

The Investigation and Prosecution of Potentially Unlawful Death

A Practitioners' Guide



Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

® The Investigation and Prosecution of Potentially Unlawful Death - A Practitioners' Guide

© Copyright International Commission of Jurists, June 2019

The International Commission of Jurists (ICJ) permits free reproduction of extracts from any of its publications provided that due acknowledgment is given and a copy of the publication carrying the extract is sent to its headquarters at the following address:

International Commission of Jurists
P.O. Box 91
Rue des Bains 33
Geneva
Switzerland

With the support of the Ministry of Foreign Affairs of Finland



The Investigation and Prosecution of Potentially Unlawful Death

Practitioners' Guide No. 14

Acknowledgments

This Practitioners Guide was researched and written by Stuart Casey-Maslen, Honorary Professor, Centre for Human Rights, University of Pretoria, with assistance from ICJ Senior Legal Adviser and Coordinator of the ICJ's Global Accountability Initiative Kingsley Abbott, both of whom were involved in the drafting of the *Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)*, which lies at the heart of this Guide. Alex Conte of the ICJ edited the text and provided legal and policy review.

The Guide was produced under the [ICJ's Global Redress and Accountability Initiative](#) in collaboration with Centre for Human Rights at the University of Pretoria. It was made possible by the financial support of the Ministry for Foreign Affairs of Finland, for which the ICJ is grateful.

Table of Contents

Table of Abbreviations	v
Terminology under the 2016 Minnesota Protocol	vi
1. Introduction	14
1.1 The role and content of the Minnesota Principles	15
1.2 Revision of the Minnesota Protocol	18
1.3 Overview of the changes between the original and revised Protocols	22
1.4 The Minnesota Protocol and its relevance for legal practitioners	26
2. Potentially Unlawful Death and the Duty to Investigate	29
2.1 The right to life and the triad of obligations	29
<i>The duty to respect the right to life</i>	<i>30</i>
<i>The duty to protect the right to life</i>	<i>31</i>
<i>The duty to fulfil the right to life</i>	<i>32</i>
2.2 The substantive component of the right to life: the prohibition on arbitrary deprivation of life	33
<i>The status of the prohibition on arbitrary deprivation of life</i>	<i>33</i>
<i>The nature of the prohibition on arbitrary deprivation of life</i>	<i>34</i>
<i>Application in a situation of armed conflict</i>	<i>37</i>
<i>Unlawful death and international crimes</i>	<i>38</i>
2.3 The procedural component of the right to life: duty to investigate	42
<i>The triggering of the duty to investigate</i>	<i>42</i>
<i>Application in a situation of armed conflict</i>	<i>44</i>
2.4 Application of the duty to investigate to non-State actors	45
2.5 The right to remedy and reparation	47
<i>The right to an effective remedy</i>	<i>47</i>
<i>The right to reparation</i>	<i>48</i>
3. The Duties of States to Investigate and Prosecute	51
3.1 The necessary character of the investigation	51
<i>Treaty law</i>	<i>51</i>

	<i>Soft law</i>	52
	<i>Effectiveness</i>	53
	<i>Independence and impartiality</i>	56
	<i>Promptness</i>	57
	<i>Transparency</i>	58
3.2	The duty to prosecute	60
3.3	The duty to prevent recurrence.....	62
	<i>Guarantees of non-repetition</i>	62
	<i>Action to combat impunity</i>	63
	<i>The problem of military courts</i>	66
4.	The Rights of Victims' Families and of Witnesses.	69
4.1	The right to protection.....	69
	<i>Protection of whistle-blowers</i>	71
4.2	The right of victims' families to remedies and reparation	72
	<i>The right to the truth</i>	72
	<i>The right to justice</i>	73
	<i>The right to reparation</i>	75
5.	General Principles of Forensic Investigation of Potentially Unlawful Death	78
5.1	The key components of an effective investigation.....	78
	<i>Investigation strategy</i>	79
	<i>Family liaison</i>	81
	<i>The development of a victim profile</i>	82
	<i>Financial issues</i>	84
	<i>Finding, interviewing, and protecting witnesses</i>	84
	<i>Elaborating a chronology of events</i>	88
6.	Forensic Investigation of Potentially Unlawful Death: Types of Evidence and the Chain of Custody.....	90
6.1	Types of evidence	90
	<i>Biological evidence</i>	91
	<i>Digital evidence</i>	92
	<i>Documentary evidence</i>	93
	<i>Physical evidence</i>	93
6.2	The chain of custody	95

7.	Forensic Investigation of Potentially Unlawful Death: Crime Scene Management and Victim Identification	97
7.1	Crime scene management.....	97
7.2	Recovery of bodies and human remains.....	102
7.3	Identification of bodies and human remains	103
8.	Forensic Investigation: The Autopsy.....	106
8.1	The conduct of the autopsy	107
	<i>Concluding the cause of death</i>	<i>110</i>
	<i>The autopsy report.....</i>	<i>111</i>
9.	The Effective Prosecution of Individuals Responsible for Unlawful Death.....	113
9.1	Fair trial standards under international law.....	113
9.2	Guidance for prosecutors	116
9.3	The role and rights of victims	118
	<i>The right of victims in the context of the International Criminal Court</i>	<i>122</i>
10.	Specific Guidance for Prosecutors and Defence Lawyers	123
10.1	Guidance for prosecutors	123
	<i>Role of the prosecutor</i>	<i>123</i>
	<i>Reviewing the investigation case file.....</i>	<i>124</i>
10.2	Guidance for defence lawyers	129
	<i>Strategic litigation.....</i>	<i>137</i>
11.	Potentially Unlawful Death in Armed Conflict.....	139
11.1	Classification of armed conflict under international law	139
	<i>International armed conflict</i>	<i>140</i>
	<i>Non-international armed conflict.....</i>	<i>141</i>
	<i>Armed conflicts co-existing over the same territory</i>	<i>142</i>
11.2	Geneva Law	142
11.3	Hague Law	145
	<i>What amount to acts in the conduct of hostilities?.</i>	<i>145</i>
	<i>The principle of distinction</i>	<i>147</i>
	<i>The principle of proportionality in attack</i>	<i>150</i>
11.4	The duty under IHL to investigate deaths occurring during the conduct of hostilities	153

Annex: The Detailed Guidelines in the Minnesota Protocol	157
A. Detailed Guidelines on Crime-Scene Investigation	157
B. Detailed Guidelines on Interviews	161
C. Detailed Guidelines on the Excavation of Graves	168
D. Detailed Guidelines on Autopsy	170
E. Detailed Guidelines on the Analysis of Skeletal Remains	186

Table of Abbreviations

ANSA	Armed non-State actor
BDA	Battle damage assessment
CT	Computerized tomography (scanning)
DNA	Deoxyribonucleic acid
DVI	Disaster victim identification
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Commission of Jurists
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International humanitarian law
LGBTI	Lesbian, gay, bisexual, transgender and inter-sex
MRI	Magnetic resonance imaging (scanning)
NGO	Non-governmental organisation
OHCHR	Office of the United Nations High Commissioner for Human Rights
UN	United Nations
UNAMA	UN Assistance Mission in Afghanistan
US	United States

Terminology under the 2016 Minnesota Protocol

Abrasion	Superficial injury involving the skin; often called a scratch, scrape or graze.
Accountable	Subject to a system that is designed to ensure the proper discharge of responsibility by a person or institution.
Alveolar bone	In relation to teeth, the sockets holding the teeth.
Ancestry	In relation to forensic anthropology, the biological heritage of the remains.
Ante-mortem data	Data about a named individual while alive that can be used to compare with post-mortem data collected from the body, usually for the purpose of identifying the body.
Artefact	Artificial product. In relation to a dead body, a change (for example resulting from resuscitation or post-mortem damage) imitating pathology, disease or injury occurring in life.
Autopsy	In this document, the examination of a dead body involving its external and internal examination and incorporating the results of special tests (including radiology). The internal examination involves, but is not limited to, examining the contents of the cranium, chest and abdomen. Further dissection may occur in particular circumstances.
Biological profile	A term used in forensic anthropology to refer to the evaluation of skeletonized human remains to make conclusions about the age, sex, ancestry and stature of those remains, to aid in their identification.
Bruise	An injury characterized by extravasation of blood into the surrounding tissues.

Cause of death	<p>The underlying cause (the disease, condition or circumstance initiating the chain of events resulting in death), possibly proceeding through more immediate (or proximate) causes, concludes the logically linked statements that constitute the cause of death. In concluding the cause of death according to the WHO format, which is the conventional and internationally understood format, the most immediate cause is stated first, and the underlying cause(s) stated last. Thus, the cause of death of a young man who was shot in the chest resulting in massive haemorrhage as the bullet passed through the heart and the lungs should be recorded as: I(a) Haemorrhage (due to) I(b) Perforation of the heart and lungs (due to) I(c) Gunshot wound to the chest.</p> <p>Part II of the cause of death statement includes the disease(s), condition(s) or circumstance(s), if any, that contribute to the death, but NOT to the underlying cause listed in I. The cause of death is Parts I and II considered together.</p> <p>Note: the Cause of death is distinguished from the Manner of death (q.v.) and the Mode of death (q.v.).</p>
Chain of custody (of an exhibit)	A process enabling the complete history of the custody of an exhibit to be tracked and recreated; that is, who has had care and control of the exhibit from the time it was first secured to the present.
Commingled remains	Usually in relation to skeletal remains, the mixing of the remains of two or more individuals, for example in a mass grave.
Contamination	The location on a person or object of material, whether obvious or not, from another source. Such contamination can be useful in forensically linking a suspect to a crime scene; or it can be confusing and damaging to justice (e.g. DNA contamination).
Continuity	See Chain of custody (above).
Death	The irreversible cessation of all vital functions, including brain activity. Death is "natural" when it is caused solely by disease and/or the ageing process. It is "unnatural" when its causes are external, such as intentional injury (homicide, suicide), negligence, or unin-

	tentional injury (death by accident).
Decomposition (post mortem)	The process of dissolution of the body after death. In the early hours and days after death, some of the changes can be mistaken for injuries (e.g. signs of putrefaction such as swelling and purplish discolouration of the face and body).
Deceased	Depending upon the context, dead, or a dead person.
Defence injuries/wounds	Injuries/wounds sustained by a victim resulting from attempts at self-defence during an assault.
Disaster Victim Identification (DVI)	The scene, mortuary-based and related processes (e.g. ante-mortem data collection, reconciliation) of dealing with a multiple fatality event to ensure that individuals are correctly identified. Undertaken in accordance with Interpol guidelines.
Epiphysis(es)	The end(s) of particularly, but not only, long bones; the process of the fusion of the epiphysis(es) with the shaft of the long bone allows conclusions to be drawn about the age of the person.
Ethics	The study of what is right and wrong. Professional ethics concentrates on the behaviour and attitudes of members of a particular profession.
Exhibits	Physical evidence thought to be relevant to the investigation of a crime or death that are labelled, recorded as exhibits and kept securely so that they cannot be interfered with or contaminated.
Femur	The thigh bone.
Fingerprints (latent)	Fingerprints present on a surface requiring a technical process to make them visible.
Forensic	Relating to the courts or, more generally, the law.
Forensic anthropology	The examination of human skeletal material to answer medico-legal questions including those of identification.
Forensic archaeology	The use of the skills employed in the study of ancient remains and objects for the purposes of the law, usually in relation to the excavation, recovery and evaluation.

