-MHRM.pdf>; and chap. 14, available at <http://www.ohchr.org/Documents/Publications/Chapter14-56pp.pdf>; ICRC Guidelines for Investigating Deaths in Custody, available at: <https://www.icrc.org/eng/assets/files/publications/icrc-002-4126.pdf>; World Health Organization (WHO), WHO Ethical and Safety Recommendations for Researching, Documenting and Monitoring Sexual Violence in Emergencies, available at: http://www.who.int/gender/documents/OMS_Ethics&Safety10Aug07.pdf; WHO, Researching Violence Against Women: A Practical Guide For Researchers and Activists, available at: <http://www.who.int/reproductivehealth/publications/violence/9241546476/en/>. See also the Istanbul Protocol, which offers guidance on the conduct of interviews where torture is suspected.

³⁰⁶ See, e.g., OHCHR, Manual on Human Rights Monitoring, chap. 12, available at: <http://www.ohchr.org/Documents/Publications/Chapter12-MHRM.pdf>.

2. Security and well-being

86. The security and well-being of interviewees and interviewers is paramount. Risk assessments should be conducted before engaging with any witness to help ensure that the benefit of the engagement outweighs the risk. When necessary, and subject to the consent of the individual(s) concerned, investigators should take steps to protect an interviewee and others from ill-treatment or intimidation as a consequence of providing information. Possible measures include protecting the identity of the interviewee (within the parameters of the law and the rights of the defence guaranteed under international fair trial standards), physical protection, relocation and placement in an effective witness-protection programme.

87. An effective witness-protection programme is essential for some investigations, and should be in place before the investigation begins. This includes reliable and durable protection for witnesses at risk, including the secure management of personal information, and legal and psychological support both during and after the investigation and any judicial proceedings. States should ensure that the authorities in charge of witness protection should in no way be involved in the alleged death.

3. Recording interviews

88. All formal and informal interviews should be recorded, regardless of where they take place, right from the commencement of an investigator's contact with a prospective witness or suspect. In certain circumstances this may be subject to the consent of the prospective witness or suspect.

89. Interviews may be recorded in written form, audio, or video. Considerations as to the best method to use may include the preference of the interviewee, the interview setting, and concerns about privacy and security.

Because of the importance of witness protection in promoting accountability for extrajudicial executions, Special Rapporteur Alston prepared a thematic report examining the role of witness protection in ending the cycle of impunity for such violations.

Report to the General Assembly (A/63/313, 20 August 2008, ¶¶12-17, 19-29)

12. The successful prosecution of those responsible for extrajudicial executions is difficult, if not impossible, in the absence of effective witness protection programmes. All too rarely are prosecutions built on painstaking forensic and other investigative work which would reduce the need to rely upon witnesses. If witnesses can be easily intimidated, if they and their families remain vulnerable, or if they sense that the protections offered to them cannot be relied upon, they are unlikely to testify. As a result, it is often the case that the only people willing to take the risk of testifying are the victims' family members. Usually, however, they are poorly placed to provide the most compelling evidence against the perpetrators. Ending impunity for killings thus requires institutionalizing measures to reduce the risks faced by witnesses who testify. Yet it is often the States that have the biggest problems that also have the least adequate witness protection arrangements.³⁰⁷ Similarly, many States have sophisticated programmes to protect witnesses to murders involving organized crime, but they devote much less attention to protecting witnesses to murders implicating their military or police forces. This latter challenge requires distinctive

³⁰⁷ See Report of the Special Rapporteur, Philip Alston, Preliminary Note on Mission to Brazil, A/HRC/8/3/Add.4, 14 May 2009, paras. 19 and 21 (d); Report of the Special Rapporteur, Philip Alston, Mission to Guatemala, A/HRC/4/20/Add.2, 19 February 2007, paras. 51 and 63; Report of the Special Rapporteur, Philip Alston, Mission to the Philippines, A/HRC/8/3/Add.2, 16 April 2008, paras. 52-54 and 71; and E/CN.4/2006/53/Add.5, *supra* note 92, para. 56.

solutions, in part because relying on the police to provide protection may itself compromise at least the appearance and often the reality of protection.

13. The central importance of effective witness protection programmes in efforts to combat extrajudicial executions has been generally overlooked by the international community and there have been all too few efforts to encourage States to devote the necessary efforts and resources to the issue. This report thus aims to highlight examples of global best practice and identify some of the key issues that need to be addressed in the design of effective programmes. The resulting survey is far from comprehensive and relies heavily upon scholarly works, reports commissioned by governments, and observations from country visits by the Special Rapporteur.³⁰⁸

14. The starting point for effective programmes is to acknowledge that the successful prosecution of killers is in the best interests of the society. Witness protection should thus not be seen as a favour to the witnesses who are in fact often making immense personal sacrifices on behalf of society. The provision of adequate assistance to witnesses, family members, and others against whom retaliation is feared, is thus a necessary condition for breaking the cycle of impunity. Such assistance must be provided in a constructive and pragmatic spirit. Dogmatic approaches must be avoided. For example, witnesses may consider the whole of the security forces to be systematically engaged in abusing rights, while the government may believe that the security forces are basically reliable despite the presence of rogue officers in some specific units. In such cases, it is tempting for the government to adopt a dogmatic attitude and insist that any protection be provided by the security forces, thus refuting assumptions that systemic problems exist. A pragmatic approach, however, would place a premium on winning the trust of the witnesses and would provide protection in the most effective and acceptable manner.

A. Witness protection as a challenge for the whole criminal justice system

15. Witness protection cannot be viewed as an isolated challenge. Rather, it must be seen as a crucial part of a comprehensive system designed to effectively investigate, prosecute, and try perpetrators of human rights abuse. Witness protection will be ineffective if the other components of the criminal justice system are not also functioning well. Moreover, a holistic approach will help to identify ways in which less reliance can be placed on testimonial evidence and methods of witness protection which do not require full-blown witness protection programmes. Every step of the process from investigation through conviction and incarceration should be analysed to identify ways in which witnesses are placed at risk and potential reforms designed to limit those risks.

1. The investigative phase

16. Already at this phase there can be problematic disclosures of witness identities. When this risk is foreseen by witnesses, they may simply choose not to speak with investigators. Conversely, safeguarding the identity of a witness at this early point enhances the potential for safely obtaining testimony at trial without resorting to a full-blown witness protection programme. A British report identified several policing methods designed to limit risks in the early phases of the investigation:

- Police should give only minimal information about witnesses over their radios
- Police should not visit witnesses on the day of the incident, and should either encourage the witness to come to the station to give a statement, send a plain-clothes officer to the home

308 Particularly helpful resources included: Law Commission of India, *Consultation Paper on Witness Identity Protection and Witness Protection Programmes* (Aug. 2004); K. Dedel, *Witness Intimidation* (US Department of Justice, July 2006); N. Fyfe and J. Sheptycki, "International Trends in the Facilitation of Witness Co-operation in Organized Crime Cases", *European Journal of Criminology* 3 (2006); Council of Europe, *Report on Witness Protection (Best Practice Survey)* (1999); and P. Finn and K. M. Healey, *Preventing Gang- and Drug-Related Witness Intimidation* (National Institute of Justice, Nov. 1996).

of the witness, or conduct a number of house-to-house calls in order to prevent the witness from being singled out. The choice should be left to the witness

- Physical screens hiding the witness from the suspect should be used in all identity parades
- A suspect should not be released when the witness is in the vicinity of the police station
- Police should warn witnesses of the risks of potential retaliation in a pragmatic manner that facilitates both their security and their cooperation
- A contact officer should be provided, so that any intimidation can be reported and acted upon immediately
- In some cases, police can hold suspects on remand and restrict their telephone rights to prevent them from contacting witnesses or accomplices to encourage intimidation³⁰⁹

17. In the special case of crimes implicating police or other state agents, the institutional affiliation of investigators may lead to an actual or perceived risk that witness identities will be improperly disclosed. This risk may be mitigated through respect for international norms requiring the removal of suspected perpetrators from positions of power or control over witnesses.³¹⁰ The existence of respected police internal affairs units might also foster confidence on the part of witnesses. But breaking the cycle of impunity will often require an independent investigative unit devoted to solving crimes involving members of the police or security forces.³¹¹ Thus, for example, the Department of Special Investigation in Thailand was established partly to facilitate the investigation of such cases. Another approach is to remove responsibility for this kind of investigation from the normal investigative police to some other existing body. In Brazil, the Public Prosecutor's Office sometimes directly investigates murders implicating the police, even though criminal investigations are normally conducted by police detectives.³¹²

[...]

2. Prosecutorial arrangements

19. The role played by prosecutors in the criminal justice system may also lead to real or perceived risks that prevent the safe cooperation of witnesses. Prosecutors generally have close professional relationships with the police, who usually gather the evidence on which their cases are based and often testify in court. These close relationships can lead witnesses to perceive, sometimes correctly, that prosecutors will not push the case aggressively (which makes becoming a witness a pointless risk) or will even be likely to improperly disclose witness identities or locations to implicated members of the police force. There are a number of possible responses to this problem. One is to assign a few prosecutors to work solely on cases involving the police or other government agents in human rights abuses, thus seeking to minimise the normal professional solidarity between prosecutors and police. In one Brazilian city I observed that a prosecutor who played this role had earned the trust of victims of police violence despite their wariness of the prosecutor's office as a whole.³¹³ Another approach is to establish a separate institution for the prosecution of police. In the Philippines, for example, a special institution was established to investigate and prosecute crimes and other misconduct committed by public officials and its independence from the executive branch was constitutionally guaranteed.³¹⁴

309 W. Maynard, *Witness Intimidation: Strategies for Prevention*, Crime Detection and Prevention Series No. 55, London: Home Office Research Development and Statistics Directorate (1994), pp. 26-30.

310 See 1989 UN Principles, *supra* note 2, para. 15.

311 See *Basic Principles*, *supra* note 2, para. 22; 1989 UN Principles *supra* note 2, para. 11.

312 See A/HRC/8/3/Add.4, *supra* note 307, para. 21 (f).

313 For preliminary observations on Brazil, see A/HRC/8/3/Add.4, *supra* note 307.

314 See Constitution of the Republic of the Philippines (1987), art. XI, sect. 13; see also A/HRC/8/3/Add.2, *supra* note 307, paras. 56-58.

3. Conduct of trials

20. The manner in which trials are conducted has both indirect and direct implications for witness protection. Scheduling and venue decisions, for example, can have a major bearing on witness participation and protection, but their importance is often overlooked. Opportunities for witness intimidation increase when trials are repeatedly delayed or are not held on consecutive days. Even if the overall workload of the courts makes delays inevitable in many cases, it is worth considering whether the kinds of cases that generally place witnesses at risk can be expedited.³¹⁵ Similarly, judges should avoid summoning witnesses on days other than when they have been scheduled to testify.³¹⁶ The way in which rules on venue changes are interpreted is also important. Whether or not they are in a formal witness protection programme, witnesses often relocate to avoid retaliation; if the trial venue can be changed to accommodate their need to remain at a distance from where the perpetrator or his associates live, this can facilitate witness participation.

21. Permitting witnesses to give testimony anonymously is one of the most controversial but important ways of protecting them. It avoids the need for relocation and other protection measures and can be arranged in such a way as to offer relatively assured protection. But anonymous testimony risks violating the defendant's right to fair hearing and "to examine, or have examined, the witness against him".³¹⁷ For that reason, courts have subjected such schemes to close scrutiny,³¹⁸ while at the same time leaving some space for approaches designed to protect both the due process rights of defendants and the lives of witnesses. Procedures and criteria for permitting anonymous testimony that attempt to respect these rights have been developed by a large number of states,³¹⁹ as well as by the International Criminal Tribunal for the Former Yugoslavia (ICTY).³²⁰ In general, the

315 For an example of one approach, see Philippines Administrative Order No. 25-2007, "Designation of Special Courts to Hear, Try and Decide Cases Involving Killings of Political Activists and Members of Media" (1 March 2007); see also A/HRC/8/3/Add.2, *supra* note 307, para. 59.

316 See also the 154th Report of the Law Commission of India, *On the Code of Criminal Procedure 1973* (1976), pp. 43-44.

317 ICCPR, Art. 14

318 See, esp., the judgements of the ECtHR in *Kostovski v. The Netherlands* (1990) 12 EHRR 434; *Windisch v. Austria* (1991) 13 EHRR 281; *Isgro v. Italy* (1991) Yearbook of the ECtHR, p. 151; *Doorson v. The Netherlands*, Reports of Judgments and Decisions 1996-II, p. 446; *Van Mechelen v. The Netherlands*, Reports of Judgments and Decisions 1997-III, p. 691; *Fisser v. The Netherlands* 13 Human Rights Case Digest (2002) pp. 65-68.

319 Two illustrative examples are Portugal and the United Kingdom. In Portugal, Section 16 of Act. No. 93/99 of 14 July 1999 lays down the conditions precedent for any grant of anonymity to a witness: the testimony must relate to a specific group of crimes; the witness, his relatives or other persons in close contact with him must face a serious danger of attempt against their lives, physical integrity, freedom or property of a considerably high value; the credibility of the witness is beyond reasonable doubt; and the testimony provides a relevant contribution to the evidence in the proceedings. The situation in the United Kingdom is more complicated. In 1995 the Court of Appeal upheld full anonymity, provided that certain criteria were satisfied. *R v. Taylor* (1995), Crim. LR 253. In June 2008, however, the House of Lords held that the use of anonymous witnesses prevented the accused from adequately examining his accusers and thus violated the right to a fair trial. *R v. Davis* [2008] UKHL 36. The Government immediately adopted new legislation authorizing the continued use of anonymous witnesses in certain circumstances. See Criminal Evidence (Witness Anonymity) Act 2008. The human rights implications of the legislation have been strongly criticized.

320 The ICTY held that five criteria must be satisfied to permit the use of protective measures:

- 1) A real fear for the safety of the witness or his or her family;
- 2) The testimony must be important to the prosecutor's case;
- 3) The Court must be satisfied that there is no prima facie evidence that the witness is untrustworthy;
- 4) The ineffectiveness or non-existence of a witness protection programme;
- 5) If a less restrictive measure would give the desired level of protection, it must be used.

See *Tadić* (IT-94-1), Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses (10 August 1995), paras. 53-86.

following criteria applied in New Zealand appears reasonably representative of efforts to achieve an appropriate balance:

- (4) The Judge may make a witness anonymity order if satisfied that —
 - a) The safety of the witness or of any other person is likely to be endangered, or there is likely to be serious damage to property, if the witness's identity is disclosed; and
 - b) Either —
 - (i) There is no reason to believe that the witness has a motive or tendency to be untruthful, having regard (where applicable) to the witness's previous convictions or the witness's relationship with the accused or any associates of the accused; or
 - (ii) The witness's credibility can be tested properly without disclosure of the witness's identity; and
 - c) The making of the order would not deprive the accused of a fair trial.
- (5) Without limiting subsection (4), in considering the application, the Judge must have regard to —
 - a) The general right of an accused to know the identity of witnesses; and
 - b) The principle that witness anonymity orders are justified only in exceptional circumstances; and
 - c) The gravity of the offence; and
 - d) The importance of the witness's evidence to the case of the party who wishes to call the witness; and
 - e) Whether it is practical for the witness to be protected by any means other than an anonymity order; and
 - f) Whether there is other evidence which corroborates the witness's evidence.³²¹

22. But witness anonymity throughout a trial requires more than an appropriate legal framework. The trial itself is one of the most dangerous phases in the criminal justice process for witnesses, when they are often out in the open and thus more susceptible to intimidation; and, where a decision has been made to grant either full anonymity or confidentiality, the possibilities of their identities being disclosed are high during their visits to the courtroom, whether or not they are actually on the witness stand.³²²

23. One approach designed to avoid these dangers is to permit the use of anonymous hearsay testimony in criminal trials. But this shortcut exacerbates the normal problems associated with witness anonymity, while also depriving the accused of the right to confront his accusers in open court, even if he retains the possibility to "question" them at an earlier stage. Nevertheless, a number of states allow the use of hearsay evidence,³²³ and some commentators and institutions have even called for this practice to be extended, perhaps with the introduction of safeguards such as videotaping the original statement. The Committee of Ministers of the Council of Europe has encouraged the use of statements given during the preliminary phase of the procedure as evidence in court when it is not possible for witnesses to appear before the court or when appearing in court might result in great and actual danger to the witnesses/collaborators of justice or to people close to them. Consequently, pre-trial statements should be regarded as valid evidence if the parties have,

321 See section 13C of the amended New Zealand Evidence Act of 1908 (amended 1997) available at: www.legislation.govt.nz/act/public/1908/0056.

322 See Finn and Healey, *Preventing Gang- and Drug-Related Witness Intimidation*, *supra* note 308, p. 13.

323 See, for example, s. 96 of the German Code of Criminal Procedure, which allows under certain circumstances for hearsay evidence to be taken from those who have questioned a witness who is to remain anonymous, and used as substantive evidence at trial. See Fyfe and Sheptycki, 'International Trends in the Facilitation of Witness Co-operation', *supra* note 308, p. 343.

or have had, the chance to participate in the examination and interrogate and/or cross-examine the witness and to discuss the contents of the statement during the procedure.³²⁴

24. The use of anonymous hearsay evidence in trial is thus extremely controversial. While it undoubtedly provides a high level of protection to the witness, it will most often do so at unacceptable cost to the fair trial rights of the accused, as the jurisprudence of the European Court on this matter suggests. It is beyond the scope of this report to evaluate when or whether it might be an acceptable practice.

25. One of the most common, and cost-effective, mechanisms for operationalizing anonymity orders is the erection of a screen between the witness testifying and the defendant. In many countries, the use of screens for witnesses is considered an unproblematic—if usually exceptional—measure.³²⁵ To protect anonymity, a common practice is for the witness in question to be assigned a pseudonym, which is then used for all trial purposes and public records. If necessary to protect the witness's identity, voice-distorting technology is also used. Where the decision has been made to keep a witness's identity secret from the accused, the use of screens provides one way of balancing the right to fair trial with the exigencies of witness protection that is significantly more robust than the use of anonymous hearsay evidence in that it allows for greater cross-examination. The risk that inevitably accompanies courtroom appearances, however, is that a witness's identity will be disclosed.

26. Some of the high risks of identity disclosure associated with courtroom appearances can be lessened by giving testimony through video links. The ICTY has used this option to protect witnesses. Rule 75B(i) (c) of its Rules of Evidence and Procedure states that the Chamber can hold in camera proceedings to decide whether to allow, *inter alia*, the “giving of testimony through image- or voice-altering devices or closed circuit television.”³²⁶ The use of videoconferencing (that is, witnesses testifying via video-link from locations far away from The Hague) has also been allowed by the Tribunal due to the “extraordinary circumstances” in which it operates, provided that the testimony is so important that it would be unfair to proceed without it, and the witness in question is unwilling or unable to come to the seat of the ICTY. The Trial Chamber appointed a presiding officer who was to be present when the witness was testifying, to ensure that it was done freely, to identify the witness, and to administer the oath; moreover, only he and some technical staff were permitted to be present. Lastly, the witnesses had to be able to see the judge, accused and questioner on a monitor, and had to be seen by them on theirs.

27. By the same token, these technological solutions come with problems of their own: Quite apart from creating a new layer of technical issues and costs, the witness is not subject to the symbolism of the courtroom, nor fully to the solemnity of its procedures. This in itself can be viewed as not entirely fair to the accused. It is for these reasons that the ICTY in *Prosecutor v. Dusko Tadić* saw fit to reaffirm the basic principle that witnesses should be present in the courtroom, and to extend the exceptional measure of videoconferencing only where there were good reasons as to why that was not possible.

28. Another technique which has been used to reduce the impact of such witness protecting measures on the rights of the defendant is the use of “special counsel” for the accused. This involves a court-appointed lawyer who represents the interests of the accused in any context in which

324 Council of Europe, *Report on Witness Protection*, *supra* note 308, paras. 5 and 17.

325 It is included, for example, in section 13G(1)(b) of the New Zealand Evidence Act of 1908. With respect to the United Kingdom, see also Foster [1995] Crim.L.R. 333. The requisite balancing was also discussed in some detail in *Donaughy Re Application for Judicial Review* (2002) NICA (8.5.2002), where police witnesses testifying in the Bloody Sunday investigations were allowed to do so from behind screens.

326 Such measures are granted by the ICTY almost as a matter of course; see *Prosecutor v. Sikirica et al.*, IT-95-8 (2001) (order on request for protective measures), in which protective measures of this sort were ordered for 23 witnesses.

witness protection measures might lessen the effectiveness of his own counsel. The special counsel thus acts in something like an *amicus curiae* capacity, representing the interests of the accused but with no legal responsibility to him. In cases in which full anonymity has been ordered, then, the special counsel could be provided with full details of the witness's identity and pose questions based thereon, without any obligation to make these known to the defence. This approach has, for example, been adopted by the United Kingdom in response to certain European Court judgements.³²⁷

29. A final option to which reference might be made is for judges to consider making greater use of pre-trial detention involving police defendants who are deemed likely to seek to intimidate witnesses. It is common in Uruguay for accused police officers to be detained pending trial. While a strong rule of this kind would raise due process concerns, an approach which signals a willingness to consider detention if obstruction of justice problems arise might be warranted.

The Special Rapporteurs have addressed the issue of witness protection in various country reports and communications.

Report on Mission to Guatemala (A/HRC/4/20/Add.2, 19 February 2007, ¶51)

51. Another reform that must be introduced to overcome impunity in cases involving powerful perpetrators is the introduction of an effective witness protection programme for these kinds of cases. It is difficult for the PNC [police] to gather evidence or for the Ministerio Público [prosecutor] to sustain prosecutions when witnesses may be intimidated from providing testimony. There are currently multiple systems of witness protection in Guatemala. One is administered by the Ministerio Público. While this system should be preserved and strengthened, its association with a body widely believed to be corrupted by clandestine groups makes it inherently unsuitable for protecting witnesses involved in some cases. Another system provides witness protection when orders for precautionary measures are received from the Inter-American Commission for Human Rights. These are received and processed by the presidential human rights body the Comisión Presidencial Coordinadora de la Política del Ejecutivo en Materia de Derechos Humanos (COPREDEH), which in turn arranges for officers from the PNC to watch over the witness. This system is also highly problematic when witnesses are involved in cases concerning clandestine groups or the police. One possibility for reform would be to establish a witness protection programme under the PDH. At a minimum, the current requirement that the PDH [Procuradía de los Derechos Humanos] pass on complaints to the implicated Government agencies must be changed to avoid endangering complainants.

Follow-up Report on Mission to Guatemala (A/HRC/11/2/Add.7, 4 May 2009, ¶¶38-39)

38. In his first report, the Special Rapporteur stressed the importance of instituting an effective witness protection programme. Without it, witnesses would continue to be too afraid to testify, especially in cases involving abuses by State actors. Since his visit, the Ministry of Justice approved in 2007 the Regulations on the Law of Protection of Subjects, Proceedings and Persons Connected with the Administration of Criminal Justice,³²⁸ which establishes the regulations and organs governing witness protection. To the knowledge of the Special Rapporteur, the law has however been left without the structure that would allow it to be effectively applied.

327 See Special Judgment on Appeals Commission Act, 1997, and the Northern Ireland Act, 1998. For a discussion of this issue, see also 1997 New Zealand Law Commission report on Witness Anonymity, paras. 46-47.

328 Decreto 70-96 del Congreso de la República.

39. As a result, [the International Commission against Impunity in Guatemala (CICIG)] has focused strongly on the need to improve security for witnesses and members of the judiciary who are involved in high profile cases and is working with the Government to completely rebuild the witness protection programme. The CICIG is currently in the process of trying to create special, high security courts to deal with cases involving transnational criminal networks, which are currently not being prosecuted because of security concerns. The courts would be located in the capital of Guatemala, but would have jurisdiction over crimes committed throughout the country, particularly crimes committed in the border areas where there are drug-affiliated gangs. In addition to the creation of the special courts, CICIG has suggested allowing witnesses to testify via video conference, and recommended the creation of a maximum-security prison to hold former criminal members who are testifying against their colleagues. Such measures would assist greatly in protecting witnesses, and thereby enable the successful prosecution of perpetrators. The Government should work with CICIG to ensure the implementation of these reforms.

Report on Mission to the Philippines (A/HRC/8/3/Add.2, 16 April 2008, ¶¶52-54)

52. The absence of witnesses is a key explanation for why extrajudicial executions hardly ever lead to convictions. One expert suggested to me that the absence of witnesses results in 8 out of 10 cases involving extrajudicial killings failing to move from the initial investigation to the actual prosecution stage. In a relatively poor society, in which there is heavy dependence on community and very limited geographical mobility, witnesses are uniquely vulnerable when the forces accused of killings are all too often those, or are linked to those, who are charged with ensuring their security. The present message is that if you want to preserve your life expectancy, don't act as a witness in a criminal prosecution for killing.

53. The witness protection programme is administered by the NPS [National Prosecution Service]. This is problematic only because the impartial role prosecutors are expected to play in the early phases of a criminal case can make them loath to propose witness protection. This problem might be remedied by establishing a separate witness protection office independent of the prosecutors but still within the Department of Justice (DOJ).³²⁹ That office would then be free to take a proactive role in providing witness protection.

54. Implementation of the statute establishing the witness protection programme is deeply flawed.³³⁰ It would seem to be truly effective in only a very limited number of cases. The rights and benefits mandated by law are too narrowly interpreted in practice to make participation possible for some witnesses.³³¹ Another widely-cited shortcoming, likely caused by inadequate resources, is that at-risk family members are not admitted into the program, although in theory "any member of his family within the second civil degree of consanguinity or affinity" who is at risk may be admitted.³³² A more fundamental problem is that, even when a witness is available, cases seldom

329 This reform would require DOJ to revise its rules and regulations implementing the "Witness Protection, Security and Benefit Act" (Republic Act No. 6981, signed into law 24 April 1991), but it would not require any legislative amendment.

330 One worthy proposal that would require a statutory amendment is to increase the penalties for harassing witnesses. These are minimal: a fine of not more than 3,000 pesos (USD \$65) or imprisonment of not less than 6 months but not more than 1 year. (Republic Act No. 6981, section 17(e).)

331 Thus, for the witnesses in one case brought to my attention, the "secure housing facility" promised by law consisted of small rooms in the NBI compound. Implicated officials were not prevented from coming directly to where the witnesses were housed, and other financial and medical benefits provided were inadequate. (For the rights and benefits provided under the witness protection program, see Republic Act No. 6981, section 8.) Most of the witnesses in that case ultimately left the programme and recanted their testimony.

332 Republic Act No. 6981, section 3(c).

move quickly through the justice system,³³³ and when a case fails to prosper, the witness is expelled from the program, although he or she may still be at risk.

Allegation letter sent to the Government of Sri Lanka (30 October 2008) (with the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment)

We would like to bring to your Government's attention information we have recently received concerning a case of death in custody due to torture, the assassination of a torture victim, and threats to the life of another torture victim and a witness in a torture case.

[...]

In the context of the cases summarized above, we would particularly like to draw your Government's attention to Article 13 of CAT, which requires that "Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given." Also Principle 15 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, which is equally relevant to cases of torture, holds:

"Complainants, witnesses, those conducting the investigation and their families shall be protected from violence, threats of violence or any other form of intimidation. Those potentially implicated in extra-legal, arbitrary or summary executions shall be removed from any position of control or power, whether direct or indirect, over complainants, witnesses and their families, as well as over those conducting investigations."

The reports we have received above regarding the cases of Seynool Miswar, Abhu Ubeyda, Nishantha Fernando, and Lalith Rajapakse all suggest that, contrary to the above provisions, police officers potentially implicated in torture and executions remain in a position of power over complainants and witnesses, free to intimidate, attack and even kill them. The excessive duration of criminal proceedings against perpetrators—in the case of Mr. Rajapakse, it would appear that the case took six years for a first instance judgment to be reached—of course increases the vulnerability of victims and witnesses to intimidation and violence.

Report on Mission to Kenya (A/HRC/11/2/Add.6, 26 May 2009, ¶¶78-80, 105-106)

78. In the Kenyan context—where many potential witnesses are justifiably afraid that testifying will lead to reprisals¹—an effective and reliable witness protection programme is a necessary component of efforts to fight impunity. It will be one of the most vital factors in the success or otherwise of attempts to prosecute those accused of offences during the PEV, in Mt Elgon, and in relation to police killings. Without a trusted and well-functioning witness protection program, many people will simply be unwilling to testify, and there will consequently be insufficient evidence to prosecute. And without protection, far too many of those who do testify will be putting their lives at risk.

333 This is so notwithstanding the legal provision, Republic Act No. 6981, section 9: "In any case where a Witness admitted into the Programme shall testify, the judicial or quasi-judicial body, or investigating authority shall assure a speedy hearing or trial and shall endeavour to finish said proceeding within three (3) months from the filing of the case."