	tion of scenes and sites.
Forensic ballistics/ Firearms and tool-marks	These two categories of forensic science are often used interchangeably; in this document, they refer to the examinations leading to conclusions of forensic value about gunshot wounds and the projectiles recovered from them.
Forensic doctor	For the purposes of this document, a certified medical doctor who is authorized to perform forensic post-mortem examinations.
Forensic entomology	The study of insects in a forensic setting, most often in forensic pathology as an indicator of the minimum time since death.
Forensic odontology	The study of dentistry in relation to the law, in particular in the investigation of death, especially for the identification of human remains.
Forensic medicine	The principles and practice of medicine as applied to the needs of the law and the courts.
Forensic pathologist	The medical specialist concerned with the investigation of deaths in which the law has an interest; in this document, used interchangeably with the term forensic doctor.
Forensic science	The application of the principles and practice of science to the needs of the law and the courts.
Forensic tool-marks	The examination of marks left on exhibits and the comparison of these with possible causative implements/tools/weapons; in some laboratories this is combined with the assessment of firearms.
Forensic toxicology	The science of drugs and poisons applied to the needs of the law and the courts.
Fracture	Break; a discontinuity in the cortex of a bone; sometimes used in relation to a cartilaginous structure such as a costal cartilage or thyroid cartilage.
Histology (histopathology)	The study of the microscopic structure of tissues (histology) in a diseased state (histopathology).

Human identification	In this document, the attachment of the correct name to a dead body.
Human remains	In this document, synonymous with deceased person or dead body, whether the body is freshly dead, decomposing or skeletonized.
Humerus	The upper arm bone.
Immediate cause of death	The disease, condition or complication, resulting from the underlying or an intermediate cause, that immediately precedes death.
Inventory	List.
Laceration	A tear or split in the skin or other organ or soft tissue due to blunt force.
Livor mortis, lividity (post mortem)	The post-mortem phenomenon of blood settling under the influence of gravity.
Manner of death	The summary of the circumstances of the death; thus: homicide, suicide, accident, natural or undetermined.
Minimum Number of Individuals (MNI)	Forensic anthropological term used in relation to the assessment of commingled remains and referring to how many individuals, as a minimum, are represented in the commingled remains being examined.
Mode of death	The pathophysiological process by which a person died (e.g. haemorrhage, respiratory failure, cardiac failure, multi-organ failure, septicaemia). Its use alone is not sufficient to complete the cause of death properly in the internationally accepted WHO format. See also "Cause of death".
Mortuary (morgue)	The place for storing, keeping and looking after the dead until final disposal or interment; includes the autopsy room; hospital for the dead.
Ordnance	Relating to artillery, large guns.

Osteo- phytes	Usually small growths of extra bone associated with degenerative, osteoarthritic changes in the joints.
Peri- mortem	Around the time of death. This term is often used in forensic anthropology in relation to injuries because, once the remains have skeletonized, an injury inflicted shortly before death will look identical to the same injury inflicted shortly after death.
Petechiae (petechial haemor- rhages)	Pinpoint or "dot-like" haemorrhages. Some forms occur in life, others can occur after death.
Photolog	The list of all photographs taken with related data, e.g. the name of the photographer, the time the photograph was taken and the place where it was taken.
Photo markers	Markers with numbers and letters visible in photographs enabling later identification of the photographs and the items shown in them.
Postcra- nial skel- eton	The entire skeleton apart from the skull.
Post- mortem changes	A term that encompasses all the natural changes that can occur to a dead body.
Post- mortem data	Data obtained from the dead body to compare with data obtained about a named individual while alive (ante-mortem data), usually for the purposes of identifying the dead body.
Post- mortem examina- tion	In this document, examination of the body after death not including an internal examination. (In this document, an examination of a dead body that includes an internal examination is an autopsy.)
Prosecu- tor	The authorized medical practitioner/forensic doctor undertaking the autopsy and preparing the report.
Pubic symphy- sis	The part of the pubic bone that joins with the other pubic bone at the front of the pelvis.
Refer- ence	A standard sample against which another sample can be compared.

sample

Reliability

The reliability of a result is its stability when the test is undertaken by different observers in different places at different times.

Responsibility

The duty to perform a task or function properly.

Reviewability

One of the aims of the autopsy is that it (and indeed the whole death investigation) should be conducted in such a way that another forensic doctor or pathologist at another time can independently come to his/her own conclusions about the death. This enables conclusions to be drawn about the reliability of the autopsy and the conclusions arising from it.

Rigor mortis

Post-mortem stiffening of the body.

Sample (or exhibit) degradation

The loss or alteration of the characteristics of a sample (or exhibit) that it possessed at the time it came into existence, was found, or was collected. In a forensic context, this means that the sample's ability to contribute to the investigation is reduced.

Security (of exhibits)

The process, including documentation, whereby an exhibit is secured such that it is evident whether or not it has been accessed, and if so, when and by whom.

Sexual dimorphism

The two different shapes of some bones, associated with males and females (which only becomes readily apparent after puberty).

Skeletal remains

The bony remains of the dead body after all soft tissue has been lost following decomposition.

Stature

Height.

Taphonomy

The study of all the (usually natural) processes that can affect a dead body.

Theodolite

A precision survey instrument which simultaneously measures angles in the horizontal and vertical planes. Modern versions (such as a total station theodolite) include electronic readers as well as distance measuring devices.

Tibia	The larger of the two lower leg bones.
Transparency (of processes)	Degree to which processes can be evaluated externally because their details are available to be examined.
Underlying cause of death	The disease or condition initiating the chain of events leading to death (often with intervening intermediate and immediate – or proximate – causes of death).
Validity	In relation to a measure or a result, the extent to which the measure or result reflects the truth of the phenomenon.
Wound	A significant discontinuity in the surface of a structure, most often in the skin, e.g. incised wound, stab wound, gunshot wound, laceration. It does not include a bruise or an abrasion.

1. Introduction

This Guide aims to help legal practitioners ensure that potentially unlawful death is investigated in a manner that respects international human rights law and, where fault is identified, that appropriate measures of accountability ensue. At the heart of the Guide is the *Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)*, which was published by the Office of the United Nations High Commissioner for Human Rights (OHCHR) in 2017.¹ This document is *The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, the revision of which involved expertise from the International Commission of Jurists (ICJ) and other leading organisations. It is commonly known as the Minnesota Protocol since the driving force behind its initial elaboration in the late 1980s was the Minnesota Lawyers International Human Rights Committee, a United States (US) non-governmental organisation (NGO).

This Practitioners' Guide builds on earlier Guides, especially Nos. 2, 7, 9 and 10. Practitioners' Guide No. 2, which addresses, the Right to a Remedy and Reparation for Gross Human Rights Violations, was updated in 2018. In particular, the present Guide updates and significantly expands the guidance set out in chapter 4 of Guide No. 2 on the right to an investigation. Guide No. 7 on International Law and the Fight Against Impunity also addresses investigations. Chapter 5 concerns the Obligation to Investigate, but was drafted before the adoption of the revised Minnesota Protocol.

¹ The Minnesota Protocol is available for download in English and Spanish at: <https://www.ohchr.org/Documents/Publications/MinnesotaProtocol.pdf> and https://www.ohchr.org/Documents/Publications/MinnesotaProtocol_SP.pdf and Arabic, Chinese, French and Russian versions are being developed and will be on the OHCHR website soon.

Practitioners' Guide No. 9 — Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction — should also be viewed in light of the revised Minnesota Protocol. The references to the Minnesota Protocol are therefore to the original document, published in 1991. In contrast, Guide No. 10 (Enforced Disappearance and Extrajudicial Execution: The Rights of Family Members) does not refer to the original Minnesota Protocol and should be considered in light of the revised Protocol, especially its Sections II(B) on accountability and remedy and II(D)(3) on the participation and protection of family members during an investigation.

1.1 The role and content of the Minnesota Principles

The original *United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* was published in 1991 by the Crime Prevention and Criminal Justice Branch of the UN Centre for Social Development and Humanitarian Affairs. It was based on the so-called Minnesota Principles – the United Nations Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions – which were endorsed by UN General Assembly Resolution 44/162 (1989).

These twenty Principles, which remain valid and were not amended during the revision of the Minnesota Protocol, address the prevention, investigation, and prosecution of potentially unlawful death and remedies for associated human rights violations.

The principles have the status of soft law, which means that they are not an international legal treaty that has to be signed and ratified by States.

With respect to **prevention**, the Principles declare, *inter alia*, that governments shall prohibit by law all extra-legal, arbitrary, and summary executions and shall ensure that any

such executions are recognized as offences under their criminal laws, and are punishable by appropriate penalties which take into account the seriousness of such offences.²

With respect to **investigation**, the Principles declare, *inter alia*, that:

- 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....³
- 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 distinguish between natural death, accidental death, suicide, and homicide.⁴
- The investigation shall include an adequate autopsy, collection and analysis of all physical and documentary evidence, and statements from witnesses.⁵
- In cases in which the established investigative procedures are inadequate, Governments shall pursue investigations through an independent commission of inquiry or similar procedure.⁶
- In order to ensure objective results, those conducting the autopsy must be able to function impartially and independently of any potentially implicated persons or organizations or entities.⁷
- Complainants, witnesses, those conducting the investigation and their families shall be protected from

² 1989 Minnesota Principles, Principle 1.

³ 1989 Minnesota Principles, Principle 9.

⁴ Ibid.

⁵ Ibid.

⁶ 1989 Minnesota Principles, Principle 11.

⁷ 1989 Minnesota Principles, Principle 14.

violence, threats of violence or any other form of intimidation.⁸

- 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.⁹
- Families of the deceased and their legal representatives shall be informed of, and have access to, any hearing as well as to all information relevant to the investigation, and shall be entitled to present other evidence.¹⁰
- The family of the deceased shall have the right to insist that a medical or other qualified representative be present at the autopsy.¹¹
- A written report shall be made within a reasonable period of time on the methods and findings of such investigations. The report shall be made public immediately and shall include the scope of the inquiry, procedures, and methods used to evaluate evidence, as well as conclusions and recommendations based on findings of fact and on applicable law.¹²
- The report shall describe in detail events that were found to have occurred and the evidence upon which the findings were based, and list the names of witnesses who testified, with the exception of those whose identities have been withheld for their own protection.¹³

With respect to **prosecution and remedy**, the Principles declare, *inter alia*, that:

⁸ 1989 Minnesota Principles, Principle 15.

⁹ Ibid.

¹⁰ 1989 Minnesota Principles, Principle 16.

¹¹ Ibid.

¹² 1989 Minnesota Principles, Principle 17.

¹³ Ibid.