79. A number of important steps have recently been taken to set up a witness protection program. In September 2008, a witness protection law came into effect.³³⁴ The Attorney-General promulgated regulations pursuant to the Act in December 2008, and began the process of setting up a Witness Protection Unit in his office.³³⁵ But to date, witness protection exists on paper only: the Director of Public Prosecutions informed me that the unit has not yet provided protection to any witness.

80. The current design of the programme is also likely to lead to significant problems in the Kenyan context. The Attorney-General is provided the “sole responsibility” to decide whether to include a witness in the witness protection program.³³⁶ The set-up of this programme can be expected to work well where witnesses are testifying against private actors or criminal organizations. But this expectation is unlikely to hold true where witness testimony implicates police and Government officials. In light of the history of impunity and intimidation, witnesses and civil society justifiably have little faith in a programme that entrusts their safety to the very system they fear.

[...]

105. A well-funded witness protection programme that is institutionally independent from the security forces and from the Office of the Attorney-General should be created as a matter of urgency.

106. The international community should continue to support Kenya’s efforts to create an effective witness protection program.

Report on Mission to Colombia (A/HRC/14/24/Add.2, 31 March 2010, ¶¶87-88)

87. Witness fear is a major cause of impunity for unlawful killings. I spoke with witnesses who had previously refused to report the details of their cases to any other officials because they did not believe the information would be secure. Significant numbers of witnesses never report their cases at all because of a well-justified fear of retaliation. Some who have filed or discussed cases publicly—including relatives of the Soacha [a well-known set of cases in Colombia, in which soldiers were alleged to have murdered civilians] victims—have received death threats or been killed. Witnesses’ fear extends not just to alleged perpetrators but, especially in more rural and remote areas, to Government actors such as the local *fiscal* [prosecutor] or *procurador* [inspector], whom witnesses believe may be cooperating with or under the influence of alleged perpetrators. In some instances, the fear may be justified, but in others Government agents are themselves under threat as they seek to prosecute unlawful killings.³³⁷ In all such circumstances, it is difficult for cases to proceed.

88. Presently, multiple sources can provide protection: the police, the Interior and Justice Ministry or, for victims or witnesses participating in criminal proceedings, the *Fiscalía*. Efforts have been made by the Government to improve protection. The budget for the Ministry’s protection programme grew 187 per cent between 2002 and 2007, and the United States has worked with the *Fiscalía* to improve its protection programme. Nevertheless, current protection is insufficient to meet witness needs and stronger protection efforts need to be made.

334 The Witness Protection Act, 2006. (Commenced 1 September 2008: see Gazette Notice No. 110 of 2008).

335 The Witness Protection Regulations, 2008. The Government allocated 20 million shillings this year for the programme.

336 The Witness Protection Act, 2006, s 5.

337 In local jurisdictions, *fiscales* may also have fewer resources and investigatory personnel, resulting in slower development and prosecution of cases, which may give rise to suspicion that the fiscal is not proceeding for more nefarious reasons.

Report on Mission to India (A/HRC/23/47/Add.1, 26 April 2013, ¶85)

85. The Special Rapporteur found that witnesses are often intimidated and threatened. However, there is no witness and victim protection programme in India. Interlocutors met explicitly stated that several investigations by commissions have been compromised due to the refusal of witnesses to testify. In the Special Rapporteur's view, India must ensure that witnesses who may be exposed to intimidation and death are adequately protected. He was, for instance, informed of the case of *Zahaira Habibulla H. Sheikh vs. State of Gujarat*, concerning the deaths of 14 persons during the 2002 communal riots in Gujarat. In this case, 21 accused were acquitted due *inter alia* to the reported refusal of 37 witnesses for the prosecution to testify. The Special Rapporteur welcomes that the Supreme Court of India reversed the acquittals in this case, ordered a retrial outside Gujarat, and emphasized the crucial role of witness protection programmes.

Report on Mission to Papua New Guinea (A/HRC/29/37/Add.1, 30 March 2015, ¶¶73-74)

73. Witnesses are often reluctant to come forward to testify due to intimidation by perpetrators of crimes or by members of the group to which the accused belongs. The intimidation may not be immediate and may be directed at the witness or at someone in his or her group. The system of payback was also raised as a reason why a standard witness protection programme would not be feasible in Papua New Guinea. Indeed, the programme would have to ensure protection for the witness and his or her family members for an extended period of time. It has also been argued that resources are not available to provide the level of protection that witnesses would require. Papua New Guinea does not have a victim protection programme either. While there are bound to be problems with such programmes, the benefits would outweigh the drawbacks and, in the long run, they would save lives and facilitate accountability. A legislative framework for victim and witness protection should be adopted based on the particular needs of the context in Papua New Guinea.

74. The Special Rapporteur was informed of a "rapid response" initiative in Simbu, where NGOs, in collaboration with local State actors help individuals accused of sorcery, as well as their family members, to relocate from their place of residence to another part of the country. While that may appear to be a life-saving solution, such initiatives should be viewed as a last resort measure to be employed only when State protection mechanisms fail. The individuals relocated in such circumstances often face severe challenges, including the lack of basic economic security.

Witness protection is also a critical issue for witnesses who testify before the Special Rapporteurs themselves. The problem was addressed in the Special Rapporteur Alston's 2009 report to the Human Rights Council.

*Report to the Human Rights Council (A/HRC/11/2, 27 May 2009, ¶¶12-26, 66)**A. Responding to reprisals against individuals assisting the Special Rapporteur in his work*

12. In March 2009, a journalist questioned the spokesperson of the Secretary-General about the protection available to individuals who had provided information to me on one of my missions.

13. The official transcript records the following exchange:

Question: [T]here are these reports following up on Philip Alston's report about police killings in Kenya that some 30 human rights activists and lawyers have gone into hiding because they think they're going to be killed because they cooperated with the UN on the report. Is the UN aware of it, and what's the UN going to do for people who actually worked with the UN on this report?

Spokesperson: This report was made to the Human Rights Council and it is a matter for the Human Rights Council to take decisions on.

Question: But if it's true what these people say that they're in fear of their life because they cooperate with the UN, does the Human Rights Council have any safety or security service? What's the procedure?

Spokesperson: The Human Rights Council does not have its own security services, if that's what you're asking.³³⁸

14. The above exchange highlights a significant challenge facing the Council in relation to the country missions undertaken on its behalf by special procedures mandate holders. At one level, it goes without saying that the Council cannot provide security services, nor can it be responsible for actions taken by Governments which are acting, or failing to act, in accordance with the generally accepted rules governing this type of human rights fact-finding. At another level, however, the question serves to expose a major gap in the arrangements that the Council has put in place. It has established a system that depends heavily on the good faith cooperation of civil society and private actors in providing information, but then stands back and fails to act when those same individuals are victimized by Government agents precisely as a result of their cooperation. The irony is that although the Council, and the Commission that preceded it have regularly acknowledged the unacceptable nature of such reprisals, it almost never takes any action in response to such cases. The Council should move to remedy this gap in its procedures.

15. One of the fundamental assumptions upon which country visits by special procedures are undertaken is the principle that "[c]omplainants, witnesses, those conducting the investigation and their families shall be protected from violence, threats of violence or any other form of intimidation". While this formulation is taken from principle 15 of the principles on the effective prevention and investigation of extra-legal, arbitrary and summary executions (Economic and Social Council resolution 1989/65, annex), the same approach was repeatedly endorsed by the Commission on Human Rights. In its resolution 2005/9, the Commission urged Governments to refrain from all acts of intimidation or reprisal against those who availed or had availed themselves of procedures established under United Nations auspices for the protection of human rights and fundamental freedoms, or who had provided testimony or information to them. The principle is also reflected in the terms of reference for fact-finding missions by special rapporteurs/representatives of the Commission on Human Rights (E/CN.4/1998/45, appendix V), which provide that "no persons, official or private individuals who have been in contact with the special rapporteur/representative in relation to the mandate will for this reason suffer threats, harassment or punishment or be subjected to judicial proceedings".

16. In spite of these principles, intimidation of witnesses remains one of the most effective ways for perpetrators of extrajudicial executions and those who tolerate such practices to avoid being held accountable. If witnesses can be easily intimidated, if they and their families remain vulnerable, or if they sense that the protections offered to them cannot be relied upon, they are unlikely to testify. In reporting to the General Assembly (A/63/313, para. 12), I noted that "[t]he successful prosecution of those responsible for extrajudicial executions is difficult, if not impossible, in the absence of effective witness-protection programmes. [...] Ending impunity for killings thus requires institutionalizing measures to reduce the risks faced by witnesses who testify." I drew attention to examples of global best practice and identified some of the key issues that needed to be addressed in the design of effective witness-protection programmes. In response, the Assembly urged States to intensify efforts to establish and implement such programmes and encouraged

338 Daily press briefing by the Office of the Spokesperson for the Secretary-General, 30 March 2009, available at: www.un.org/News/briefings/docs/2009/db090330.doc.htm.

OHCHR to develop practical tools designed to encourage and facilitate greater attention to the protection of witnesses.³³⁹

17. Just as successful prosecution of organized crime and serious offences committed by organs of State or armed groups at the national level is difficult or impossible in the absence of effective witness-protection programmes, effective fact-finding and reporting on extrajudicial executions by my mandate is difficult, if not impossible, if persons cooperating with the mandate can be effectively intimidated by those interested in preventing them from doing so.

18. In the domestic context, the first and most important step for investigators is to take measures to avoid placing witnesses at risk. The same applies to witnesses³⁴⁰ assisting country missions by special procedures. In preparing country visits, a considerable effort is made to assess the potential threat to possible witnesses. This involves the Special Rapporteur, OHCHR officials and other staff assisting my mandate, in consultation with the OHCHR Field Security Unit, the United Nations presence in the country, any relevant national human rights institution, and civil society organizations who are in contact with potential witnesses. Depending on the level of threat, precautionary measures regarding the locations and circumstances in which I meet witnesses are decided. The actual implementation of such measures (for example, selection of meeting locations or travel arrangements for witnesses) is essentially the responsibility of the United Nations field presence, national human rights institution and civil society organizations, and of the witnesses themselves. The Special Rapporteur, however, retains moral responsibility for not subjecting witnesses to unjustified risks. Occasions have arisen when I have decided not to meet a potentially very valuable witness because I could not justify the risk involved for the witness.

19. Three factors complicate the choice, adoption and implementation of precautions designed to protect witnesses. First, the financial and logistical means available to a special rapporteur for such purposes are minimal, even with the support provided by the United Nations field presence, non-governmental organizations and civil society. Special rapporteurs have no resources to set up their own witness-protection programmes, unlike States and even the ad hoc international criminal tribunals and the International Criminal Court. Second, most witnesses are likely to overestimate the ability of a special rapporteur to protect them, and might as a consequence be less cautious than they would be in cooperating with a domestic investigator. Third, as the Government of the country concerned is the host and is responsible for the security of the special rapporteur, the basic details of my travel plans within the country must be shared with the Government. This in turn implies a serious limitation on the confidentiality of any arrangements that can be made to protect the identity of witnesses becoming known.

20. I inform witnesses who might be at risk that I have no concrete means at my disposal to assist them against retaliatory measures by the authorities once I leave the country. In some cases, it will be possible for a special procedures mandate holder to ask the Government concerned to include persons at risk in the domestic witness-protection programme. During a visit in 2003 to Brazil by my predecessor, a witness who had testified to her on police death squads was killed by unknown perpetrators (having already survived one attempt on his life by a police officer).³⁴¹ The Government reacted immediately and offered to include all witnesses who spoke to the special rapporteur – and who agreed – to be included in a witness-protection programme.³⁴² The Special Rapporteur subsequently submitted a list of witnesses to the Federal Government.

339 General Assembly resolution 63/182, para. 10.

340 In this context, the term “witness” is used to cover all those who provide information to the Special Rapporteur, whether they be victims, eyewitnesses, victims’ family members, officials of human rights organizations or other.

341 E/CN.4/2004/7/Add.3, *supra* note 178, para. 3.

342 See A/63/313, *supra* note 190, paras. 17, 19 and 45.

21. The possibility of entrusting witnesses at risk to the domestic witness-protection programme is, however, an exception. Generally, there is no witness-protection programme that would be effective under the circumstances. Where such programmes do exist, they are usually run by the same authorities responsible for taking or threatening the reprisals in the first place.

22. In the absence of an effective programme, my only option is to seek clarification and assurances from the Government concerned. For example, after my mission to Kenya, I sent an urgent appeal and issued public statements in response to continuing reprisals.³⁴³ Other mandates have similarly sought explanations and assurances from Governments – whether orally, in letters, or through their reports – upon receiving credible allegations of such reprisals.³⁴⁴

23. At the end of the day, however, there will be situations in which Governments fail to respond meaningfully and the reprisals continue. In those situations, it is essential that the Council itself have a mechanism for seeking explanations from the Governments concerned and, where appropriate, expressing public concern when a Government's response is inadequate. While the Secretary-General and other actors have an important role to play in this regard, it is ultimately the responsibility of the Council, whose “eyes and ears” the special procedures are often said to be.

24. Under current arrangements, the Council receives once a year a report addressing acts of intimidation or reprisal against four categories of individuals: those cooperating with representatives of United Nations human rights bodies; those who have cooperated with United Nations human rights procedures; those who have submitted communications under established procedures; and the relatives of human rights victims. The net thus appears to be cast broadly. In his report for 2009 (A/HRC/10/36), the Secretary-General provides details of, *inter alia*, the killing of the spouse of a witness who testified under the universal periodic review process (para. 8), the incarceration of a human rights defender who had written to the United Nations (paras. 9 and 10), and soldiers threatening the staff of a non-governmental organization (paras. 11 and 12).

25. The above-mentioned report is far from comprehensive, indeed it presents only an extremely limited picture of the real situation. First, it relies almost entirely on cases publicized by mandate holders in their reports, and especially on those mentioned by the Special Rapporteur on the situation of human rights defenders. Second, cases are not reported if there are “security concerns” or the individuals concerned have opted not to have their cases made public. In instances involving threats of serious reprisals, this will often be the case. Third, reprisals against individuals for cooperating with other United Nations bodies, such as OHCHR field presences and peacekeeping operations, are not covered by the report. And finally, in the report itself, the Secretary-General acknowledges that reprisals against individuals cooperating with United Nations human rights bodies are often unreported owing to a lack of access to appropriate means of communication or fear of further reprisals (para. 7). The coverage of the report is thus very limited and its reporting seems perfunctory.

26. Perhaps unsurprisingly, none of the three reports submitted by the Secretary-General to the Council at its fourth, seventh and tenth sessions has generated any debate among Member States.