- Governments shall ensure that persons identified by the investigation as having participated in extra-legal, arbitrary, or summary executions in any territory under their jurisdiction are brought to justice. Governments shall either bring such persons to justice or cooperate to extradite any such persons to other countries wishing to exercise jurisdiction. This principle shall apply irrespective of who and where the perpetrators or the victims are, their nationalities, or where the offence was committed.¹⁴
- Superiors, officers, or other public officials may be held responsible for acts committed by officials under their authority if they had a reasonable opportunity to prevent such acts.¹⁵
- In no circumstances, including a state of war or other public emergency, shall blanket immunity from prosecution be granted to any person allegedly involved in extra-legal, arbitrary, or summary executions.¹⁶

With respect to **remedies**, the Principles declare that the families and dependents of victims of extra-legal, arbitrary, or summary executions shall be entitled to fair and adequate compensation within a reasonable period of time.¹⁷

1.2 Revision of the Minnesota Protocol

The drafting of the original Minnesota Protocol was facilitated by the Minnesota Lawyers International Human Rights Committee (now known as The Advocates for Human Rights), with contributions from the Science and Human Rights Program of the American Association for the Advancement of Science. Since it was published in 1991, the Minnesota Protocol has been widely used as a practical guide to the

¹⁴ 1989 Minnesota Principles, Principle 18.

¹⁵ 1989 Minnesota Principles, Principle 19.

¹⁶ Ibid.

¹⁷ 1989 Minnesota Principles, Principle 20.

investigation of potentially unlawful death and as a legal standard for the implementation of the right to life.

Along with the Minnesota Principles, the Protocol has been used by national, regional, and international courts and other bodies, including the European Courts of Human Rights, the Inter-American Court of Human Rights, the African Commission on Human and Peoples' Rights, and the UN Human Rights Committee. The ICJ itself has used and applied the Protocol widely in its work.

The Minnesota Protocol is an expert document offering guidance to States on the implementation of the Minnesota Principles and the duty to investigate under the right to life. As mentioned, the Protocol is not an international legal treaty and does not need to be signed and ratified by States.

With the passage of time since the late 1980s, the content and scope of the right to life under international law has evolved significantly, both as a result of normative developments and as a result of jurisprudence. In addition, investigative practice and forensic science have undergone a sea change in methodology and approach, including in the fields of DNA and telecommunication evidence. It became increasingly evident that the Minnesota Protocol needed updating to retain and expand its relevance.¹⁸

In 2014, the then UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, in collaboration with the OHCHR, initiated a process to revise and update the Minnesota Protocol. He had seen the importance of the Protocol in the field during country visits, the first of which took place to India in 2012. In mortuaries, medical personnel involved in autopsies emphasized to the Special Rapporteur the importance of the Protocol, but observed that it had

¹⁸ See, e.g., UN Commission on Human Rights Resolutions 1998/36, 2000/32, 2003/33 and 2005/26.

become outdated. After consulting international forensic and human rights experts, the Special Rapporteur decided to convene a series of expert meetings to revise the text. These meetings brought together working groups of legal and medical experts from around the world to elaborate the new Protocol, while guidance to the revision process was also sought from a high-level Advisory Panel.¹⁹

In May 2015, a first consultation of States and other interested groups and individuals was opened on an initial draft of the revised Protocol. A note verbale was sent to diplomatic missions in Geneva and the draft was put on the OHCHR website with a request for comment. At the end of July 2015, the two working groups convened in Geneva to consider the results of this consultation. The Special Rapporteur also dedicated half of his thematic report to the UN General Assembly that year to the question of the use of forensics in investigations, underlining the importance of investigations to the protection of the right to life.²⁰

The working groups met again in February 2016 to review the ongoing work and the OHCHR convened an open briefing for all States. A revised draft text was then published to launch a second round of consultations. The Special Rapporteur informed the Human Rights Council of the impending completion of the revision in June 2016.

The text of the revised Protocol was presented to the UN High Commissioner for Human Rights at the end of July 2016. The OHCHR published the Minnesota Protocol in advance electronic version in May 2017. This version was officially launched in

¹⁹ Kingsley Abbott, ICJ Senior Legal Adviser and Coordinator of the ICJ's Global Accountability Initiative, was a member of the legal working group, while Matt Pollard, ICJ Senior Legal Adviser, was a member of the Advisory Panel. Federico Andreu, Deputy Director of Litigation & Legal Protection at the Colombian Commission of Jurists, an ICJ affiliate, also participated in the legal working group as an expert.

²⁰ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. A/70/304 (2015).

Thailand at an event organised by the ICJ in collaboration with the Thai Ministry of Justice, the OHCHR, and the German Embassy in Bangkok. It was then made available in final electronic and hard-copy English texts in October 2017. The revised Protocol was made available in Spanish in 2018. Translations into other UN official languages were nearing completion as this Guide was going to print.

The revised 2016 Minnesota Protocol has already been referred to and endorsed by the UN Human Rights Committee²¹ and independent UN experts. For example, in June 2019, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions published her report into the unlawful death in the Saudi consulate in Istanbul of the Saudi journalist, Jamal Khashoggi, where she found that “Mr. Khashoggi’s killing constituted an extrajudicial killing for which the State of the Kingdom of Saudi Arabia is responsible”.²²

In her report, the Special Rapporteur explicitly referred to the revised Minnesota Protocol as the basis for the standards applicable to such an investigation, including with respect to crime-scene management and investigation, international cooperation between States, and the characteristics of an investigation that complies with international law.²³

²¹ Human Rights Committee, General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, UN Doc. CCPR/C/GC/36 (2018) (General Comment No. 36 on the right to life). For example, among other things, the Human Rights Committee has called on States to ensure that “[i]nvestigations and prosecutions of potentially unlawful deprivations of life should be undertaken in accordance with relevant international standards, including the Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)”, para. 27.

²² Annex to the Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions: Investigation into the unlawful death of Mr. Jamal Khashoggi, A/HRC/41/CRP.1, 19 June 2019, para. 1.

²³ Human Rights Committee, General Comment No. 36 on the right to life, para. 64.

1.3 Overview of the changes between the original and revised Protocols

As one might expect, the original 1991 Minnesota Protocol and the revised 2016 Minnesota Protocol are very different documents. Under international human rights law, it is understood today that a failure to investigate thoroughly a death in which foul play is suspected may itself amount to a violation of the right to life. This is so, even if the State did not arbitrarily deprive a person of his or her life through its actions, or failed to exercise due diligence to protect a person under its jurisdiction from being killed by a third party. The contours of what is required of a death investigation have been clearly delineated, in particular by case law, meaning that standards unquestionably exist for what does and does not conform to the requirements of international law.

Furthermore, within the realm of criminal investigation, crime scene management²⁴ and the broader criminal or other investigations have undergone a transformation in the last 25 years. For instance, the overriding need to avoid contamination of a death scene or other location of potential interest is understood in far stricter terms than was the case in the 1980s when the original protocol was being drafted. The preservation of the integrity of all evidence – the “chain of custody” – begins with the identification and collection of any type or item of evidence and continues through to the end of all judicial processes. To avoid the risk of contamination, forensic personnel wear personal protective equipment today that simply was not required back when the Minnesota Protocol was first being developed. Similarly, other technologies – first and foremost DNA evidence, but also digital photography and telecommunication evidence – have fundamentally changed the character of forensic investigations. Indeed, these and a number of other relevant

²⁴ The term is used without prejudice as to whether any crime has, in fact, been committed.

scientific tools and methods were not even referred to in the 1991 version of the Protocol.

Another issue for the revision process concerned whether or not to explicitly include within the scope of the Protocol deaths occurring during a situation of armed conflict, particularly those resulting from the conduct of hostilities (i.e. combat). The original Protocol was not clear on this point. One dilemma results from the differing legal standards for what amounts to arbitrary deprivation of life during the conduct of hostilities. In general, the rules of international humanitarian law (also called the law of armed conflict or the law of war) are considerably less restrictive than those applicable to law enforcement under international human rights law with respect to when life may be intentionally or foreseeably taken. Given that the right to life continues to apply during armed conflict,²⁵ including the legal duty to investigate potentially unlawful death, the decision was taken that the new Protocol should clearly cover all situations where deprivation of life may be arbitrary, including during warfare.

This position was later adopted in the Human Rights Committee's General Comment No. 36 on the right to life, which concerns the implementation of Article 6 of the International Covenant on Civil and Political Rights (ICCPR).²⁶

The 2016 Protocol is thus explicit about its applicability at all times, whether peacetime, internal disturbances or tensions, or armed conflict. The revision notes, however, that the duty to investigate principles "must be considered in light of both the circumstances and the underlying principles governing international humanitarian law", and recognizes that an armed

²⁵ *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, International Court of Justice, 8 July 1996, para. 25.

²⁶ Human Rights Committee, General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, UN Doc. CCPR/C/GC/36 (2018) (General Comment No. 36 on the right to life), para. 64.

conflict “may pose practical challenges” for an investigation.²⁷ The Protocol describes the specific investigation obligations during the conduct of hostilities in an armed conflict, providing for post-operation assessment, an inquiry, or a full investigation, depending on whether a violation of international humanitarian law or a war crime (i.e. a serious violation of international humanitarian law for which individual criminal responsibility is envisaged) is suspected to have occurred.²⁸ This is discussed further in Chapter 9 of this Practitioners’ Guide.

Another decision to be taken was how to address the use of commissions of inquiry in the revised Protocol. These were treated in a dedicated section of the original Minnesota Protocol and accorded priority in the investigation of potentially unlawful death, which is not the case in the 2016 version. Commissions of inquiry may be one mechanism to implement the duty to investigate, but they are not the only — or even the primary — means by which this can occur. The 2016 Protocol focuses on setting the standards for investigations rather than to prescribe the particular form that they should take. As Paragraph 38 of the revised Protocol explains:

“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. ... Whichever mechanisms are used, however, they must, as a whole, meet the minimum requirements set out in these Guidelines.”

With respect to structure, the 1991 Protocol comprised five sections and three annexes. The first section addressed international human rights standards while the second described the elaboration of the Minnesota Principles and the

²⁷ 2016 Minnesota Protocol, para. 20.

²⁸ Ibid, para. 21.

original Protocol itself. Three model protocols then addressed, respectively, the legal investigation of extra-legal, arbitrary, and summary executions (focusing on commissions of inquiry); autopsy; and the disinterment and analysis of skeletal remains. Annexes included a copy of the Minnesota Principles, offered guidance on the post-mortem detection of torture (during autopsy), and attached drawings of parts of the human body for use in autopsies.

The 2016 Minnesota Protocol has seven sections. Section I sets out its aims and scope. Section II outlines the relevant international legal framework, describing the right to life under international law, the duties of accountability and remedy, and the triggering and scope of the duty to investigate. This section also describes the requisite character of any investigation: it must be effective, independent and impartial, prompt, and transparent. This section also emphasizes the importance of the participation and protection of family members during an investigation. Section III defines professional ethics that govern the conduct of all those involved in any investigation of potentially unlawful death.