343 Documented in my public statement issued at the conclusion of the visit (“Independent expert on extrajudicial executions says police killings in Kenya are systematic, widespread and well planned”, press release, 25 February 2009) an urgent appeal I sent jointly with three other special procedures mandate holders on 13 March 2009 (which regrettably remained without a response from the Government as of one month later; see Report of the Special Rapporteur, Philip Alston, Communications to and from Government, A/HRC/11/2/Add.1, 29 May 2009) and in two press releases (“UN expert on extrajudicial executions calls upon Kenyan Government to establish an independent investigation into the assassination of two prominent Kenyan human rights defenders” and “UN expert on extrajudicial executions calls on Kenya to stop the systematic intimidation of human rights defenders”).

344 See Report of the Special Representative of the Secretary-General on the situation of human rights defenders, Ms. Hina Jilani, Mission to Indonesia, A/HRC/7/28/Add.2, 28 January 2008, paras. 72-74.

While a few Governments have made statements in relation to specific incidents, the reporting process has not served the original purpose of bringing greater attention to the relevant problems and providing an occasion for the Council to take action. It is therefore essential that the Council and other stakeholders address this issue with urgency. Recommendations to this effect are proposed at the end of the present report.

[...]

66. Intimidation of, or retaliation against, those cooperating with special procedures mandate holders is a problem that threatens the very foundations of the Council's work in protecting human rights. Urgent measures are needed to respond to any such reported incidents. The following steps should be taken:

- a) The Council should urge Governments, United Nations field presences and special procedures mandate holders to give particular attention to the protection of persons who have cooperated with a mandate holder;
- b) Given the need to be able to respond promptly and meaningfully to any reports of serious or continuing harassment, the Council should define appropriate mechanisms to make representations to the Government concerned in a timely and effective manner and to monitor situations;
- c) Civil society organizations and States through their diplomatic missions should continue to enhance arrangements to provide financial and other assistance to individuals who are at risk, including, where necessary, providing assistance in relocation to a secure place;
- d) The Coordination Committee for Special Procedures should pursue this issue following an exchange of views among mandate holders at their annual meeting.

Follow-up to Country Recommendations – Kenya (A/HRC/17/28/Add.4, 26 April 2011, ¶¶49-52)

VII. Reprisals for cooperating with the Special Rapporteur

49. Two weeks after the visit of the Special Rapporteur two prominent human rights defenders who had met with the Special Rapporteur – Oscar Kamau King'ara and John Paul Oulu – were killed. On 13 March 2009, the Special Rapporteur wrote to the Government concerning the killings of Mr. King'ara, who was the founder and Chief Executive Officer of the Oscar Foundation Free Legal Aid Clinic, and Mr. Oulu, who was its Communications and Advocacy Director. The Special Rapporteur informed the Government that several human rights defenders in Kenya's Western Province who had met with him were also receiving threats. The Government was requested to provide information on the steps taken to ensure that all forms of violence, intimidation and harassment against human rights defenders, particularly those who have cooperated with the Special Rapporteur, are brought to an end. The Government was also requested to provide information on the investigations and criminal proceedings regarding the killings of Mr. King'ara and Mr. Oulu. Two years later, the Government has yet to respond to the communication.

50. The status of the investigation into the killing of the two defenders remains inconclusive. Recently the Prime Minister made a public statement requesting that investigation into the killings should resume. It is important that the Government follows up on its public statements with action.

51. On 30 April 2010, the Special Rapporteur sent a communication to the Government concerning the case of Keneth Kirimi, a human rights activist working with the non-governmental organization Release Political Prisoners, and member of Bunge la Mwananchi, a grassroots movement fighting social injustice and promoting accountable leadership. He was arrested by plain-clothed police officers and was allegedly interrogated about his organization, the work carried out by the executive

coordinator of the organization, the organization's work on extrajudicial killings and the sharing of their report with the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston. The Government is yet to respond to the communication.

52. Information made available to the Special Rapporteur in the preparation of the follow-up report indicates most defenders who demand accountability for extrajudicial executions have been threatened; others have been forced to seek protection within the country while many others have fled the country. The nature of the intimidation has become clandestine and the perpetrators are not easily identifiable. The Special Rapporteur is deeply concerned that acts of intimidation are continuing without investigations to hold the perpetrators criminally liable.

In his report on witness protection programmes to the General Assembly, Special Rapporteur Alston provided examples of good practice:

Report to the General Assembly (A/63/313, 20 August 2008, ¶¶30-47)

B. The design of a formal witness protection programme

30. Whatever measures are introduced within the criminal justice system to lessen the risk posed to witnesses to extrajudicial executions by state agents, it will generally also be necessary to adopt a formal witness protection programme for some cases. [...]

1. The structure of a witness protection programme

31. One of the most well-established witness protection schemes is the United States Federal Witness Security Program. In many respects it can be viewed as “paradigmatic”, having served as a model for similar arrangements in other countries. It has been suggested that a comprehensive witness protection model must include: (a) an organizing committee, composed of policymakers from key stakeholders; (b) an operational team, often composed of officials of those institutions involved in the day-to-day running of the programme; (c) a programme administrator; (d) case investigators, or a specially trained law enforcement unit; and (e) designated contact people in all cooperating authorities, agencies and institutions.³⁴⁵

32. It is important that information regarding witness identities and locations be carefully safeguarded even within such a structure. Thus, for instance, while the operational team may need to weigh the range of protection options available for a particular witness, there is no reason for this information to flow upward to the group dealing with policy questions.

33. While some countries establish witness protection programmes as units within the police force, this approach is inappropriate for programmes designed to facilitate cases against state agents involved in human rights abuse. One alternative is to appoint officials in key criminal justice system institutions to a committee to administer or oversee the programme. In Belgium, for example, decisions about whom and when to protect are taken by a Witness Protection Board, consisting of public prosecutors, senior police officers and representatives of the Ministries of Justice and the Interior. Another approach is to create a witness protection agency as a separate body, funded by and ultimately responsible to the government, but with decisions on inclusion and exclusion taken by the project director rather than with broader governmental input on the matter, and with law enforcement agencies playing no direct role in the programme. It is worth noting, however, that, if an independent agency is established, it must be given the necessary resources. In some cases, notionally independent agencies have ended up depending on the police force to implement protection measures due to a lack of internal resources.

345 See Finn and Healey, *Preventing Gang- and Drug-Related Witness Intimidation*, *supra* note 308, pp. 59-74.

34. A formal, institutionalized structure is preferable to an informal, ad hoc one for several reasons. The first is efficiency: a formal structure can involve all key cooperating stakeholders in the planning and execution of protection programmes, thereby minimizing the risk of breakdowns in communication or cooperation, gaps in services to witnesses, and inefficient or ineffective procedures. The second is security: informal procedures involving many agencies (such as housing applications, welfare benefit transfers, etc.) are unlikely to have the necessary bureaucratic safeguards in place to ensure that the new locations or identities of protected witnesses are not too readily disclosed. The third is consistency: ad hoc arrangements are extremely sensitive to changes in personnel at the various cooperating agencies. The fourth is communication: formal, structured programmes assign witnesses with a single, constant contact person, who can provide the round the clock support and assistance that many witnesses require if they are to testify. It is important that witnesses are able to build up relationships of trust with the programme administrators with whom they deal, and this is not possible if the latter keep changing. The final reason for preferring a formal, structured programme is evaluation. Frequent and well-planned evaluations are critical to the success of any witness protection effort, allowing administrators to fine-tune the programme and prevent any errors that may have been made from happening again.³⁴⁶

35. With respect to criteria for admission to the programme, key considerations include: (a) the importance of the case in terms of ending a cycle of impunity for human rights abuse; (b) the importance of the witness's testimony to the case; (c) the level of threat to the witness; (d) the suitability of the witness for the programme, including whether he or she is genuinely willing to relocate and break ties with family and friends; and (e) the availability and adequacy of less onerous forms of protection.³⁴⁷

36. It is equally important to develop a clear set of criteria as to when the programme participation of a witness or family member may be terminated. Most jurisdictions provide for termination if the participant breaks any of the rules of conduct that have been agreed upon (on which more below), if they in some way threaten the security of the programme itself, or if the circumstances which necessitated the original provision of protection have ceased to exist. They also always provide for some sort of review by an official or body other than the programme director or administrator.³⁴⁸ The provisions of the Witness Protection Act of South Africa are perhaps among the clearest and most detailed in this regard, stating that the Director may discharge any protected person from protection if he is of the opinion that:

- a) the safety of the person is no longer threatened;
- b) satisfactory alternative arrangements have been made for the protection of the person;
- c) the person has failed to comply with any obligations imposed upon him or her by or under this Act or the protection agreement;
- d) the witness, in making application for placement under protection, wilfully furnished false or misleading information ...;
- e) the person refuses or fails to enter into a protection agreement when he or she is required to do so ...;
- f) the behaviour of the person has endangered or may endanger the safety of any protected person or the integrity of a witness protection programme ...; or
- g) the person has wilfully caused serious damage to the place of safety where he or she is protected, or to any property in or at such place of safety.³⁴⁹

346 Ibid., pp. 59-60.

347 Similar criteria may be found in the legislation of a number of countries. See e.g. art. 6 of the Witness Protection Programme Act of Canada, 1996.

348 See, e.g., the Victoria State Witness Protection Act 1991, sect. 16.

349 Witness Protection Act of 1998, Art. 13.

37. The legislation also provides for the right to request a review of any decision to terminate, to be made by the relevant Government Minister.³⁵⁰

38. Establishing mechanisms for inter-agency cooperation is essential to an effective witness protection programme. Such programmes need to provide much more than simply physical protection for those in their care; a whole host of other issues inevitably arise, from health to housing and other welfare benefits and beyond. These difficulties are, moreover, compounded when witnesses are provided with new and secret identities or addresses, and, as the number of different agencies and institutions involved increases, so do the chances for either inefficient bureaucratic procedures, opportunities to exploit the system or security lapses. The risk of all three can be minimized by employing certain good practices including:

- a) Establishing a contact person within each agency who is in a position to take action when a request is made. Again, the creation and maintenance of relationships of mutual trust between individuals in the various government agencies and officials of the witness protection programme can be crucial in ensuring that requests for assistance are dealt with in a timely and efficient manner;
- b) Gaining support from the top. It is important to ensure that the head of each agency is both aware and approving of the relationship between the witness protection officials and their contact person within the relevant agency, and of the actions taken by the latter at the request of the former;
- c) Developing inter-agency memorandums of understanding. These written agreements between agencies can be extremely useful in ensuring the clarity, consistency and efficiency of the inter-agency relationship. The reasons for using these are many and varied: they create stability despite personnel changes in either agency; making a commitment in writing makes agencies less likely to attempt to evade responsibility, but it also makes it less likely that they will be asked to do more than they should; and a written document serves to reduce uncertainties surrounding the role and responsibilities of each party. The contents of the memorandums will vary from context to context; however, at a minimum, each should specify the services each agency will provide, the staff and funding they will make available, and the allowable expenses or services.³⁵¹

2. Protection measures short of relocation

39. Within the context of a formal witness protection programme, there can be a range of possible protective measures employed on the basis of a case-specific risk assessment. In some countries, the measure of first resort has been protective incarceration. Witnesses are placed in what amounts to a cell inside a police station, unused prison, or other security forces establishment. Except as an extremely temporary measure, this kind of approach must be avoided. Witnesses quite reasonably can seldom accept their own detention as a condition for participating in what will generally be a lengthy trial. Nevertheless, it is not always necessary or advisable to escalate directly to witness relocation or identity change. Sometimes it may be possible to employ lower level physical protection measures. One possibility is the provision of a “rapid response alarm”, connected directly to the local police station. This allows officers to arrive quickly if any threat materializes, without having the expense of providing round-the-clock protection.³⁵² Another possibility may be the installation of locks, grates, security alarms and outdoor lighting for the witness’s house,³⁵³ or increasing patrols in the area. On occasion, police officers in some jurisdictions can assist by taking at-risk witnesses and their families to and from work and school for a short time. Lastly,

350 Ibid., Art. 14.

351 Finn and Healey, *Preventing Gang- and Drug-Related Witness Intimidation*, *supra* note 308, pp. 71-74; see also Dedel, *Witness Intimidation*, *supra* note 308, pp. 18-19.

352 Maynard, *Witness Intimidation*, *supra* note 309, p. 4.

353 Dedel, *Witness Intimidation*, *supra* note 308, pp. 22-23.

it is common practice for police to send vulnerable witnesses to live with out-of-town relatives (as a cheap alternative to making complex and costly relocation arrangements within the witness protection programme).³⁵⁴ Many of these measures will, however, be generally inadequate when witnesses fear retaliation from the police or other security forces.

3. Relocation

40. Relocation is the central mechanism in effective witness protection programmes and is generally viewed as the most effective way of protecting high risk witnesses from intimidation, threats and violence. It is, however, also often expensive and time-consuming, and it requires a high degree of inter-agency cooperation and planning if it is to be carried out effectively.³⁵⁵ There are broadly three different types of relocation: emergency, short-term, and long-term/permanent.³⁵⁶

41. Emergency relocation is used when a threat is imminent and often requires an expedited initial process in terms of acceptance into the witness protection programme, with a more detailed evaluation to take place when the danger has passed. The accommodation used is very often a hotel (which is very expensive); however, it can also be a police station or another public building designated for that purpose. Such protective incarceration should, however, never last longer than a few days or weeks, at most.

42. Short-term relocation is used when the witness remains at risk for longer periods. It is in this context that the practice of sending witnesses to live with family or friends out of town is most popular, as by far the most cost-effective measure; it also provides a source of emotional support and means that a number of risks attendant to relocation measures, in particular boredom and subsequent returns to visit friends and family, are minimized.³⁵⁷ However, depending on the structure of a society and the character of the threat, this may not provide adequate protection. Indeed, in some circumstances, it will only increase the danger to family members. Other possibilities include social housing or rental property. Here already, however, logistical difficulties begin to arise: it may be necessary to transfer schools; the witness will in all likelihood no longer be able to work; it may also be necessary to make arrangements for the transfer of social benefits to the other jurisdiction. As always, the more people and agencies are involved in the process, the higher the risk of disclosure of the whereabouts of the witness, accidental or otherwise.

43. Long-term/permanent relocation is most commonly used in cases in which the threat of violent retaliation does not end even with the conviction of the defendant. This has often been true in major gang-related or organized crime cases, but the same problem exists when the police or security forces continue to commit abuses with impunity and may retaliate on behalf of their convicted colleague. Permanent relocation need not be significantly more costly than its short-term counterpart. The major outlays mostly come at the beginning in any event, such as housing costs, and subsistence payments until either social security benefits can be transferred or the witness finds employment.

4. Innovative approaches to relocation

44. There are some innovative approaches to relocation that may be useful in meeting the special challenges of protecting witnesses to human rights abuses perpetrated by state agents. These include involving foreign governments and non-governmental organizations in the implementation of relocation plans.

354 Finn and Healey, *Preventing Gang- and Drug-Related Witness Intimidation*, *supra* note 308, p. 29.

355 Dedel, *Witness Intimidation*, *supra* note 308, pp. 27.

356 Finn and Healey, *Preventing Gang- and Drug-Related Witness Intimidation*, *supra* note 308, p. 23-38.

357 *Ibid.*, p. 29.

45. It is relatively common for non-governmental human rights advocacy organizations to help victims and witnesses on an ad hoc basis. In some cases, such assistance has been transformed into full-fledged witness protection programmes and even into joint arrangements between government and non-governmental organizations. For example, in Brazil the witness protection programme began as a project of the non-governmental organization *Gabinete de Assessoria Jurídica às Organizações Populares* (GAJOP) and was subsequently developed into a programme that involves both government agencies and a number of non-governmental organization partners.³⁵⁸ Today, a committee that includes judges, prosecutors, and others, provides policy direction and makes final decisions on the admission and expulsion of witnesses while day-to-day operations are conducted by the state's secretariat for justice in tandem with a non-governmental organization.³⁵⁹ The non-governmental organization receives government funds to relocate witnesses and help them integrate into a new community. This innovative structure, in which government officials are not actually informed of the witness's location, has provided witnesses to crimes committed by government agents a much higher level of protection than most systems that rely solely on the government to provide protection. However, some of the non-governmental organizations providing protection services to witnesses reported dissatisfaction with the structure of the programme and questioned the long-term viability of a programme that relies so extensively on non-governmental organization implementing partners. Non-governmental organization involvement in witness protection can be invaluable in overcoming the difficulties caused by a severe lack of trust in state institutions, and in law enforcement agencies in particular.

46. It is important to note, however, that even a strong and respected non-governmental organization will find protection difficult or impossible without corresponding government action. The process of investigation, prosecution, and trial will still require contact between witnesses and government officials, and reforms to minimise the risks posed by these contacts will still be necessary. Moreover, it is impossible for non-governmental organizations to arrange new identities for witnesses without the cooperation of numerous government agencies. Finally, the risks posed to non-governmental organization staff implementing such a programme may exceed even those posed to government witness protection personnel.

47. When secure and trusted relocation within a state's territory is not feasible, whether due to limited government capacity or to the pervasiveness of the threat, relocation to another country may be considered. South Africa is one state that has successfully resorted to international cooperation on witness protection to enable the prosecution of human rights cases. For example, in the trial of the commander of a police hit squad, Eugene de Kock, three witnesses who were police officers themselves and feared intimidation from colleagues, were sent to Denmark for 18 months. This type of cooperation is already common, on an informal basis, between the heads of the European witness protection programmes, and a best practice survey by the Council of Europe has called for more formalized action along these lines.³⁶⁰ It is worth considering whether countries with established witness protection programmes could more routinely agree to relocate witnesses to their territory in order to assist countries attempting to successfully prosecute state agents so as to break with a pattern of impunity. Any such arrangement would, of course, need to take into account how witness participation in investigations and trials could be ensured. Either secure transport involving both governments would need to be provided or the provision of testimony through videoconferencing would need to be authorized.

358 The involvement of non-governmental organizations also features prominently in the history of witness protection in South Africa.

359 Law No. 9.807 (13 July 1999); Decree No. 3.518 (20 June 2000).

360 Council of Europe, *Witness Protection*, *supra* note 308, p. 25.

The NGO-administered and government-funded witness protection programme in Brazil provides an example of an innovative model that can provide trusted protection to witnesses through a clear separation between perpetrators and protection providers.

Report on Mission to Brazil (A/HRC/11/2/Add.2, 23 March 2009, ¶¶61-63, 94)

61. The high number of homicides in Brazil, together with significant levels of organized crime and police corruption and violence, means that an effective and comprehensive witness protection programme is essential in order to protect particularly vulnerable witnesses and to ensure that impunity does not result from widespread witness intimidation. I interviewed many victims' relatives who told me they had spoken with witnesses to the victim's death. But in many cases the witnesses feared police reprisals and refused to come forward publicly. I also spoke to a number of family members taking action to investigate the circumstances of the victim's death who had received death threats.

62. Brazil has recognized the importance of witness protection and has taken positive steps over the past decade to improve its programs. The most important of its witness protection programs, the *Programa de Assistência a Vítimas e a Testemunhas Ameaçadas*³⁶¹ (PROVITA), currently operates in 16 states and the federal district.³⁶² Between 1998 and 2006, it protected a total of 2265 people (870 witnesses and 1,395 family members).³⁶³ Between 2003 and 2007, 355 people were protected in relation to executions. PROVITA's structure is defined by federal legislation, it receives a combination of federal and state funding, and is administered at the state level. In each state, a committee that includes judges, prosecutors, and others, provides policy direction and makes final decisions on the admission and expulsion of witnesses.³⁶⁴ Day-to-day operations are conducted by the state's secretariat for justice in tandem with an NGO. The NGO receives government funds to relocate witnesses and help them integrate into a new community. This innovative structure, in which government officials are not actually informed of the witness's location, has provided witnesses to crimes committed by Government agents a much higher level of protection than most systems that rely solely on the Government to provide protection. However, some of the NGOs providing protection services to witnesses reported dissatisfaction with the structure of the programme and questioned the long-term viability of a programme that relies so extensively on NGO implementing partners.

63. In practice, some State Governments have not fulfilled their PROVITA obligations. At the time of my visit, the programme in Rio de Janeiro had been operating for over a year without state funding,³⁶⁵ and the programme in Pernambuco had been doing so for 5 months. Another problem

361 Law No. 9.807, of the 13th of July, 1999. PROVITA was started in 1996 in Pernambuco by the NGO *Gabinete de Assessoria Jurídica às Organizações Populares* (GAJOP).

362 Acre, Amazonas, Bahia, Ceará, Espírito Santo, Goiás, Maranhão, Mato Grosso do Sul, Minas Gerais, Pará, Paraná, Pernambuco, Rio de Janeiro, Rio Grande do Sul, São Paulo, and Santa Catarina. See Presidência da República, Secretaria Especial dos Direitos Humanos, Subsecretaria de Promoção e Defesa dos Direitos Humanos.

In addition to PROVITA, the National Special Secretariat for Human Rights developed the National Programme for the Protection of Human Rights Defenders. However, it currently only operates in a few states, and does not protect many human rights defenders. According to SDDH, the National Programme for the Protection of Human Rights Defenders has a list of 90 human rights defenders in Pará threatened with execution, but only 10% of these are under protection.

363 See Presidência da República, Secretaria Especial dos Direitos Humanos, Subsecretaria de Promoção e Defesa dos Direitos Humanos, Coordenação-Geral de Proteção a Testemunhas, "Programa de Assistência a Vítimas e a Testemunhas Ameaçadas" (2007).

364 Law No. 9.807 of the 13th of July, 1999, Art. 4; Decree No 3.518, of the 20th of June, 2000, s. 1.

365 See PROVITA Rio: Centro de Defesa dos Direitos Humanos de Petrópolis (9 November 2007). This has had obvious effects on the numbers of people that can be protected by the program. In Rio de Janeiro, at November 2007, 41 people were being protected, while numbers in prior years were notably higher (2000 (70), 2001 (76), 2002 (66),

identified by officials and NGO representatives responsible for PROVITA was that they face problems when there is a need to escort witnesses to court (the most dangerous time for a witness under protection), and when there is a need for emergency transportation. These services are to be provided by state police forces, but this provides an opportunity for obstruction and intimidation.

[...]

94. In many respects, the existing witness protection programmes constitute a model, but reforms are also needed:

- a) State governments should provide adequate, timely, and reliable funding;
- b) State governments should ensure that police cooperate in escorting witnesses to court appearances in a safe and non-threatening manner;
- c) The federal government should conduct a study on whether there are ways to protect witnesses who are unwilling to comply with the current programs' strict requirements, and on whether the use of NGOs as implementing partners should be phased out or restructured.

5. Ombudsperson offices

Many countries have an ombudsperson's office or similar institution that provides some form of accountability or oversight of public officials. The powers, role, functions and effectiveness of ombudsperson offices differ widely from country to country. In the country reports extracted here, the Special Rapporteurs analysed the role of ombudsperson's offices in promoting accountability, and the problems they typically encounter.

Report on Mission to the Philippines (A/HRC/8/3/Add.2, 16 April 2008, ¶¶56-58)

56. The Office of the Ombudsman is responsible for investigating and prosecuting crimes and other misconduct committed by public officials.³⁶⁶ However, the Ombudsman's office has done almost nothing in recent years to investigate the involvement of Government officials in extrajudicial executions. Despite having received a significant number of complaints alleging extrajudicial executions attributed to State agents, no information was provided by the Ombudsman's office indicating that it had undertaken any productive investigations.

57. The Office of the Ombudsman has surrendered its constitutionally-mandated independence from the executive branch. First, it has adopted an untenably narrow interpretation of its jurisdiction, choosing not to initiate an investigation into an extrajudicial execution unless there is already very strong evidence that a public official was responsible in the particular case. Second, the Office of the Ombudsman often operates as a *de facto* subsidiary of the Department of Justice. The NBI [National Bureau of Investigation] conducts most of its investigations. Pursuant to a Memorandum of Agreement between the DOJ [Department of Justice] and the Office of the Ombudsman, the relevant Regional State Prosecutor and other senior members of DOJ's NPS [National Prosecution Service] monitor and oversee the "successful prosecution and speedy

2003 (78), 2004 (68), 2005 (58), 2006 (75)).

366 The Ombudsman has the authority and duty to investigate and prosecute on complaint or by its own initiative "any act or omission of any public official, employee, office or agency, when such act or omission appears to be illegal, unjust, improper, or inefficient", to "[d]irect" any public official "to perform and expedite any act or duty required by law, or to stop, prevent, and correct any abuse or impropriety in the performance of duties", "[d]irect" public officials to "take appropriate action against a public official or employee at fault, and recommend his removal, suspension, demotion, fine, censure, or prosecution, and ensure compliance therewith", and to "[p]ublicise matters covered by its investigation when circumstances so warrant and with due prudence". (Constitution of the Republic of the Philippines (1987), art. XI, section 13.) This unit within the Office of the Ombudsman responsible for dealing with extrajudicial executions is headed by the Deputy Ombudsman for the Military and Other Law Enforcement Offices.

disposition of Ombudsman cases”. “Deputized prosecutors” from the NPS “have the primary responsibility of prosecuting Ombudsman cases”, and prosecutor investigators from the Office of the Ombudsman “assist, if practicable, the Deputized Prosecutor in the prosecution of the case” and “may, with prior clearance from the Ombudsman or his Deputy, take over the prosecution of the case at any stage”.³⁶⁷ As a practical matter, these arrangements serve to all but completely subordinate the Ombudsman to the DOJ.

58. The Ombudsman insists that her office can take over a case being handled by the DOJ at any time, but it is unclear how the Ombudsman would even be aware that such a measure was necessary given her Office’s lack of involvement. One NPS prosecutor at the local level explained that, in his locality, the local representative of the Ombudsman sits in the DOJ office, reviews the work of DOJ prosecutors and passes this on to the Ombudsman in Manila. It is, in his words, a “chummy” relationship, because the person from the Office of the Ombudsman is disinclined to criticise the conduct of what are, in effect, his colleagues.

Report on Mission to Brazil (A/HRC/11/2/Add.2, 23 March 2009, ¶¶73-75, 90)

73. Police Ombudsman Offices (*Ouvidorias*) are a relatively new institution in Brazil – the first was set up in 1995 in São Paulo.³⁶⁸ Their precise role and powers differ slightly between the states, but in general they are empowered to receive complaints about police from the public, and may forward complaints to police Internal Affairs Departments or the Public Prosecutor’s Office. They can also monitor ongoing police investigations and provide information to the public on the progress of investigations.³⁶⁹

74. The existence of Ombudsman Offices has made it possible for many people to make complaints about police behaviour who otherwise would not have done so for fear of having to report such complaints directly to police.³⁷⁰ However, the effectiveness of these offices is hampered by their lack of independence, resources, and investigative powers. Ombudsman Offices are unable to conduct their own investigations and thus rely almost entirely on information provided by the internal affairs services of the police. Both factors undermine the ability of Ombudsman Offices to provide genuinely *external* oversight.

75. Efforts to strengthen the institution of the Ombudsman should keep in mind its place within the overall system of police accountability. It does not need more teeth: The Public Prosecutor’s Office already has the power to prosecute police and, more broadly, to “exercise external control over police conduct”.³⁷¹ But to provide *external* accountability, it should report directly to the governor rather than to the state secretary of public security.³⁷² In addition, it needs to be better

367 Memorandum of Agreement dated 12 November 2004 and signed by Raul M. Gonzalez, Secretary, Department of Justice and Simeon V. Marcelo, Tanodbayan, Office of the Ombudsman.

368 Decree n° 39,900, of 1 January 1995; Complementary Law n° 826, of 20 June 1997. There are now ombudsmen in 14 states, including Rio de Janeiro and Pernambuco.

369 For example, the Ombudsman in São Paulo has been tracking 54 (at least 11 with suspected police involvement) cases involving 89 victims of crimes from May 2006 in which the perpetrator was unknown, and making public the progress of police investigations into each killing.

370 In São Paulo, the Ombudsman received 3668 complaints in 2006. Of these, 476 concerned murders, of which 20% implicated the Civil Police and 68% implicated the Military Police (with the residual implicating either or both). A number of states have also created telephone hotlines (*disque-denúncia*), which have made it easier for anonymous complaints to be made. In São Paulo, for instance, 34% of complaints received in 2006 were made by telephone, with another 15% made by email. The existence of the hotline has also played an important role in information gathering on death squads in Pernambuco.

371 Constitution of Brazil, Art. 129(VII).

372 Additional measures for further ensuring the independence of Ombudsman Offices recommended by the parliamentary commission of inquiry into extermination groups in the Northeast should also be given careful

equipped to gather its own information on individual cases and on broad trends and patterns of police abuse. And to provide external *accountability* it does need to better communicate the information it gathers to the general public.

[...]

90. Offices of police Ombudsman, as they exist in most states, should be reformed so as to be better able to provide external oversight:

- a) They should report directly to the state governor rather than to the state secretary of public security;
- b) They should be provided with the resources and legal powers necessary to reduce dependence on information from the internal affairs services of the police forces;
- c) They should issue regular public reports providing accessible information on patterns of police abuse and on the effectiveness of disciplinary and criminal proceedings. This information should be compiled so as to enable meaningful comparisons across time and geographical areas;
- d) In order for them to provide more reliable information on the strengths and weaknesses of existing policing strategies in terms of both respecting and protecting rights, they should be provided resources to conduct or commission surveys on citizen experiences with crime and the police.