Section IV describes how an investigation of potentially unlawful death should be conducted. It summarises general principles that apply to investigations and then details the investigation process, including how to collect and manage data, materials, and important physical locations, including the death/crime scene; family liaison; developing a victim profile; finding, interviewing, and protecting witnesses; any needs for international technical assistance; telecommunications and other digital evidence; and financial issues. Also addressed in Section IV are key issues and principles in the recovery of human remains and the analysis of skeletal remains, the identification of dead bodies, types of evidence and sampling, and autopsy.

Section V sets out detailed guidelines on, respectively, crime scene investigation, the conduct of interviews, the excavation of graves, autopsy, and the analysis of skeletal remains (included as an Annex to this Practitioners' Guide). These build

on the guidance already provided but go into considerably more detail on what steps should be taken in each case.

Section VI provides a glossary of key forensic and medical terms (included as an Annex to this Practitioners' Guide). Finally, the five annexes in Section VII contain for use during autopsy, respectively: anatomical sketches, a case details form, a firearm wound chart, a stab wound chart, and an adult dental chart.

It is not correct to say that the Minnesota Protocol can only be implemented by States with considerable resources and a robust respect for the rule of law. In fact, much of the Protocol, such as with respect to crime scene management and witness interviews are not onerous but require clear procedures to be in place. In the case of more technical areas, the Protocol should be seen as aspirational, and in a number of instances alternatives are proposed if it is not yet possible to comply with all the guidance. It is always open to States to seek international cooperation and assistance in such areas.

1.4 The Minnesota Protocol and its relevance for legal practitioners

The Minnesota Protocol itself serves as a valuable guide to lawyers on the international standards and best practice for investigating potentially unlawful death or suspected enforced disappearance. This should assist lawyers involved in any form in such processes at the national, regional or international levels, including whether they are potentially prosecuting suspects, defending clients or engaged in strategic litigation.

Accordingly, the present Guide seeks to explain the content of the Minnesota Protocol, which at certain points is highly technical in nature, and supplement the guidance set out in the Protocol with further examples as well as subsequent developments and practice.

Chapter 2 sets out the international normative framework on the right to life and its two main components: the substantive prohibition on arbitrary deprivation of life and the procedural

duty to investigate. This includes the application of the right during a situation of armed conflict and the application of the duty to investigate to non-State actors.

Chapter 3 looks at the duty upon States to investigate a potentially unlawful death and to prosecute individuals who are found to have committed criminal offences in relation to a death (or enforced disappearance). The chapter looks at the necessary character of the investigation under international human rights law, in particular the demands of effectiveness, independence and impartiality, promptness, and transparency. The duty to prevent recurrence of human rights violations and action to combat impunity are also considered.

Chapter 4 addresses the rights of victims' families and of witnesses, picking up on some of the issues addressed in Practitioners' Guide No. 10. The guidance offered concerns the right to protection, including of whistle-blowers, and the right of victims' families to remedies, reparation and to the truth.

Chapter 5 concerns the general principles of forensic investigation of potentially unlawful death, reflecting the guidance set out in the 2016 Minnesota Protocol. The key components of an effective investigation include an overarching investigation strategy, liaison with the family (a two-way process), the development of a victim profile, financial issues, witnesses, and elaborating a chronology of events.

Chapter 6 addresses the different types of evidence (biological, digital, documentary and physical) and the chain of custody that is essential to the integrity and reliability of evidence. Failure to respect the chain of custody can lead to a defendant being acquitted. Chapter 7 then discusses some of the most important evidentiary elements in an investigation: appropriate crime scene management (including the recovery of the body or human remains) and robust victim identification.

Chapter 8 goes on to outline how an autopsy should be performed. An autopsy should generally be conducted in a

potentially unlawful death (although that is not always the case in practice, for a variety of reasons). The cause and manner of death should be set out clearly in a report.

Chapter 9 considers how individuals responsible for unlawful death should be prosecuted. In addition to offering general guidance to prosecutors in their determination of whether to proceed to trial, the chapter also recalls key fair trial standards under international law and the role and rights of victims, including in the context of the International Criminal Court. In turn, Chapter 10 offers specific guidance for both prosecutors and defence lawyers, in particular on reviewing the investigation case file.

Finally, Chapter 11 considers the investigation of potentially unlawful death in armed conflict. The intersection between international humanitarian law (IHL) and human rights continues to be disputed, although it is generally uncontested that the right to life applies during both international and non-international armed conflict. The chapter describes the key rules of IHL, in particular governing the conduct of hostilities: the principle of distinction and the principle of proportionality in attack, as well as the duty under IHL to investigate deaths occurring during the conduct of hostilities.

Annexes to the present Practitioners' Guide contain the detailed guidelines set out in the 2016 Minnesota Protocol on crime-scene investigation, on interviews, on the excavation of graves, on autopsy, and on the analysis of skeletal remains.

2. Potentially Unlawful Death and the Duty to Investigate

The formal title of the original Minnesota Protocol, published in 1991, referred to the investigation of “Extra-legal Arbitrary and Summary Executions”. During the revision, it was felt that this language could be perceived as prejudging the issue of whether a death being investigated was actually unlawful. The decision to use the term “potentially unlawful death” in the revised Protocol was chosen to avoid this perception, as well as to denote the fact that all kinds of potentially unlawful death are covered, irrespective of whether the death resulted from a deliberate or reckless act or omission.

2.1 The right to life and the triad of obligations

It is generally understood that the implementation of each human right should be understood in terms of a “triad” of three mutually reinforcing dimensions: the duty to **respect**, the duty to **protect**, and the duty to **fulfil**. According to the OHCHR:

“By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and to fulfil human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights.”²⁹

²⁹ OHCHR, “International Human Rights Law”, at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx>

The triad of respect, protect, and fulfil applies to the right to life. It is effectively reflected in the Human Rights Committee's General Comment No. 36 on the right to life.³⁰

The duty to respect the right to life

The duty to respect the right to life means that States, their organs and agents, and those whose conduct is attributable to the State, must comply with the **duty under international law not to deprive anyone of their life arbitrarily**.³¹ This duty applies on both a State's metropolitan and non-metropolitan territory, as well as, in certain circumstances, extraterritorially. A State party to the ICCPR, for instance, has an obligation to respect Article 6 of the Covenant with respect to "all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control".³² This includes respecting the lives of individuals over whom the State or its agents has effective control or those that are located in territories a State occupies.³³

As the Human Rights Committee further recalls, enforced disappearance constitutes a unique and integrated series of acts and omissions representing a grave threat to life and may thus result in a violation of the right to life. States must take adequate measures to prevent the enforced disappearance of individuals, and conduct an effective and speedy inquiry to establish the fate and whereabouts of persons who may have been subject to enforced disappearance.³⁴

³⁰ Human Rights Committee, General Comment No. 36 on the right to life, especially paras. 4, 7, 19, 27, 61, and 63.

³¹ 2016 Minnesota Protocol, para. 8(a).

³² Human Rights Committee, General Comment No. 36 on the right to life, para. 63.

³³ Ibid.

³⁴ Ibid., para. 58.

The duty to protect the right to life

The duty to protect the right to life obligates States to **exercise due diligence to prevent the arbitrary deprivation of life by private actors**. This due diligence obligation, which entails both legal and practical measures, must be implemented in good faith and in a non-discriminatory manner.³⁵ The nature of the due diligence obligation is such as to require States to “undertake reasonable positive measures, which do not impose on them disproportionate burdens”.³⁶

With respect to legal measures, States must enact a **“protective legal framework”** that criminalizes prohibitions on intentional and negligent homicide, violent hate crimes, death threats, terrorist attacks, and other manifestations of violence or incitement to violence that are likely to result in a deprivation of life.³⁷

Beyond the requisite legal framework, States must also take **practical measures to protect other individuals within their jurisdiction from foreseeable threats to life** originating from private persons and entities whose conduct is not attributable to the State. States must, for example, exercise due diligence to prevent the unlawful use of lethal force or violence against children or women by private actors, and must protect against similar abuses by companies.³⁸ This is particularly the case where officials have specific information about threats against one or more identified individuals, or where there is a pattern of killings, such as where victims are linked by political affiliation, sex, sexual orientation or gender identity, religion, race or ethnicity, caste, or social status.³⁹

³⁵ 2016 Minnesota Protocol, para. 8(b).

³⁶ Human Rights Committee, General Comment No. 36 on the right to life, para. 21.

³⁷ Ibid., para. 20.

³⁸ 2016 Minnesota Protocol, para. 8(b).

³⁹ Ibid.

The duty to protect the right to life may require States to take special measures of protection towards those at risk. Obvious examples include human rights defenders, journalists, prominent public figures, witnesses to crime, and victims of domestic violence. Others requiring such special protection may include street children, indigenous peoples, displaced persons, lesbian, gay, bisexual, transgender, and inter-sex (LGBTI) persons, persons with disabilities, asylum seekers, and refugees.⁴⁰

The Human Rights Committee observes that in responding “urgently and effectively” to protect individuals under specific threat, such special measures may include ensuring “round-the-clock police protection, the issuance of protection and restraining orders against potential aggressors and, in exceptional cases, and, only with the free and informed consent of the threatened individual, protective custody”.⁴¹

The duty to fulfil the right to life

States must also take reasonable measures to address conditions that may give rise to direct threats to life.⁴² One obvious example of this is in the realm of environmental protection. The effects of climate change and environmental degradation constitute “some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life”.⁴³ In 2015, for instance, it was affirmed in a study carried out by researchers at King’s College London that almost 9,500 people die early each year in London due to long-term exposure to air pollution.⁴⁴ These figures are,

⁴⁰ Human Rights Committee, General Comment No. 36 on the right to life, paras. 23 and 25.

⁴¹ Ibid., para. 23.

⁴² See, e.g., *Öneryildiz v Turkey* (2004) ECHR 657.

⁴³ Declaration of the United Nations Conference on the Human Environment, 17 June 1972, first preambular paragraph.

⁴⁴ A. Vaughan, “Nearly 9,500 people die each year in London because of air pollution – study”, *The Guardian*, 15 July 2015, at: <https://www.theguardian.com/environment/2015/jul/15/nearly-9500-people->

though, dwarfed by the impact of air pollution in China and India. In early 2017, the United States-based Health Effects Institute found that air pollution caused more than 4.2 million early deaths worldwide in 2015, making it the fifth highest cause of death overall. About 2.2 million of these deaths occurred in China and India.⁴⁵

In the view of the Human Rights Committee, the obligations of States under international environmental law should inform the scope of Article 6 of the Covenant.⁴⁶ Thus, the Committee asserts:

"States parties should therefore ensure sustainable use of natural resources, develop and implement substantive environmental standards, conduct environmental impact assessments and consult with relevant States about activities likely to have a significant impact on the environment, provide notification to other States concerned about natural disasters and emergencies and cooperate with them, provide appropriate access to information on environmental hazards and pay due regard to the precautionary approach..."⁴⁷

2.2 The substantive component of the right to life: the prohibition on arbitrary deprivation of life

The status of the prohibition on arbitrary deprivation of life

It is generally accepted today that the right to life comprises both a substantive component and a procedural component. The substantive component is the prohibition of arbitrary

[die-each-year-in-london-because-of-air-pollution-study](#). The premature deaths are due to two key pollutants: fine particulates known as PM2.5s and the toxic gas nitrogen dioxide (NO₂).

⁴⁵ D. Stanway, "China, India account for half world's pollution deaths in 2015: study", *Reuters*, 14 February 2017, at: <https://www.reuters.com/article/us-china-pollution-health/china-india-account-for-half-worlds-pollution-deaths-in-2015-study-idUSKBN15T0EO>

⁴⁶ Human Rights Committee, General Comment No. 36 on the right to life, para. 62.

⁴⁷ *Ibid.*

deprivation of life while the procedural component entails the duty to investigate potentially unlawful death. Violation of either component will mean that the right to life has been violated.

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.⁴⁸ The right to life is a norm of *jus cogens* (meaning it is a customary norm that cannot be overridden by treaty) and is protected by international and regional treaties, customary international law, and domestic legal systems.⁴⁹ The right is recognized in, among other instruments, the Universal Declaration of Human Rights, the ICCPR, the European Convention on Human Rights, the American Convention on Human Rights, the African Charter on Human and Peoples' Rights, and the Arab Charter on Human Rights.

The nature of the prohibition on arbitrary deprivation of life

The term "arbitrary" means first and foremost action (or omission) in violation of either international or domestic law, but it is not restricted to the scope of this notion. As the Human Rights Committee clarifies:

"The notion of 'arbitrariness' is not to be fully equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law ... as well as elements of reasonableness, necessity, and proportionality..."⁵⁰

This prohibition on arbitrary deprivation of life includes all deaths caused by law enforcement officials where the death results from unlawful use of force. Use of force may be

⁴⁸ 2016 Minnesota Protocol, para. 7.

⁴⁹ Ibid.

⁵⁰ Human Rights Committee, General Comment No. 36 on the right to life, para. 12.

unlawful because either it was not necessary, or it was disproportionate, in the circumstances as the law enforcement official honestly believed them to be. The deliberate use of potentially lethal force for law enforcement purposes is particularly constrained. The default rule is that **firearms may only be used in self-defence or defence of others against an imminent threat of death or serious injury**.⁵¹ Thus, “use of potentially lethal force for law enforcement purposes is an extreme measure..., which should be resorted to only when strictly necessary in order to protect life or prevent serious injury from an imminent threat.”⁵² Falling within the scope of the rules governing use of force for law enforcement purposes are private military or security forces exercising State functions.⁵³

There is also a duty of precaution under international human rights law. States have a duty to plan law enforcement operations in such a way as to minimise the risk of recourse to lethal force. This duty was first outlined by the European Court of Human Rights in its Grand Chamber judgment in the *McCann* case in 1995.⁵⁴ In the *Dorzema* case, the Inter-American Court of Human Rights similarly affirmed that States “have an obligation to plan the actions taken by their agents adequately in order to minimize the use of force and the fatalities that may result from it”.⁵⁵

Extrajudicial or summary executions by any State agents, including paramilitary groups, militias, or “death squads” acting under the direction or with the permission or

⁵¹ Basic Principles on the Use of Force or Firearms by Law Enforcement Officials, adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, 1990 (hereafter the Basic Principles on the Use of Force or Firearms), Principle 9.

⁵² Human Rights Committee, General Comment No. 36 on the right to life, para. 12.

⁵³ 2016 Minnesota Protocol, para. 2(a).

⁵⁴ *McCann and others v United Kingdom* (1995) ECHR 31, paras. 213–14.

⁵⁵ *Nadege Dorzema and others v Dominican Republic*, IACtHR Judgment of 24 October 2012, para. 88.

acquiescence of the State, will always be such as to violate the prohibition on arbitrary deprivation of life.

Where a death occurs of a person who is in any form of detention by the State, its organs, or agents,⁵⁶ there is a rebuttable presumption that the State is responsible, either because it has caused the death or because it has failed to exercise due diligence to prevent it.⁵⁷ Such a scenario would encompass all deaths of persons detained in prisons, in other places of detention (official or otherwise), and in other facilities where the State has heightened control over life (e.g. psychiatric hospitals, institutions for children and the elderly, and centres for migrants or refugees).⁵⁸

The 2016 Minnesota Protocol recalls that circumstances in which the State will be held responsible for a death in detention, unless it is proven to the contrary, include cases where the deceased had suffered injury while in custody, or where he or she was a political opponent of the regime in power or a human rights defender, or was known to be suffering from mental health issues, or who committed suicide in unexplained circumstances.⁵⁹ The Human Rights Committee has held that the State is obligated to provide relevant documentation on the death.⁶⁰ This includes the death certificate, the medical report, and reports on the investigation that must be held into the circumstances surrounding the death.

⁵⁶ Without prejudice to the obligations of the State, the same presumption of responsibility will apply to the authorities managing private prisons. 2016 Minnesota Protocol, para. 17.

⁵⁷ Ibid.

⁵⁸ Ibid., para. 2(b).

⁵⁹ Ibid., para. 17.

⁶⁰ *Barbato v Uruguay*, Human Rights Committee Communication 84/1981, UN Doc. CCPR/C/OP/2 at 112 (1990), para. 9.2.

Application in a situation of armed conflict

As already mentioned, what amounts to arbitrary deprivation of life during a situation of armed conflict is more complex from an international legal standpoint. A major challenge is to determine whether a use of force by the State or its agents is to be considered under the human rights law rules governing law enforcement or the rules of international humanitarian law (IHL) governing the conduct of hostilities. If the use of force, say by the police, is entirely unrelated to an ongoing armed conflict – such as in response to an armed bank robbery by private citizens – it will be the rules governing law enforcement that apply. If, on the other hand, force is used during a pitched battle between the government and insurgents who are pitted against each other in an armed conflict, what amounts to arbitrary deprivation of life will be determined by reference to the rules of IHL.

IHL rules are generally far more permissive with respect to use of force and firearms than are the rules governing law enforcement, as Chapter 9 below explains. In brief, however, while *intentionally* killing or wounding civilians is unlawful, *foreseeably* killing or wounding them may not be. Under IHL a party to an armed conflict is obligated to target only military objectives (objects or personnel) during the conduct of hostilities, and not civilians or civilian objects. This is known as the principle of distinction. However, in targeting a military objective it is understood that civilians may be incidental victims of the attack (defined broadly to encompass all defensive actions). If the expected civilian harm (deaths, injuries, or damage to civilian objects, or a combination thereof) would be excessive compared to the concrete and direct military advantage anticipated, the attack will be unlawful. This is known as the principle of proportionality. All feasible precautions must be taken to avoid or at least minimise civilian harm during the conduct of hostilities (the rule of precautions in attack). It is therefore unlawful to target civilians but not necessarily to use force that will foreseeably lead to their death or serious injury.

A number of scenarios exist, however, between the two clear and distinct examples given above. In other situations, determining whether the use of force is one of law enforcement or in the conduct of hostilities can be more problematic. Examples include when soldiers open fire at a car that fails to stop at a checkpoint, when violence erupts at an anti-government demonstration, or where attacks target suspected members of insurgency group far from the area in which fighting is already occurring.

Unlawful death and international crimes

An extrajudicial or summary execution, where the victim is in the effective power of the security forces, will always be unlawful, whether or not there is a close nexus to the armed conflict. But acts by the State may not only violate the right to life; in certain circumstances, they will also amount to crimes under international law. These concern, in particular, crimes against humanity, war crimes and genocide. International criminal law concerns the criminal responsibility of individuals for crimes under international law. It is separate from, and in addition to, the responsibility of States under international law for such internationally wrongful acts.

Crimes against humanity

Crimes against humanity encompass certain cruel or violent acts, including murder and extermination, "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".⁶¹ Article 7(2)(a) of the ICC Statute states that an "[a]ttack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack".

⁶¹ Statute of the International Criminal Court, Article 7(1).

Crimes against humanity may be committed during or outside a situation of armed conflict.

In the *Katanga* case,⁶² an International Criminal Court (ICC) Trial Chamber explained that the international crime entails three elements:

- The existence of an attack (an operation or course of conduct involving the multiple commission of proscribed acts that is directed against a civilian population, and which took place pursuant to or in furtherance of a State policy);⁶³
- The characterization of the attack as widespread (large-scale in nature) or systematic (of an organized nature);⁶⁴ and
- Proximate nexus between the attack and the proscribed act and knowledge of that nexus by the perpetrator.⁶⁵

To amount to a crime against humanity, the civilian population (meaning everyone who is not a member of the armed forces) must be the primary target of an attack and not its incidental victim.⁶⁶ There must also be a policy to attack the civilian population, defined broadly as the intent of a State “whether through action or deliberate failure to take action”.⁶⁷ The “systematic” nature of an attack goes “beyond the existence of any policy seeking to eliminate, persecute or undermine a community”, to represent “a series of repeated actions seeking to produce always the same effects on a civilian population”.⁶⁸

⁶² *Prosecutor v Germain Katanga*, International Criminal Court, Judgment of 7 March 2014, Case No. ICC-01/04-01/07.

⁶³ *Ibid.*, para. 1097.

⁶⁴ *Ibid.*, para. 1098.

⁶⁵ *Ibid.*, para. 1099.

⁶⁶ *Ibid.*, paras. 1102, 1104.

⁶⁷ *Ibid.*, para. 1108.

⁶⁸ *Ibid.*, para. 1113.

Within or outside armed conflict, so-called “death squads”, acting under the direction or with the permission or acquiescence of the State, or deadly repression of peaceful protests against the regime in power, may rise to the level of crimes against humanity.

War crimes

War crimes are serious violations of IHL that, in addition, entail individual criminal responsibility under international law. These crimes are defined in several IHL treaties, notably the 1899 and 1907 Hague Regulations on Warfare; the 1949 Geneva Conventions; the 1954 Hague Convention on Cultural Property; and the 1977 Additional Protocol I (and, arguably, also Additional Protocol II). The crimes are also set out in the ICC Statute and broader customary international law. **Any war crime committed by a State armed force will amount to a human rights violation.**

In practice, war crimes committed against detainees and other persons in the power of an enemy are far easier to prosecute successfully than those allegedly committed during the conduct of hostilities. This is because the formulation of the principles of distinction and proportionality in attack is vague, making it hard to prove the requisite *actus reus* and *mens rea* in each case. Mistakes in the conduct of hostilities, unless they are reckless, are not criminalized, so many civilians may die during an attack without individual criminal responsibility attaching to the perpetrator, his commander, or any that have assisted his or her actions.

Genocide

Under customary international law and the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention), all States have a duty to prevent and punish genocide. Genocide was declared a crime under international law by the UN General Assembly in 1946, and the prohibition of genocide has since been recognised as a peremptory norm of international law, meaning it is absolute and unconditional. It is a crime whether committed in time of

peace or during armed conflict. According to Article II of the Genocide Convention, genocidal acts include the following: killing members of a minority; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; and forcibly transferring children of the group to another group.”