Follow-up Report on Mission to Brazil (A/HRC/14/24/Add.4, 28 May 2010, ¶¶58-61)

58. In his report, the Special Rapporteur recognized the important role for police ombudsman offices in contributing to police oversight, and he encouraged the Government to strengthen the institution through more resources, powers and independence.³⁷³

59. Since the Special Rapporteur's visit, the São Paulo office has taken some important proactive measures to address police accountability. The office has started a project to quickly send information on suspected unlawful police killings to the Attorney-General, who forwards them to the relevant prosecutor. In this way, reporting delays by the Civil Police can be circumvented, and prosecutors' work can be focused on suspect cases. The office also makes data on police killings available on its website.

60. Generally, however, all police ombudsman offices continue to have restrictive mandates, independence and budgets. The Rio de Janeiro Police Ombudsman is still selected by the State Secretary for Security (who is also responsible for the police), and neither the Pernambuco or Rio de Janeiro offices appear to publicly disseminate data on police killings.

61. The Special Rapporteur notes the positive announcement in the information provided by the Government for this follow-up report that one of its strategic targets[...] is to "establish independent police ombudsman units" for the federal police departments.³⁷⁴

consideration. See Relatório Final da Comissão Parlamentar de Inquérito do Extermínio no Nordeste. Criada por meio do Requerimento nº 019/2003 – destinada a “Investigar a ação criminosa das milícias privadas e dos grupos de extermínio em toda a região nordeste” – (CPI – extermínio no nordeste), pp. 565-566.

373 A/HRC/11/2/Add.2, *supra* note 187, paras. 75, 90.

374 Information provided by Brazil to the Special Rapporteur in the preparation of this follow-up report, para. 22.

Report on Mission to Colombia (A/HRC/14/24/Add.2, 31 March 2010, ¶36)

36. The *Defensoría* [Ombudsman] received and processed 169 complaints of unlawful killings by security forces in 2008 and 22 in the first six months of 2009.³⁷⁵ While the *Defensoría's personeros* can play an important role in local communities, they generally lack any real power and are often prevented from rigorously pursuing cases due to resource constraints, threats and intimidation.

Follow-up to Country Recommendations – Turkey (A/HRC/29/37/Add.4, 6 May 2015, ¶¶75-77)

75. The Ombudsman Institution is accountable to Parliament and is tasked with receiving and investigating complaints and making recommendations on the functioning of the public administration. The Special Rapporteur considers the Institution as an important entity and urged the Ombudsman to uphold genuine commitment to protecting human rights and to conduct impartial and independent investigations.

76. The Government of Turkey stated that violations of fundamental human rights, including the rights of women, children and detainees were given priority by the Institution and that the Ombudsman played an important function in ensuring the accountability and transparency of the administration. It highlighted that complaints received by the Institution related mainly to public administration, education and training, labour as well as social security. As of September 2014, the Ombudsman had reportedly examined over 6,097 of 11,580 complaints received in its first two years of operation.

77. The Special Rapporteur recommended that Turkey consider amending the Law on the Ombudsman Institution to enable it to examine violations committed in all instances by the Turkish Armed Forces (*ibid.*, para. 129). The law has not yet been amended to include such violations.

6. National human rights institutions, NGOs, and international mechanisms

A range of external institutions—such as non-governmental organizations, national human rights institutions, and international mechanisms—can assist in promoting accountability. In country mission reports, the Special Rapporteurs have examined their roles, contributions, effectiveness, and obstacles to their functioning.

Report on Mission to Sri Lanka (E/CN.4/2006/53/Add.5, 27 March 2006, ¶63)

63. The HRC [Human Rights Commission] has been acting as an independent oversight body for complaints concerning police conduct since 1997.³⁷⁶ Its mandate is to investigate and respond to violations of fundamental rights under the Constitution and human rights under international law, including the right to life. It can receive complaints, and its investigations are facilitated by statutory powers to, for instance, pay unannounced visits to police stations and other places of detention. It has exercised its mandate with regard to torture cases, and is currently conducting an inquiry into the police shooting of criminal suspects. While the Commission lacks the power to impose remedial and preventative measures, it is empowered to recommend prosecutions and to refer cases to the courts. While it has the potential to play a crucial role, it lacks the necessary resources. Thus, for instance, it does not have enough vehicles to respond to all major mistreatment complaints by visiting detention places.

375 In 2009, there were 18 complaints against the army and 4 against the police. Most of the facts underlying the complaints occurred before October 2008. *Defensoría*, Written Response to Questions by the Special Rapporteur.

376 The HRC was established pursuant to the Human Rights Commission of Sri Lanka Act of August 1996, available at: <http://www.hrc-srilanka.org/docs/HRActe.pdf>. In 2002 it was brought under the Seventeenth Amendment to the Constitution.

Report on Mission to the Philippines (A/HRC/8/3/Add.2, 16 April 2008, ¶¶62-65)

62. The Philippines Commission on Human Rights (CHRP) stands out as an oversight mechanism that has safeguarded its independence and mandate. However, more resources must be devoted to ensure the effectiveness of its investigations.

63. The CHRP was established by the Constitution as an independent body charged with investigating human rights violations, providing preventive measures and legal assistance to victims, recommending reforms, and monitoring the Government's compliance with its human rights treaty obligations.³⁷⁷

64. In my discussions with CHRP commissioners, CHRP staff, and civil society advocates, they all expressed that the CHRP's highest priority must be to increase its investigative capacity. This requires hiring and training more investigators, devoting greater resources to investigations, and increasing investigators' capacity to make use of physical evidence.³⁷⁸ With this in mind, I was pleased to learn that in March [2007] the Government provided the CHRP significant additional funding.³⁷⁹

65. Many advocates and, indeed, many CHRP staff call for the CHRP to be given prosecutorial powers. This is a very tempting proposition: Today, CHRP investigators can submit cases to a prosecutor or ombudsman, but these cases seldom prosper. However, the proposal's risks outweigh its benefits. First, there are already other organs responsible for prosecuting cases, including one (the Ombudsman) that is independent of the executive. To give the CHRP prosecutorial powers would not only be redundant but would compromise a responsibility held solely by the CHRP: to monitor all of these other organs for human rights compliance. Second, while a grant of prosecutorial powers might give the CHRP more teeth, it would also increase the security risks faced by its investigators and witnesses. Today, the CHRP has the potential to publicly and authoritatively reveal the reality of widespread abuse despite the near absence of criminal convictions.

Follow-up Report on Mission to the Philippines (A/HRC/11/2/Add.8, 29 April 2009, ¶36)

36. Under its relatively new leadership, the CHRP has been more vocal on various human rights issues in the Philippines, and has shown a greater willingness to act independently. The largest obstacle it faces is a shortage of resources. While it has received additional funding since 2007, it is not clear that it has, as a result, been able to increase its investigative reach by hiring, training, and equipping more investigators. Nor does it have the resources needed to effectively monitor human rights during military operations throughout the country, aside from their periodic visits to monitor internally displaced persons as a result of the GRP-MILF conflict. The CHRP should be commended for its recent initiative to investigate the existence of the death squad in Davao, and should be encouraged to continue initiating more such independent investigations.

377 Constitution of the Republic of the Philippines (1987), art. XIII.

378 The CHRP's staff numbers roughly 600, with half in the central office and half in the regional offices, each of which has roughly 30 staff. Only about 10 percent of regional staff work as investigators. There are many examples of how inadequate resources impede investigations. Offices have few vehicles and work under gasoline allowances so strict as to inhibit investigations in rural areas. The CHRP is seldom able to provide victim assistance in excess of a bus fare, limiting its ability to help victims and potential witnesses to relocate. Only the central office has access to doctors for conducting autopsies, and regional offices have essentially no capacity for dealing with physical evidence.

379 "CHR to set up P25-M forensic center," GMA News TV (3/10/07); Letter from the Philippine Mission to the United Nations, dated 23 May 2007.

Report on Mission to Kenya (A/HRC/11/2/Add.6, 26 May 2009, ¶¶75)

75. The [Kenya National Commission on Human Rights], Kenya's national statutory human rights institution has the authority to investigate complaints of human rights violations.³⁸⁰ It is a highly professional organization of committed and skilled staff. In the absence of other well-functioning accountability mechanisms, it has played a critical role in bringing to light serious human rights issues. Yet its legitimacy is questioned by officials, and especially by the police, every time it issues a report. Its carefully researched reports rarely draw a substantive response. Instead, officials opt to attack its mandate, credibility or expertise, and the police accuse its members of being in the pay of the *Mungiki* [a sect/criminal gang].³⁸¹

Report on Mission to the Central African Republic (A/HRC/11/2/Add.3, 27 May 2009, ¶¶79-82)

79. The ability to accurately assess the human rights situation in the Central African Republic and to take appropriate action based on those facts is severely hampered by the lack of reliable data collection on human rights abuses.

80. There is no independent national human rights commission in the Central African Republic. The *Ministre d'état responsable pour les droits de l'homme et la bonne gouvernance* has a human rights section, but it has largely been ineffective. Thus, for example, the relevant officials were unable to provide any details on the numbers of killings by police in Bangui, or information on crimes by the military. Structurally, it is not sufficiently independent from the other organs of Government. The department has no cars, and so can only conduct fact-finding missions with BONUCA support. There are 20 posts, but only 10 are filled. There is a decree to set up human rights offices in 16 areas of the Central African Republic, but there are no funds to implement this.

81. The Special Rapporteur met a number of committed local NGOs who were monitoring human rights abuses, engaging in human rights advocacy, and taking legal actions on behalf of victims. Civil society organizations, however, remain weak. They receive little support and are severely under-resourced. NGOs are often unable even to circulate or publish their human rights reports. It is essential for the long-term development of a culture of respect for human rights and for reliable independent monitoring of abuses that the capacity of the domestic civil society in the Central African Republic is strongly supported, especially by the international community.

82. BONUCA [UN Peace-building Office in the Central African Republic] has been operating in the Central African Republic since 2000, with a mandate to both monitor human rights and support the Government in consolidating peace and reconciliation. BONUCA has an important role to play in the Central African Republic, and it is clear that the current Special Representative of the Secretary-General is a very positive force. However, there is general consensus that the human rights section of BONUCA has not fulfilled its mission. It has seldom taken a proactive role in information gathering and reporting. Limited resources, especially for the field offices, severely inhibit investigations. Part of the problem stems from the fact that BONUCA's mandate combines both peacebuilding and human rights monitoring. These different functions can sometimes be carried out effectively within the same mandate, but in some circumstances, the necessity for positive ongoing relationships required for effective peacebuilding, can conflict with the independent human rights assessments needed for effective human rights monitoring. This

380 Kenya National Commission on Human Rights, Act No. 9 of 2002, s 16.

381 See Press Statement, "Allegations by KNHRC", 24 February 2009 (EK Kiraithe, for Commissioner of Police). ("Our detectives started investigating information to the effect that some officers from the KNHRC have been regularly receiving payments from the outlawed Mungiki sect followers. Kenyans must ask themselves the services the *Mungiki* is paying for.").

appears to be the case in the Central African Republic presently. While BONUCA's first public human rights report, published in October 2008, is a positive step forward, a more effective United Nations human rights monitoring and assistance presence needs to be established by clearly separating peacebuilding from human rights monitoring. This is unlikely to be achieved unless the Office of the High Commissioner for Human Rights establishes an office in the Central African Republic.

7. Private security providers

An important challenge in promoting accountability and ending impunity is the increase in privatization of security and law enforcement services. In a dedicated report to the Human Rights Council on private security providers, Special Rapporteur Heyns discussed this accountability gap.

Report to the Human Rights Council on Private Security Providers (A/HRC/32/39, 6 May 2016, ¶¶105-118)

G. Monitoring and accountability

105. Accountability processes when a violation has potentially occurred represent a vital part of the protection of the right to life. With respect to a globalized and transnational industry such as the private security sector, it is important to ensure that accountability exists at the international and domestic (judicial) levels, and at the internal (company) level.

1. Monitoring the use of force

106. Often the first step in any process of accountability is effective monitoring of levels of use of force. That necessary step remains sadly incomplete in many contexts with respect to the use of force by State law enforcement. However it is even less complete in the case of the use of force by private security providers. That data gap fundamentally undermines the work of national and international efforts to ensure accountability for human rights abuses.

107. In order for any organization that uses or potentially uses force for the purpose of security provision demonstrably to respect the right to life, there must be a system of mandatory reporting of all incidents involving the use of firearms, all deaths, and any serious injuries.³⁸² It is good practice that such a system also requires mandatory reporting of potentially lethal incidents.

2. Accountability under international law

108. While States play the primary role in international law, particularly with regard to law-making and international legal responsibility, and while the regulation and scrutiny of the private security sector may primarily be a question for domestic law, that does not mean there can be no international element.³⁸³ International human rights law does not exclusively govern the conduct of States; it has been variously confirmed that it is the nature of the conduct, and not the entity, that will determine whether or not international human rights law is applicable.³⁸⁴

109. Against the backdrop of uncertainty around the exact role that corporations play in the international legal context, there is consensus that corporations should at the very least respect

382 See *Basic Principles*, *supra* note 2, principles 6, 11(f) and 22.

383 R. Steinhardt, "Weapons and the human rights responsibilities of multinational corporations", in *Weapons Under International Human Rights Law*, S. Casey-Maslen, ed. (Cambridge, Cambridge University Press, 2014), pp. 509 and 513-514.

384 *Kadic v. Karadzic*, 70 F.3d 232 (United States Court of Appeals, Second Circuit, 1995), cert. denied 518 US 1005 (1996); *Sosa v. Alvarez-Machain*, 542 US 692, 725 (2004), p. 748.

human rights.³⁸⁵ There is increasing support for the view that non-State collective entities have a binding obligation to obey *jus cogens* and not to engage in conduct amounting to international crimes (see, for example, A/HRC/19/69, para. 106). Along with that come links between human rights and corporate social responsibility, which incentivizes companies to take into account principles that include human rights, labour, the environment and anti-corruption.

110. Under current best practice, unlawful conduct on the part of private security providers is addressed either directly through international corporate social responsibility frameworks and voluntary, self-regulatory codes of conduct aimed at implementing the corporate responsibility to respect human rights, or by holding States accountable where they fail to provide realistic options to hold private security providers and individual personnel accountable under domestic civil and criminal law.