Genocide primarily distinguishes itself from other international crimes, particularly war crimes and crimes against humanity (with the exception of the crime against humanity of persecution), because it requires special intent: *dolus specialis*. The special intent of the crime of genocide is identified in Article II of the Genocide Convention, as well as in Article 6 of the ICC Statute, as “the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such”. The crime of genocide does not require the actual destruction of a protected group – a person may be held liable for the crime of genocide without any killings taking place. Genocidal intent has to be established beyond reasonable doubt to prove genocide.

Genocidal intent should not be confused with, and is independent from, any personal motives prompting the actions of a perpetrator. The intent refers to the person’s state of mind at the time of committing the crime, i.e. the intended destruction of a protected group. The main difficulty with genocidal intent, it has been argued, is in obtaining evidence sufficient to prove, beyond a reasonable doubt, the perpetrators’ intentions to destroy the group. As a result, prosecutors have not always been able to prove genocidal intent beyond reasonable doubt in relation to a number of individuals tried for genocide, particularly before the ICTY, although there have been some successes.⁶⁹

⁶⁹ See ICJ, “Questions and Answers on the Crime of Genocide”, Legal Briefing Note, August 2018, especially pp. 9–10, at: <https://www.icj.org/wp->

2.3 The procedural component of the right to life: duty to investigate

The procedural component of the right to life is the duty to investigate potentially unlawful death. As noted above, failure to comply with the duty to investigate will normally amount to a violation of the right to life even if the substantive use of force is deemed to be not of a nature to arbitrarily deprive a person of his or her life. This subsection describes first when the duty to investigate is triggered and then summarises how that trigger applies during the conduct of hostilities in an armed conflict.

The triggering of the duty to investigate

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 **have been made**.⁷⁰ The duty to investigate does not, therefore, apply only where the State is in receipt of a formal complaint.⁷¹ The duty exists whenever 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 its jurisdiction (for instance, on territory it controls abroad).⁷² Where the duty to investigate applies, it obligates all and any States that may

[content/uploads/2018/08/Universal-Genocide-Q-A-FINAL-Advocacy-analysis-brief-2018-ENG.pdf](https://www.unhcr.org/refugees/files/2018/08/Universal-Genocide-Q-A-FINAL-Advocacy-analysis-brief-2018-ENG.pdf)

⁷⁰ 2016 Minnesota Protocol, para. 15, citing the European Court of Human Rights in: *Ergi v Turkey*, Judgment, of 28 July 1998, para. 82; *Isayeva, Yusopva and Bazayeva v Russia*, Judgment of 24 February 2005, paras. 208–09; and *Montero-Aranguren and others v Venezuela*, IACtHR Judgment of 5 July 2006, para. 79.

⁷¹ 2016 Minnesota Protocol, para. 15, citing the UN Standard Minimum Rules for the Treatment of Prisoners (the "Nelson Mandela Rules"), adopted by UN General Assembly Resolution 70/175 (2015), Rule 71(1).

⁷² 2016 Minnesota Protocol, para. 19, citing *Jaloud v The Netherlands* (2014) ECHR 1292.

have contributed to the death or which may have failed to protect the right to life.⁷³

The duty to investigate includes all cases where the State has caused a death or where it is alleged or suspected that the State caused a death. An obvious example is where law enforcement officers used force that may have contributed to the death. This duty governs all peacetime situations and also applies to all cases during an armed conflict other than those that occur during the conduct of hostilities (see below). Where the State or its agents may have been involved in causing or contributing to a death by act or omission, the duty to investigate exists regardless of whether it is suspected or alleged that the death itself was unlawful.⁷⁴

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.⁷⁵

The State further has a duty to investigate any potentially unlawful death caused by any private individual, even if the State is not responsible for failing in its due diligence obligation to prevent any such death.⁷⁶

The 2016 Minnesota Protocol calls upon each State to ensure that an appropriate avenue is available for allegations of

⁷³ 2016 Minnesota Protocol, para. 19.

⁷⁴ 2016 Minnesota Protocol, para. 16.

⁷⁵ 2016 Minnesota Protocol, para. 17.

⁷⁶ 2016 Minnesota Protocol, para. 18, citing: Human Rights Committee, General Comment No. 31 on The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (hereafter Human Rights Committee General Comment No. 31), UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 10; African Commission on Human and Peoples' Rights, General Comment No. 3 on the Right to Life, November 2015. See also *Hassan v United Kingdom* (2014) ECHR 936, para. 78.

potentially unlawful death to be made and for relevant information to be provided.⁷⁷

Application in a situation of armed conflict

Certain situations, such as armed conflict, may pose practical challenges for the application of some aspects of the guidance offered by the 2016 Minnesota Protocol. This is obviously the case with regard to the obligation on a State to investigate deaths linked to armed conflict when they occur on territory the State does not itself control. But the Protocol cautions that where constraints in a particular context prevent a State complying with any part of its guidance, "the constraints and reasons for non-compliance should be recorded and publicly explained".⁷⁸ Moreover, there may be video footage or satellite imagery available to a State, including of the attack, and a State will often conduct a battle damage assessment (BDA) after a strike.

The application of the duty to investigate during armed conflict was one of the most controversial elements in the revision of the Minnesota Protocol. The approach that was ultimately taken is grounded in IHL (which generally requires that States both ensure respect for the rules and repress any breaches), as well as in international human rights law. The specific guidance of the 2016 Minnesota Protocol is set out in its Paragraph 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."⁷⁹ Where there are reasonable

⁷⁷ 2016 Minnesota Protocol, para. 19.

⁷⁸ 2016 Minnesota Protocol, para. 20.

⁷⁹ 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, paras. 48–50, pp. 102–03.

grounds to suspect that a war crime was committed, the State must conduct a full investigation and prosecute those who are responsible.⁸⁰ 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.”

2.4 Application of the duty to investigate to non-State actors

Whether non-State actors are subject to **legal** obligations under international human rights law is disputed. In 2013, the Committee on the Elimination of Discrimination against Women noted in its General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations that “under certain circumstances, in particular where an armed group with an identifiable political structure exercises significant control over territory and population, non-State actors are obliged to respect international human

⁸⁰ For a discussion of the duty to investigate violations of IHL see the International Committee of the Red Cross (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 Geneva Conventions: Geneva I, Article 49; Geneva II, Article 50; Geneva III, Article 129; Geneva IV, Article 146; Additional Protocol I, Article 85; and see also 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 (hereafter Basic Principles and Guidelines on Remedy and Reparation), adopted under UN General Assembly Resolution 60/147 (2006); Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. A/68/382 (2013), para. 101. See also, e.g., Report of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc. A/68/389 (2013), para. 42.

rights.”⁸¹ The UN Assistance Mission in Afghanistan (UNAMA), which publishes reports on the protection of civilians with the OHCHR, has stated that:⁸²

“While they cannot become parties to international human rights treaties, non-State actors, including armed groups, are not precluded from being subject to human rights obligations under customary international law. Non-state actors are increasingly deemed to be bound by certain international human rights obligations, particularly those actors exercising de facto control over some areas, such as the Taliban.”⁸³

In June 2018, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions issued a report to the Human Rights Council in which she affirmed that armed non-State actors (ANSAs) “commit violations of the right to life and other human rights”.⁸⁴ The Special Rapporteur added that “to the extent that the prohibition against extrajudicial killings constitutes a *jus cogens* norm applicable to all ANSAs, it should be binding upon them extra-territorially as well”.⁸⁵

The 2016 Minnesota Protocol focuses on the duty of the State to investigate potentially unlawful death, but is “also

⁸¹ Committee on the Elimination of Discrimination against Women, General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations, UN Doc. CEDAW/C/GC/30 (2013), para. 16.

⁸² UNAMA and OHCHR, *2017 Annual Report on the Protection of Civilians in Armed Conflict in Afghanistan*, March 2018, p. 56, at: https://unama.unmissions.org/sites/default/files/afghanistan_protection_of_civilians_annual_report_2017_final_6_march.pdf

⁸³ See Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka, 31 March 2011, para. 188. See also Report of the International Commission of Inquiry to investigate all Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya, UN Doc. A/HRC/17/44 (2011); Report of the International Commission of Inquiry on the Situation of Human Rights in the Syrian Arab Republic, UN Doc. A/HRC/19/69 (2012), para. 106; and UN Mission in the Republic of South Sudan (UNMISS), *Conflict in South Sudan: A Human Rights Report*, 8 May 2014, para. 18.

⁸⁴ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on armed non-State actors: the protection of the right to life, UN Doc. A/HRC/38/44 (2018), para. 51.

⁸⁵ *Ibid.*, para. 56.

relevant⁸⁶ to cases where armed non-State groups exercising State or quasi-State authority,⁸⁷ or business entities⁸⁸ have a responsibility to respect the right to life and to remedy any abuses they cause or to which they contribute.⁸⁹

2.5 The right to remedy and reparation

The right to an effective remedy

As the 2016 Minnesota Protocol recalls,⁹⁰ persons whose rights have been violated have the right to a full and effective remedy.⁹¹ An effective remedy is a form of access to an independent authority that has the power to decide whether a human rights violation has taken place or is taking place and the power to offer a remedy (for instance, by ordering cessation or reparation).

The right to a remedy is the subject of a separate ICJ Practitioners' Guide.⁹² That Guide identifies a set of cumulative criteria that a remedy must satisfy:

- Promptness and effectiveness;
- Independence of the awarding authority;
- Accessibility including legal assistance;
- Leading to cessation and reparation and guarantees of non-repetition; and

⁸⁶ 2016 Minnesota Protocol, para. 5.

⁸⁷ With respect to armed groups, see Report of the UN Fact-Finding Mission on the Gaza Conflict, UN Doc. A/HRC/12/48 (2009), para. 1836.

⁸⁸ OHCHR, *Guiding Principles on Business and Human Rights*, UN Doc. HR/PUB/11/04 (2011).

⁸⁹ Basic Principles and Guidelines on Remedy and Reparation.

⁹⁰ 2016 Minnesota Protocol, para. 10.

⁹¹ See Basic Principles and Guidelines on Remedy and Reparation; Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, Principle 4; ICCPR, Article 2(3).

⁹² ICJ, *The Right to a Remedy and to Reparation for Gross Human Rights Violations*, Practitioners' Guide No. 2, at: <https://www.icj.org/the-right-to-a-remedy-and-reparation-for-gross-human-rights-violations-2018-update-to-practitioners-guide-no-2/>

- Leading to an investigation.

The first requirement for a remedy is that it should be prompt and effective, providing meaningful access to justice for a victim of a human rights violation. Effectiveness means that the remedy must not be theoretical and illusory, but offer practical and real access to justice. It must be capable of finding whether a violation took place and be able to remedy it.

Secondly, the authority which reviews the remedy must be independent, in the sense that the remedy must not be subject to interference by the authorities against which the complaint is brought.

Third, an effective remedy is one that is both simple and accessible. This means that there must be the real possibility of access to legal representation. It may also require the provision of free legal aid.

Fourth, as the Human Rights Committee has emphasized, effective remedies are those that demand cessation, offer reparation, and seek to prevent the recurrence of violations.⁹³

Fifth, as the following section highlights, the right to an effective remedy should encompass the right to a prompt, effective, independent and impartial, and transparent investigation.

The right to reparation

As part of their right to a remedy, family members of victims of unlawful death have the right to adequate, effective, and prompt reparation. Reparation includes restitution, compensation, rehabilitation, guarantees of non-repetition,

⁹³ Human Rights Committee, General Comment No. 31, para. 15.

and satisfaction.⁹⁴ Relatives of the disappeared and/or extrajudicially executed persons have the right to reparation.⁹⁵

Restitution should, whenever possible, restore the victim (or family members in the event of death) to the original situation before the violations of international human rights law or IHL occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.⁹⁶

Compensation should be provided for "any economically assessable damage" for the consequences of violations of international human rights law and IHL. Such consequences include the following, according to the UN Basic Principles and Guidelines on the Right to Remedy and Reparation:

- (a) Physical or mental harm;
- (b) Lost opportunities, including employment, education and social benefits;
- (c) Material damages and loss of earnings, including loss of earning potential;
- (d) Moral damage;
- (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.⁹⁷

The level of compensation should be "as appropriate and proportional to the gravity of the violation and the circumstances of each case".

⁹⁴ See, e.g., Human Rights Committee, General Comment No. 31, paras. 15–17 and 19; and *Yrusta v Argentina*, Committee on Enforced Disappearance Communication 1/2013, UN Doc CED/C/10/D/1/2013 (2016).

⁹⁵ ICJ, *Enforced Disappearance and Extrajudicial Execution: The Rights of Family Members*, Practitioners' Guide No. 10, Chap. VI.

⁹⁶ UN Basic Principles and Guidelines on the Right to Remedy and Reparation, para. 19.

⁹⁷ *Ibid.*, para. 20.

Rehabilitation should include medical and psychological care, as well as legal and social services.⁹⁸

Guarantees of non-repetition involve the State (or non-State armed group) accepting that what they did was unlawful or wrong and pledging that such actions will not recur. Examples of what amount to such guarantees are offered in the following Chapter of this Practitioners' Guide.

Satisfaction includes government verification of the facts and public disclosure of the truth, an accurate accounting for of the legal violations, sanctions against those responsible for the violations, and the search for the disappeared and for the bodies of those killed.⁹⁹

⁹⁸ Ibid., para. 21.

⁹⁹ See Basic Principles and Guidelines on Remedy and Reparation, para. 22.

3. The Duties of States to Investigate and Prosecute

International law sets standards for an adequate investigation of potentially unlawful death and also requires a range of accountability measures when fault is identified. Where fault rises to the level of criminal responsibility, prosecution would normally be expected to follow. These duties are, as the Human Rights Committee has recalled, an important element of the protection afforded to the right to life.¹⁰⁰ This is so whether an alleged arbitrary deprivation of life results from the act or omission of State authorities, including where it is alleged that they have used excessive force, or from the actions of private individuals and entities.

3.1 The necessary character of the investigation

There are at least four required aspects to the character of an investigation that meets the standards set under international law: effectiveness; independence and impartiality; promptness; and transparency.¹⁰¹ The duty to investigate and the necessary character of the investigation are reflected in both treaties and soft law instruments, as summarised below.

Treaty law

Convention against Torture

"Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever

¹⁰⁰ Human Rights Committee, General Comment No. 36 on the right to life, paras. 19, 27.

¹⁰¹ The Human Rights Committee (ibid., para. 28) has offered a longer list of criteria for an investigation into an alleged violation of Article 6 of the ICCPR: it must always be independent, impartial, prompt, thorough, effective, credible, and transparent. Substantively, however, these criteria are adequately reflected in the four elements identified above.

there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.” (Article 12)

International Convention for the Protection of All Persons from Enforced Disappearance

“Each State Party shall ensure that any individual who alleges that a person has been subjected to enforced disappearance has the right to report the facts to the competent authorities, which shall examine the allegation promptly and impartially and, where necessary, undertake without delay a thorough and impartial investigation.” (Article 12)

Soft law

Minnesota Principles

“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.” (Principle 9)

Declaration on Human Rights Defenders

“The State shall conduct a prompt and impartial investigation or ensure that an inquiry takes place whenever there is reasonable ground to believe that a violation of human rights and fundamental freedoms has occurred in any territory under its jurisdiction.” (Article 9)

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 IHL

“Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law.” (Principle 3)

Updated Set of principles for the protection and promotion of human rights through action to combat impunity

"States shall undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished. (Principle 19)

Effectiveness

By definition, an ineffective investigation cannot meet the demands of international law. To be capable of being effective, at a minimum, **an investigation must take all reasonable steps to:**

- Identify the victim or victims;
- 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); and
- Determine who was involved in the death and their associated individual and collective responsibility.¹⁰²

To meet these aims, investigators must, to the extent they are able to do so, collect and confirm all relevant witness, documentary, digital, and physical evidence.¹⁰³

The 2016 Minnesota Protocol states that it will "almost always be the case" that meeting these aims "will be materially assisted in some way by the performance of an autopsy". It therefore states that any decision not to undertake an autopsy

¹⁰² 2016 Minnesota Protocol, para. 25.

¹⁰³ Ibid., para. 24.

should be justified in writing and should also be "subject to judicial review".¹⁰⁴

The 1989 Minnesota Principles declare that an investigation "shall include an adequate autopsy". The Model Protocol on Autopsy contained as an annex in the original 1991 Minnesota Protocol was one of the most frequently cited in jurisprudence. This trend appears to be continuing under the new version of the Protocol. In December 2017, the Committee against Torture urged Rwanda to guarantee that any investigation into allegations of extrajudicial, arbitrary, or summary executions entails an independent forensic examination, including, if necessary, an autopsy, in line with the 2016 Minnesota Protocol.¹⁰⁵

The Human Rights Committee, which also cites the Protocol, is, however, a little more equivocal, stipulating that: "Where relevant, the investigation should include a rigorous autopsy of the victim's body".¹⁰⁶ In the case of an enforced disappearance, an investigation must seek to determine the fate of the disappeared and, where the disappeared person is in fact dead, the location of their remains.¹⁰⁷

Of course, not every investigation, however well it is conducted, achieves all three core aims set out above. As the formulation indicates, the notion of effectiveness is one of means and process, and not of outcome. This means that an investigation must be carried out "diligently and in accordance with good practice".¹⁰⁸

¹⁰⁴ Ibid., para. 25.

¹⁰⁵ Committee against Torture, Concluding Observations on the second periodic report of Rwanda, UN Doc. CAT/C/RWA/CO/2 (2017), para. 39(a).

¹⁰⁶ Human Rights Committee, General Comment No. 36 on the right to life, para. 28.

¹⁰⁷ 2016 Minnesota Protocol, para. 25.

¹⁰⁸ 2016 Minnesota Protocol, para. 27, citing: *Abubakar Amirov and others v Russia*, Human Rights Committee Communication 1447/2006, UN Doc CCPR/C/95/D/1446/2006 (2009), para. 11.4 *et seq.*; *Rodríguez Vera and*

Whatever investigative mechanism is conducting the investigation – and, as noted above, the 2016 Minnesota Protocol is not prescriptive in this regard – must, at a minimum, have the power to compel witnesses and require the production of evidence.¹⁰⁹ The mechanism must also have sufficient financial and human resources to do its job professionally, including qualified investigators and other relevant experts.¹¹⁰ If the State does not possess the requisite technical expertise it should seek it from others through international cooperation and assistance.¹¹¹ The mechanism must further be capable of ensuring the safety and security of witnesses, including, where necessary, through an effective witness protection programme.¹¹²

Potentially, though, there are also broader considerations to be assessed by an investigation, especially one in which the acts or omissions of the State are involved. The 2016 Minnesota Protocol observes that an investigation should, for instance, seek to identify failures to take reasonable measures that could have prevented 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. The Protocol gives the example of how, in order to establish the element of “widespread or systematic” in the context of an attack against the civilian population for the purpose of assessing an alleged crime against humanity, evidence of the same chronology of events in different towns could be valuable. This might encompass some or all of the following:

- The arming of certain groups within the area;

others (The Disappeared from the Palace of Justice) v Colombia, IACtHR Judgment of 14 November 2014, para. 489.

¹⁰⁹ *Paul and Audrey Edwards v United Kingdom*, Judgment (2002) ECHR 303.

¹¹⁰ *"Mapiripán Massacre" v Colombia*, IACtHR Judgment of 15 September 2005, para. 224.

¹¹¹ 2016 Minnesota Protocol, para. 77.

¹¹² 2016 Minnesota Protocol, para. 27.

- 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.¹¹³

Independence and impartiality

To be capable of being effective, it is normally the case that investigators and investigative mechanisms must be – and must be seen to be – independent of undue influence.¹¹⁴ Both investigator and mechanism must be "independent institutionally and formally, as well as in practice and perception, at all stages".¹¹⁵ Investigators must be impartial and must act at all times without bias, acting in accordance with recognized professional duties, standards, and ethics,¹¹⁶ and analysing all evidence objectively. They must, the Protocol recalls, "consider and appropriately pursue exculpatory as well as inculpatory evidence".¹¹⁷

The Minnesota Protocol does not require that an investigation into alleged wrongdoing by the security forces be conducted by a civilian agency entirely unconnected with the particular force, but it does require it to be "independent of any

¹¹³ Ibid., para. 32, note 62.

¹¹⁴ Ibid., para. 28.

¹¹⁵ Ibid.

¹¹⁶ See Section III of the 2016 Minnesota Protocol on the question of ethics.

¹¹⁷ 2016 Minnesota Protocol, para. 29.

suspected perpetrators and the units, institutions or agencies to which they belong".¹¹⁸ In the case of a fatal police shooting, for example, the investigation "must be capable of being carried out free from undue influence that may arise from institutional hierarchies and chains of command".¹¹⁹ Furthermore, 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."¹²⁰

Thus, for instance, in December 2017, the Committee against Torture urged Rwanda to ensure that all allegations of extrajudicial, arbitrary, or summary executions and enforced disappearances are investigated with impartiality by an independent authority and that those responsible are punished if found guilty, including potential officers or civilian authorities who may bear command responsibility.¹²¹

Promptness

The rights to life and to an effective remedy are violated when investigations into potentially unlawful death are not conducted "promptly".¹²² The authorities must conduct an investigation "as soon as possible" and must proceed "without unreasonable delay".¹²³ Thus, officials who know of a potentially unlawful death must report it to their superiors and/or other proper authorities without delay.¹²⁴

¹¹⁸ Ibid., para. 31.

¹¹⁹ Ibid.

¹²⁰ Ibid., para. 28.

¹²¹ Committee against Torture, Concluding Observations on the second periodic report of Rwanda, UN Doc. CAT/C/RWA/CO/2 (2017), para. 39(a).

¹²² *Garibaldi v Brazil*, IACtHR Judgment of 23 September 2009, para. 39.

¹²³ 2016 Minnesota Protocol, para. 23.

¹²⁴ *Anzualdo Castro v Peru*, IACtHR Judgment of 22 September 2009, para. 134.