111. Of the voluntary frameworks perhaps most notable is the International Code of Conduct for Private Security Service Providers, which seeks to facilitate access to remedy through the creation of its independent governance and oversight mechanism, as well as the forthcoming complaints process.³⁸⁶ Whether or not the complaints procedure of the International Code of Conduct for Private Security Service Providers' Association will be able to provide effective access to remedies for victims of human rights abuse by private security providers remains to be seen.

3. Accountability under domestic law

112. Human rights abuses perpetrated by private security personnel can be redressed under criminal law and, in some instances, as part of tort law or the law of delict. That can raise questions regarding the legal personality of companies and the different doctrines applied when establishing corporate liability. Some States, such as the United Kingdom, have explicitly codified corporate criminal liability, while others rely on general tort law and the law of delict to institute civil claims.

113. Nothing should detract from the pursuit of personal criminal liability of the individual perpetrator of the abuse. However, vice versa, the fact that sufficient evidence cannot be gathered to prove a criminal act does not mean that an abuse has not occurred.

114. In certain circumstances the concept of vicarious criminal liability can be helpful. A corporation can be criminally responsible for conduct, distinct from the owners, agents or employees of the corporation. The application of vicarious liability transfers the criminal responsibility for an offence from an agent or employee to the corporation itself, while the agent or employee remains responsible for the crime committed. Essential elements of corporate criminal liability include a special relationship between the agent or employee and the corporation (namely, employment) and the requirement that the crime must have been committed in the performance of duties in terms of that relationship. Attention must also be given to considerations of the liability of parent companies for abuses committed by their subsidiaries.³⁸⁷

115. It should be noted that, given the inherent risks of abuse of rights associated with security work, close attention should be paid to the trigger of liability concerned. It can be argued that private security providers should be held to a modified standard of strict liability as might be expected from a company, for example, handling hazardous waste. Laws should not grant a company the

385 N. Pillay "The corporate responsibility to respect: a human rights milestone", *International Labour and Social Policy Review* (Geneva, 2009), pp. 63-68.

386 The processes put in place for the reporting, monitoring and assessment of members' performance in accordance with the code of conduct were established under article 12 of the Association.

387 See G. Skinner, "Parent company accountability: ensuring justice for human rights violations" (International Corporate Accountability Roundtable, November 2015), available at: <http://icar.ngo/wp-content/uploads/2015/06/PCAP-Report-2015.pdf>.

right to exculpate itself from intentional or grossly negligent excessive force resulting in death or serious injury, even if the company can show that the employee concerned was appropriately selected and trained. Without that standard of liability, victims will often have no effective recourse, as the individual perpetrator is often devoid of means.

116. Since many private security providers operate on a global level, the extraterritorial applicability of human rights law, and specifically human rights treaties, is crucial to the regulation of the sector. In the context of business, extraterritorial jurisdiction has in one way or another made its way into a number of policy domains that include anti-corruption, securities regulation, environmental protection and more general civil and criminal jurisdictions, but not in relation to business and human rights (see A/HRC/14/27, para. 46).³⁸⁸ However, international law does not prevent States from extending their jurisdiction to include such issues, provided there is a recognized basis. Moreover, the Guiding Principles on Business and Human Rights highlight that there are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, especially when the State itself is involved in or supports those businesses. The reasons include ensuring predictability for business enterprises by providing coherent and consistent messages, and preserving the State's own reputation.³⁸⁹ While the extraterritorial scope of a prominent national example, the Alien Tort Statute in the United States, has recently been limited, there are a number of other potential avenues, such as in the European Union, that allow for extraterritorial claims to be pursued against corporations for human rights abuses.³⁹⁰

4. Internal accountability mechanisms

117. As part of the due diligence aspect of the Guiding Principles on Business and Human Rights, companies are encouraged to set up internal grievance mechanisms, also referred to in some instances as “operational-level” or “project-level” grievance mechanisms. The mechanisms are usually set up to allow those that are affected by the actions of the company to bring allegations of non-compliance with internal policies and procedures to the attention of the company. Several of the voluntary initiatives, including the International Code of Conduct for Private Security Service Providers, also require companies to set up internal grievance mechanisms to monitor compliance with the principles of the initiatives, considered to be external unless incorporated into those of the company.³⁹¹ Notwithstanding the potential of internal grievance mechanisms to offer another course of redress to victims of corporate human rights abuse, the functioning of those mechanisms has met with great scepticism in the ranks of civil society.

118. Most internal grievance mechanisms currently require claimants to sign a legal waiver that keeps victims from pursuing further legal action.³⁹² While the use of such grievance mechanisms has produced some successes in particular circumstances, human rights abuses of certain magnitudes, including violations of the right to life, cannot be adequately addressed through an internal

388 See J. Zerk, “Extraterritorial jurisdiction: lessons for the business and human rights sphere from six regulatory areas”, Corporate Social Responsibility Initiative Working Paper No. 59 (Cambridge, MA, John F. Kennedy School of Government, Harvard University, 2010), available at: www.hks.harvard.edu/m-rcbg/CSRI/publications/workinpaper_59_zerk.pdf.

389 See Guiding Principles on Business and Human Rights, principle 2.

390 J. Kirshner, “A call for the EU to assume jurisdiction over extraterritorial corporate human rights abuses”, *Northwestern Journal of International Human Rights*, vol. 13, No. 1 (2015), pp. 1-26.

391 See International Code of Conduct for Private Security Service Providers, article 66.

392 See “Rape victims must sign away rights to get remedy from Barrick”, *MiningWatch* (30 January 2013), available at: <http://miningwatch.ca/news/2013/1/30/rape-victims-must-sign-away-rights-get-remedy-barrick>. See also K. McVeigh, “Canada mining firm compensates Papua New Guinea women after alleged rapes”, *Guardian*, 3 April 2015, available at: <http://www.theguardian.com/world/2015/apr/03/canada-barrick-gold-mining-compensates-papua-new-guinea-women-rape>.

grievance mechanism, and in such cases legal waivers can represent a deliberate impediment to accountability.

8. Corruption and the justice system

Corruption often affects all aspects of the justice system, and is both a consequence and a cause of impunity. The complex relationship between corruption, impunity and extrajudicial executions is explored in the country mission report extracts below.

Report on Mission to Guatemala (A/HRC/4/20/Add.2, 19 February 2007, ¶49)

49. That many investigations and prosecutions have been impeded by officials corrupted either by intimidation or financial inducement is widely acknowledged in and out of Government. In Guatemala, as in many countries, there are networks of personal connections, trust, and loyalty that lead government officials to do favours for their friends and associates in private life. There have also been indications, however, that some corruption is less personal and more organized, with “illegal groups” and “clandestine apparatuses” associated with organized crime and elements of the military infiltrating criminal justice institutions to ensure impunity for their actions, including murders of rivals as well as of those who seek to expose their crimes. In my discussions with the Minister of Defence, I was disturbed by the apparent evasion of responsibility for ensuring that military personnel were not involved in organized crime. I was informed first that the *Ministerio Público* could not take action without a referral from the Department of Military Justice, then that the Department of Military Justice took no proactive steps to identify criminal activity but would only initiate investigations upon receiving a complaint, and finally that the problem could not be too bad because the *Ministerio Público* was not investigating any cases against drug traffickers in the military. This circular reasoning does little to dispel the widespread belief that military personnel are involved with drug traffickers, organized crime, and clandestine groups. Whatever the precise contours of the problem, the fact of corruption is undisputed and must be addressed. It is both a cause and a consequence of impunity.

Report on Mission to Afghanistan (A/HRC/11/2/Add.4, 6 May 2009, ¶¶58-60)

58. While specific reforms to the justice system are essential, corruption is the common thread running through many of the problems. It is routine among police, prosecutors, and judges. To their credit, this was candidly acknowledged by Government officials. Senior Government officials described corruption as being so “widespread” as to be “unbelievable”, and admitted that they had corruption within their offices. According to many Afghans with whom I spoke, the problem is as blatant as it is rampant. One interlocutor told me that, as you approach a courthouse, you will be approached by persons with some link to the judge who will inquire as to your problem and solicit bribes. It was widely affirmed that when wealthy or powerful people do get convicted, they will not spend long in prison. With respect to the police, one senior foreign police trainer noted that, while individual police could be properly trained, the entire policing system was so corrupt that putting a new officer into the system was like “throwing people into a cesspool and expecting them to stay clean”. The result is a system which provides a thoroughly unacceptable degree of impunity to those accused of killings.

59. On a day-to-day basis, it is the Attorney General who has the authority to proactively monitor corruption, and to monitor the operations of other government agencies. This can involve both periodic visits to investigate offices and the long-term presence of a representative of the Attorney General’s office in the offices of another government agency. These may provide corrective guidance when officials are ignorant of their legal obligations and, when necessary, commence prosecutions. In 2007, this had led to the prosecution of 300 officials, 95% of whom were prosecuted for

corruption. There have not, however, been any prosecutions of senior officials. The Government's anti-corruption efforts have also included a number of specialized commissions, including, most recently, the High Office of Oversight and Anti-Corruption. Thus far, however, all governmental anti-corruption initiatives have been routinely undermined by political considerations when powerful figures have been implicated.

60. Pervasive corruption cannot be eliminated overnight, but there is a pressing need to establish a visible and credible mechanism with the power to subpoena witnesses and evidence, and to launch prosecutions. Above all, it must be designed to withstand the inevitable pressures of both corrupt politicians and those in government who feel obliged to turn a blind eye to corruption so as not to jeopardise their ability to govern. Independent corruption agencies have been successfully established in many states including Nigeria, Hong Kong and Australia. A series of carefully targeted prosecutions of egregious cases would be beneficial in terms of sending the necessary message. While this will require international funding, national ownership is indispensable. There is also a need for the international community to recognise that, insofar as international aid money provides the resources on which much of this corruption thrives, it has a responsibility to use mechanisms, such as high-level appointment review boards, to support Government anti-corruption efforts.

Report on Mission to Mexico (A/HRC/26/36/Add.1, 28 April 2014, ¶¶51-52)

51. The Special Rapporteur was informed that one manifestation of impunity in Mexico is that innocent people are set up for conviction. He was informed that in some cases, perpetrators were knowingly not brought to justice but instead an innocent, often vulnerable individual such as a migrant, indigenous person or poor person was punished instead. At other times, a suspect was apparently prosecuted (as was the case with Israel Arzate) and even convicted based only on self-incriminating confessions obtained through torture or by the testimony of supposed witnesses who were not present at the scene of the crime. Similarly, the Special Rapporteur received information about cases in which people were tried for murder without respect for due process. In some of these cases, after years of imprisonment, people who had been improperly processed were later released without adequate compensation.

52. The Special Rapporteur considers that the use of such scapegoats makes a mockery of justice. While this may create an illusion of accountability, it in fact results in a double injustice. He recalls that full respect of due process is crucial to ensure justice and combat impunity. The credibility of the judicial system is essential to encourage the participation of the population in all efforts to combat crime.

Follow-up to Country Recommendations – Turkey (A/HRC/29/37/Add.4, 6 May 2015, ¶¶68-71)

68. Problems with accountability in Turkey are sometimes exacerbated by the inappropriate exercise of prosecutorial and judicial discretion. The Special Rapporteur made recommendations aimed at overcoming some of those challenges and strengthening accountability measures, including that, in cases of unlawful killing, the prosecutor should always bring charges for killing and never for a lesser crime and should not misuse certain arguments to reduce sentences [...].

69. The Special Rapporteur welcomes the clarification by the Government that prosecutors are required to act in accordance with the duties and powers entrusted by the Code of Criminal Procedure, and that it is not possible to bring charges for a lesser crime in instances of killing.³⁹³

393 State response, October 2014.

However, he is still concerned about reports received that public officials often receive lighter sentences when found guilty of torture, ill-treatment or even fatal shootings.³⁹⁴

70. The Special Rapporteur was informed that the practice of misusing arguments of mitigating factors continues, especially in relation to lesbian, gay, bisexual and transgender victims. The broad framing of article 29 of the Criminal Code without a definition or guidelines on the meaning of “unjust act” could allow for a subjective interpretation and abuse of the provisions of the article. With regard to lesbian, gay, bisexual and transgender persons, the courts sometimes reduce the sentence of the perpetrator by deciding that the victim’s sexual orientation or gender identity itself constitutes an “unjust act”.

71. The Special Rapporteur was also informed that accountability for violations to the right to life is further hindered by the workload and backlog of cases in the judicial system, which creates additional barriers to accessing remedies for violations. The Government of Turkey has taken various positive steps in that regard, including increasing the number of chambers and members of the Court of Cassation and the Council of State; creating district and regional courts of appeal (which are not yet operational); and improving the legal aid system.

9. Statistics and data collection

A number of the Special Rapporteurs’ country reports indicate the problems in promoting accountability that result from poor data collection.

Report on Mission to Kenya (A/HRC/11/2/Add.6, 26 May 2009, ¶15)

15. During my mission, the police stated that they could not tell me how many people were killed by the police (whether in self-defence or otherwise), because there was no centralized data-keeping or monitoring; rather, records were kept in the inquest file register maintained at each police station. My press statement at the conclusion of my mission noted that this was simply unacceptable. Following my mission, I have been informed by the Government that the committee reviewing police standing operation procedures has been directed to draft a regulation establishing an updated database at police headquarters on all killings by police. I welcome this positive development.

Report on Mission to the United States of America (A/HRC/11/2/Add.5, 28 May 2009, ¶¶33-35, 37)

33. Data on deaths in custody in federal and state prisons and jails are compiled by the Bureau of Justice Statistics (BJS) of the Department of Justice (DOJ).³⁹⁵ These data cover homicides (generally by other inmates), suicides, and other causes and show generally that there has been a significant decline in deaths both in jails and prisons.³⁹⁶ The data do not separate out deaths caused by guards,

394 See Amnesty International “Turkey: Ali Ismail Korkmaz convictions fail to bring justice”, public statement (21 January 2015).

395 The state-level data are gathered pursuant to the Death in Custody Reporting Act of 2000 (Public Law 106-297), but this provides only a weak financial incentive for compliance, and there is no law inducing federal institutions to provide data. However, while the programme is essentially voluntary, compliance with reporting “requirements” is extremely high. According to the officials with whom I spoke, out of roughly 3,100 state jail jurisdictions, no more than 10 or so fail to report in any given year, and all state prisons have reported throughout.

396 The data show that while the homicide rate in jails has remained fairly stable at 3-5 per 100,000 inmates, the homicide rate in state prisons has plummeted from 54 per 100,000 in 1980 to 4 per 100,000 in 2006. Data on homicides and suicides in state jails and prisons are from BJS, “Suicide and Homicide in State Prisons and Local Jails” (August 2005) and “Deaths in Custody Statistical Tables” available at <http://www.ojp.usdoj.gov/bjs/dcrp/>

however, so it is impossible to estimate the rate of such deaths or to assess whether the trends in this regard are similarly encouraging.³⁹⁷ The Government also compiles three sources of data on law enforcement killings outside detention centres, the most comprehensive and reliable of which is likely BJS's data on "arrest-related killings."³⁹⁸ The number of arrest-related killings has not changed dramatically over the past 30 years.³⁹⁹

34. Generally, police killings are investigated by a police department's internal affairs unit and prosecuted by the local district attorney. However, in cases involving the "wilful" violation of constitutional rights, the Federal Bureau of Investigations (FBI) may investigate, and the Civil Rights Division of the federal Department of Justice may prosecute.⁴⁰⁰ Statistics on the total number of prosecutions and convictions in such cases are not available, but it is clear that the number of prosecutions is small and the number of convictions smaller still. Because there are no statistics on killings that involved the use of excessive force, it is difficult to evaluate whether the low conviction rate reflects impunity for abuse or whether the use of lethal force is limited and disciplined.

35. Two measures that would improve transparency and analysis are: (1) enhanced use of technology to record police conduct, and (2) adapting existing data collection efforts to be more comprehensive and to play an "early warning" and "hot spot identification" role for unlawful killings by law enforcement officers.

[...]

37. Data collection by the Government on deaths related to law enforcement activities serves to create an historical record that is useful, *inter alia*, in assessing long-term trends. It is quite unhelpful, however, in providing "early warning" of emerging problems, whether at the national level or in particular jurisdictions. Indeed, most of the available statistics are three years out of date. Officials explained that one cause of delay is the need to obtain local medical examiners certificates on the cause of death in each case. While such efforts are commendable, and the resulting impulse to delay the release of data understandable, BJS should consider adopting working methods that better accommodate the need for timely as well as accurate data. One possibility would be to adopt

dictabs.htm. The suicide rate in jails also fell from 129 per 100,000 in 1983 to 38 per 100,000 in 2005. The suicide rate in state prisons was 34 per 100,000 in 1980 and had fallen to 17 per 100,000 in 2006. In the federal prison system, over a one-year period in 1999-2000, there were approximately 3 homicides and 12 suicides per 100,000 inmates. BJS, "Census of State and Federal Correctional Facilities, 2000" (August 2003).

397 Officials stated that cases involving "positional asphyxiation" during cell extraction will generally end up in the "accidental" category even though some of the deaths in this category will constitute unlawful killings by guards. However, even if all such killings are so classified, this would permit one only to determine that there are somewhere between 0 and 3 unlawful killings by correctional officials per 100,000 inmates.

398 BJS is mandated to gather data from states on the death of "any person who is in process of arrest", which BJS interprets to include "[a]ll deaths of persons in the physical custody or under the physical restraint of law enforcement officers" and "all deaths resulting from use of force by law enforcement officers". In addition to the statistics on "arrest-related deaths" gathered by the BJS, statistics on "justifiable homicides" by police are gathered by the FBI, and statistics on "deaths by legal intervention" are gathered by the National Center for Health Statistics of the Centers for Disease Control and Prevention (CDC). BJS, "Arrest-Related Deaths in the United States, 2003-2005" (October 2007). According to BJS data, there were 703 arrest-related deaths in 2005, of which 364 were homicides (justified or unjustified) by law enforcement officers. BJS, "Arrest-Related Deaths in the United States, 2003-2005" (October 2007).

399 BJS, "Trends in justifiable homicide by police and citizens" available at: <http://www.ojp.usdoj.gov/bjs/homicide/tables/justifitytab.htm>. Note that these data are for "justifiable homicides" as compiled by the FBI. These data are likely to be undercounts because three states and the federal Government did not report to BJS, and the law enforcement agencies concerned were often the principal sources of information.

400 18 U.S.C. § 242 makes it a federal crime for a Government official to wilfully deprive someone of a constitutional or statutory right; 18 U.S.C. § 241 makes it a federal crime for a Government official to conspire to accomplish the same.

the approach used for economic indicators, which are released rapidly but are then subsequently revised as more information is gathered.⁴⁰¹

Follow-up Report on Mission to Brazil (A/HRC/14/24/Add.4, 28 May 2010, ¶17)

17. Some concerns have been expressed about the integrity of Rio de Janeiro Government statistics on resistance killings [killings by police, recorded as occurring following suspect attempts to resist arrest], and homicides more generally. Evidence suggests that incidents are being classified under different statistical categories in order to demonstrate a reduction in, for example, the homicide rate. Whether or not there has been an intentional manipulation of the statistics, the allegations highlight the need for independent statistics gathering. The Government should ensure that the statistics agency remains independent of the Security Secretariat, which currently oversees police statistics. An independent statistics agency should have access to police records in order to independently oversee the gathering of vital statistics regarding the police killings and the types of categorizations used to explain the incidents.

The above extracts make clear the scale of the problem of poor data collection around deaths as a result of police action. As Special Rapporteur Heyns noted in his follow-up on the mission to the United States, the same need for good reporting applies with respect to civilian casualties during armed conflict.

Follow-up Report on Mission to the United States of America (A/HRC/20/22/Add.3, 30 March 2012, ¶¶46-53)

46. While acknowledging the challenges of compiling statistics on civilian casualties during military operations owing to the lack of secure access to incident sites, the Special Rapporteur underscored in the mission report that systematic tracking was critical for minimizing casualties. The DoD noted that information on civilian casualties is included in significant activity (SIGACT) reports; however, the data is not necessarily accurate and has not been consolidated in a comprehensive and searchable database.⁴⁰²

47. In Afghanistan, United States troops take part in ISAF and still operate under Operation Enduring Freedom (OEF). ISAF established the Civilian Casualty Tracking Cell in 2008, but has reportedly not accurately recorded civilian casualties. Although most of the United States Special Forces (USSF) in Afghanistan were reportedly brought under COMISAF (Commander of ISAF) in March 2010, their procedures for investigating civilian casualties remain unclear.⁴⁰³ In December 2010, members of the North Atlantic Treaty Organization (NATO) agreed to review the tracking cell to address shortfalls in effectiveness and inadequacies in resourcing. Despite these efforts, the tracking cell appears to have insufficient investigatory capacity and empowerment from the military leadership. A further shortcoming is that the tracking cell relies heavily on forces on the ground to report incidents on their own initiative.⁴⁰⁴

401 As an illustrative example, see Eugene P. Seskin and Shelly Smith, “Annual Revision of the National Income and Product: Accounts Annual Estimates for 2004-2006; Quarterly Estimates for 2004:I-2007:I”, *Survey of Current Business* (August 2007), which provides revisions by the Bureau of Economic Analysis of the U.S. Department of Commerce to previously released economic statistics. The authors explain that “these estimates incorporated newly available source data that are more complete, more detailed, and otherwise more reliable than those that were previously incorporated.”

402 A/HRC/11/2/Add.5, *supra* note 93 para. 44. The DoD occasionally includes civilian casualty figures within its reports on Afghanistan. For example, see Congressional Research Service, *Afghanistan Casualties. Military Forces and Civilians*, 3 February 2011, summary, available at: <http://www.fas.org/sgp/crs/natsec/R41084.pdf>.

403 Submission by Amnesty International for the present report.

404 Report of the Special Rapporteur, Christof Heyns, *Follow-up to Mission to Afghanistan*, A/HRC/17/28/Add.6, 27 May 2011, para. 35.

48. While some progress has been made, inappropriate data collection technology, the lack of consistency and of full-time investigators need to be addressed. In the event that an incident causes civilian harm, the unit involved conducts an assessment and reports to the tracking cell within 24 hours. After 10 days, the unit submits an assessment report to the tracking cell, containing all results, including lessons learned and whether compensation has been paid. In high-profile cases involving multiple deaths and significant media coverage, an incident assessment team of experts (IAT) is deployed by COM-ISAF. The Special Rapporteur is concerned however that the IAT operates on an ad hoc basis, in particular in high-profile cases, in the absence of clearly established criteria. Furthermore, in each case, the team is composed of different experts, making it difficult to ensure continuity in analysis and identification of lessons learned. Additionally, the tracking cell may not always capture all information relating to civilian casualties, since some incidents take place in areas where thorough battle damage assessments are not systematically conducted.⁴⁰⁵

49. Regarding civilian casualty estimates, figures are provided by the United Nations Assistance Mission in Afghanistan (UNAMA) and the Afghanistan Independent Human Rights Commission (AIHRC). Between 2010 and mid-2011, most civilian casualties in Afghanistan were attributed to Anti-Government Elements (AGE),⁴⁰⁶ accounting for 75 per cent of 2,777 civilian casualties in 2010 and 80 per cent of 1,462 civilian casualties in the first half of 2011.⁴⁰⁷ While a rising death toll caused by AGE is noted, fewer civilians were killed and injured by Pro-Government Forces (PGF) in 2010 than in previous years, due to efforts by international and Afghan military forces to reduce civilian casualties. Air strikes claimed the largest number of civilian deaths resulting from PGF operations.⁴⁰⁸ According to UNAMA, night raids and other tactics resulted in less civilian casualties in 2010, primarily through the effect of regulations. The Counterinsurgency Guidelines and the Tactical Directive on the disciplined use of force were revised and updated by General David Petraeus, who took over command of ISAF in July 2010. The Standard Operating Procedures on the escalation of force were also published, and two Tactical Directives on night raids were issued in January and December 2010, respectively.⁴⁰⁹

50. UNAMA and AIHRC mentioned difficulties in monitoring USSF operations due to both tactical reasons and deliberate lack of information. The number of raids conducted by USSF increased as they are believed to be more successful in gathering intelligence and reducing civilian losses. However, night raids reportedly generate anger and resentment among the Afghan population towards the international military presence.⁴¹⁰ In some instances, excessive use of force, death and injury to civilians have been reported. AIHRC and UNAMA documented 13 such incidents which occurred in 2010.⁴¹¹ No information has been received regarding OEF operations to indicate that measures have been taken to enhance transparency regarding civilian casualties.

51. The Special Rapporteur welcomes efforts made in Afghanistan to spare civilians from military operations, notably through the adoption of regulations emphasizing civilian protection and restricting the use of force. He notes that positive measures have been taken to enhance transparency regarding civilian casualties, namely through the ISAF tracking cell. However, in light of its shortfalls, the Special Rapporteur calls on the international security forces in

405 Submission by Campaign for Innocent Victims in Conflict (CIVIC).

406 Suicide attacks and improvised explosive devices (IEDs) caused the most civilian deaths.

407 See UNAMA and Afghanistan Independent Human Rights Commission (AIHRC), *Afghanistan, Annual Report 2010: Protection of Civilians in Armed Conflict*, March 2011, p. i.; also Afghanistan, *Midyear Report 2011*, July 2011, p. 2; and Congressional Research Service, *Afghanistan Casualties: Military Forces and Civilians*, 3 February 2011, summary, available at: <http://www.fas.org/sgp/crs/natsec/R41084.pdf>.

408 UNAMA and AIHRC, *Afghanistan, Annual Report 2010*, *supra* note 407, p. 23; and *Midyear Report 2011*, *supra* note 407, p. 23.

409 UNAMA and AIHRC, *Afghanistan, Annual Report 2010*, *supra* note 407, p. 22.

410 *Ibid.*, pp. 29 and 33. It was reported that 3,000 night-raids were carried out from May to the end of July 2010.

411 UNAMA and AIHRC, *Afghanistan, Annual Report 2010*, *supra* note 407, p. 29.

Afghanistan, including the United States, to allocate sufficient financial and human resources to the tracking cell, including full-time experienced investigators to carry out its functions and to ensure continuity, analysis and integration of lessons learned.⁴¹² Additionally, given the allegations that investigations by the tracking cell depend on forces on the ground to report incidents on their own initiative, the Special Rapporteur contends that in order for the tracking cell to record losses systematically, relevant binding instruments should be adopted to impose on officers the obligation to systematically report incidents. Such an obligation is also strongly advisable in respect of incidents in Iraq.

52. In Iraq, United States troops were involved in Operation Iraqi Freedom until 31 August 2010, when it was re-designated as Operation New Dawn (OND). Despite the withdrawal of United States Forces (USF-I) from Iraqi cities on 30 June 2009, civilian deaths have continued to be reported as a result of joint Iraqi Security Forces (ISF) and USF-I operations. In 2010, 113 deaths reportedly resulted from ISF and/or USF-I operations, while 64 deaths were reported in 2009. Civilian casualties caused by USF-I stood at 17, significantly lower than the 64 deaths reported in 2009.⁴¹³ It is reported that USF-I opened fire on a vehicle, killing an Iraqi journalist and her husband. No further clarification was provided by USF-I. Likewise, on 12 February 2010, it is alleged that up to 10 people were killed and five wounded in a joint ISF/USF-I raid some 75 km north of Amarah in Missan Governorate.⁴¹⁴ As mentioned above, information on casualties is contained in SIGACTS reports.⁴¹⁵ In a report to Congress, the DoD explained that as a consequence of USF-I withdrawal from Iraqi cities, the Government's visibility and ability to verify Iraqi reports have been reduced. While United States and Iraqi forces data are close, some values differ.⁴¹⁶ The Special Rapporteur notes the challenges encountered by the United States forces in this regard, but recalls that it is the Government's duty to gather information on civilian casualties resulting from USF-I operations, be they joint operations or not. The Special Rapporteur reiterates the recommendation that the Government systematically and consistently track and publicly disclose information on all civilian losses resulting from its international operations. This is important in terms of transparency and accountability, and the collected data may be analysed to draw lessons with a view to preventing further deaths and collateral damage to civilians.

53. Unlike in the battlefield, operational difficulties cannot be invoked to justify a failure to compile statistics on deaths in military custody. When a State detains an individual, it is held to a heightened level of diligence to protect the individual's rights,⁴¹⁷ meaning that it should prevent deaths, conduct investigations and prosecute unlawful conduct.⁴¹⁸

412 UNAMI Human Rights Office, *2010 Report on Human Rights in Iraq*, January 2011, p. 10.

413 Ibid.

414 United States Department of Defense, *Measuring Stability and Security in Iraq*, Report to Congress, June 2010, p. 29.

415 Ibid., p. iii.

416 Human Rights Committee, Communication No. 84/1981 (1990), *Dermitt Barbato et al. v Uruguay*, para. 9.2.

417 Economic and Social Council resolution 1989/65, annex, para. 9.

418 Commission on Wartime Contracting in Iraq and Afghanistan, *At what risk? Correcting over-reliance on contractors in contingency operations, Second Interim Report to Congress*, 24 February 2011, p. 1; see also *Transforming Wartime Contracting, Controlling Costs, Reducing Risks, Final Report to Congress*, August 2011, pp. 18-20.