As mentioned earlier, 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 **have been made**.¹²⁵ The duty of promptness does not, however, justify a rushed or unduly hurried investigation. In its 2016 judgment in the *Pomilyayko* case, for instance, the European Court of Human Rights stated that "the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis for their decisions".¹²⁶ Closing the book on an investigation too early to avoid finding where fault lies is just as unacceptable as closing it too late.

At the same time, when armed conflict is raging, or a regime in power is committing crimes against humanity against its own populace, it may be months or even years before it is realistically possible to conduct an on-site investigation. The failure of the State and/or the relevant authorities promptly to investigate a potentially unlawful death when the death occurs does not relieve it of its duty to investigate subsequently. The duty to investigate does not cease even with the passing of significant time.¹²⁷

Transparency

International law demands that investigative processes and outcomes must be transparent, including through openness to the scrutiny of the general public and of victims' families.¹²⁸ This principle was at stake in the 2001 case of *McKerr v United*

¹²⁵ 2016 Minnesota Protocol, para. 15, citing the European Court of Human Rights in: *Ergi v Turkey*, Judgment of 28 July 1998, para. 82; *Isayeva, Yusopva and Bazayeva v Russia*, Judgment of 24 February 2005, paras. 208–09. See also *Montero-Aranguren and others v Venezuela*, IACtHR Judgment of 5 July 2006, para. 79.

¹²⁶ *Pomilyayko v Ukraine* (2016) ECHR 170, para. 53.

¹²⁷ 2016 Minnesota Protocol, para. 23.

¹²⁸ *Ibid.*, para. 32.

Kingdom. In its judgment, the European Court of Human Rights stated that:

“the shortcomings in transparency and effectiveness ... run counter to the purpose identified by the domestic courts of allaying suspicions and rumour. Proper procedures for ensuring the accountability of agents of the State are indispensable in maintaining public confidence and meeting the legitimate concerns that might arise from the use of lethal force.”¹²⁹

The lack of transparency identified by the Court with respect to a shooting to death of three men in a car by the Royal Ulster Constabulary in 1982 founded a violation of the procedural element of the right to life.

The 2016 Minnesota Protocol calls on States to 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.”¹³⁰

The Protocol cautions that any limitations on transparency must be strictly necessary for a legitimate purpose, such as protecting the privacy and safety of affected individuals, ensuring the integrity of ongoing investigations, or securing sensitive information about intelligence sources or military or police operations:¹³¹

“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.”¹³²

¹²⁹ *McKerr v United Kingdom* (2001) ECHR 329, para. 160.

¹³⁰ 2016 Minnesota Protocol, para. 32.

¹³¹ *Ibid.*, para. 33.

¹³² *Ibid.*

Thus, in his interim report in 2010, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions stated that a victim's immediate family "must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests".¹³³ Without jeopardizing an ongoing investigation, it is usually possible to describe the process, for instance, the number of people who have been interviewed, the date when there will next be a press conference convened, and even the type of forensic expertise that has been engaged.

3.2 The duty to prosecute

Investigations must seek to ensure accountability for unlawful death. In particular, they must be capable of leading to the identification and, if justified by the evidence and seriousness of the case, the prosecution and punishment of all those responsible.¹³⁴ This includes the legal responsibility of superior officials with regard to violations of the right to life committed by their subordinates.¹³⁵

The Human Rights Committee has recalled that given the importance of the right to life, States parties to the ICCPR "must generally refrain from addressing violations of article 6 merely through administrative or disciplinary measures, and a criminal investigation is normally required, which should lead, if enough incriminating evidence is gathered, to a criminal

¹³³ UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Interim Report, UN Doc. A/65/321 (2010).

¹³⁴ 2016 Minnesota Protocol, paras. 8(c) and 24, citing: *José Antonio Coronel and others v Colombia*, Human Rights Committee Communication 778/1997, UN Doc CCPR/C/76/D/778/1997 (2002); *Sathasivam v Sri Lanka*, Human Rights Committee Communication 1436/2005, UN Doc CCPR/C/93/D/1436/2005 (2008); and *Abubakar Amirov and others v Russia*, Human Rights Committee Communication 1447/2006, UN Doc CCPR/C/95/D/1447/2006 (2009). See also the Working Group on Enforced or Involuntary Disappearances, General Comment No. 10 on the Right to the Truth in Relation to Enforced Disappearances, UN Doc A/HRC/16/48 (2008), para. 5.

¹³⁵ Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc A/HRC/26/36 (2014), para. 81.

prosecution”.¹³⁶ This is consistent with the (Updated) Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity.

In any situation, the 2016 Minnesota Protocol affirms that States must ensure that any special mechanisms they create do not serve to undermine accountability “by, for example, unduly delaying or avoiding criminal prosecutions”.¹³⁷ Thus, a special investigative mechanism that is, for example “designed 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”.¹³⁸

At the same time, as the Minnesota Protocol recalls, investigators must not be prosecuted or threatened with prosecution, for carrying out their work impartially and professionally:

“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.”¹³⁹

This state of affairs “applies equally to lawyers, whatever their relationship to the investigation”.¹⁴⁰

¹³⁶ Human Rights Committee, General Comment No. 36 on the right to life, para. 27, citing: *Arellano v Colombia*, Communication 563/93, UN Doc CCPR/C/55/D/563/1993 (1995), para. 8.2; and *Marcellana and Gumanoy v The Philippines*, Communication 1560/2007, UN Doc CCPR/C/94/D/1560/2007 (2008), para. 7.2.

¹³⁷ 2016 Minnesota Protocol, para. 40.

¹³⁸ *Ibid.*

¹³⁹ 2016 Minnesota Protocol, para. 30.

¹⁴⁰ UN Basic Principles on the Role of Lawyers, adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, 1990 (hereafter the Basic Principles on the Role of Lawyers), Principles 16 and 17.

In a situation of armed conflict, 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 (or extradite them for prosecution to a more appropriate jurisdiction).¹⁴¹ This principle of compulsory universal jurisdiction is also known by the Latin moniker, *aut dedere, aut judicare*.

3.3 The duty to prevent recurrence

Guarantees of non-repetition

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.¹⁴² These should, though, be complemented by guarantees of non-repetition of the unlawful behaviour.¹⁴³ As the UN Basic Principles and Guidelines on the Right to Remedy and Reparation stipulate, such guarantees should include the following measures, as appropriate:

- (a) Ensuring effective civilian control of military and security forces;
- (b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;
- (c) Strengthening the independence of the judiciary;
- (d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;
- (e) Providing, on a priority and continued basis, human rights and international humanitarian law education

¹⁴¹ 2016 Minnesota Protocol, para. 21.

¹⁴² Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. A/70/304 (2015); Preamble to the Basic Principles and Guidelines on Remedy and Reparation.

¹⁴³ Basic Principles and Guidelines on Remedy and Reparation, para. 23.

- to all sectors of society and training for law enforcement officials as well as military and security forces;
- (f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;
 - (g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution; and
 - (h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.

These measures will contribute to the prevention of future violations.¹⁴⁴ Thus, in addition to guarantees of non-repetition, investigations must also aim to draw necessary lessons for revising practices and policies with a view to avoiding repeated violations.¹⁴⁵

Action to combat impunity

The UN Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity consider impunity to include the granting of amnesties to those who have committed serious crimes under international law even “when intended to establish conditions conducive to a peace agreement or to foster national reconciliation”, unless and until they have been duly prosecuted and convicted.¹⁴⁶ As the

¹⁴⁴ Ibid.

¹⁴⁵ Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc E/CN.4/2006/53 (2006), para. 41.

¹⁴⁶ UN Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, Principle 24; see also I. Siatitsa and M. Wierda, “Principle 24: Restrictions and other measures relating to amnesty”, in F. Haldemann and T. Unger (eds.), *The United Nations Principles to Combat*

Human Rights Committee recalls, immunities and amnesties accorded "to the perpetrators of intentional killings and to their superiors, and comparable measures leading to de facto or de jure impunity, are, as a rule, incompatible with the duty to respect and ensure the right to life, and to provide victims with an effective remedy".¹⁴⁷ Impunity may stem from unreasonably short statutes of limitations or blanket amnesties (de jure impunity), or from prosecutorial inaction or political interference (de facto impunity).¹⁴⁸ Either is incompatible with the duty to prosecute,¹⁴⁹ and, as the OHCHR has remarked, impunity "is often the primary obstacle to upholding the rule of law".¹⁵⁰

The Inter-American Court of Human Rights observed in its judgment in the *Barrios Altos* case that "amnesty laws lead to the defencelessness of victims and perpetuate impunity; therefore, they are manifestly incompatible with the aims and spirit" of the American Convention on Human Rights. "This type of law precludes the identification of the individuals who are responsible for human rights violations, because it obstructs the investigation and access to justice and prevents the victims and their next of kin from knowing the truth and receiving the corresponding reparation."¹⁵¹

The UN Basic Principles and Guidelines on the Right to Remedy and Reparation stipulate that treaties or other international instruments shall not apply statutes of limitations to gross violations of international human rights law and serious violations of IHL which constitute crimes under international

Impunity: A Commentary, Oxford Commentaries on International Law (Oxford: Oxford University Press, 2018).

¹⁴⁷ Human Rights Committee, General Comment No. 31, para. 18.

¹⁴⁸ 2016 Minnesota Protocol, para. 8(c).

¹⁴⁹ See, e.g., Human Rights Committee, General Comment No. 31, para. 18.

¹⁵⁰ OHCHR, "Impunity and the rule of law", Report, 2011, p. 44, at: http://www2.ohchr.org/english/ohchrreport2011/web_version/ohchr_report2011_web/allegati/10_Impunity.pdf

¹⁵¹ *Barrios Altos v Peru*, IACtHR Judgment of 14 March 2001, para. 43.

law.¹⁵² Thus, under Article 27(2) of the ICC Statute, it is stipulated that “[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person”. With respect to domestic statutes of limitations for violations that do not constitute crimes under international law, the UN Basic Principles and Guidelines on the Right to Remedy and Reparation provide that time limitations, including those that apply to civil claims and other procedures, “should not be unduly restrictive”.¹⁵³

The OHCHR has stressed the importance of constitutional amendments and the rule of constitutional courts in tackling impunity. The Office cites the example of Mexico, which amended its Constitution, giving constitutional status to all human rights provisions enshrined in international treaties to which Mexico is a State party.¹⁵⁴ In Mauritania, the criminalization of torture and slavery practices was incorporated in the Constitution, along with the establishment of the National Human Rights Commission.

Of course, constitutional amendments are extremely hard to pass and, even if they do, extremely time- and resource-consuming. Practical measures can also, though, be put in place to try to tackle impunity. In Kenya, for instance, a Witness Protection Agency¹⁵⁵ was set up in 2008 with a view to ending impunity by aiding investigations and prosecutions and protecting evidence and witnesses of alleged crimes.¹⁵⁶ But implementing an effective witness protection system requires further efforts, as the example of Kenya has shown. It needs courts to transmit cases to the relevant agency and sufficient

¹⁵² Basic Principles and Guidelines on Remedy and Reparation, para. 6.

¹⁵³ *Ibid.*, para. 7.

¹⁵⁴ OHCHR, “Impunity and the rule of law”, Report, 2011, p. 44.

¹⁵⁵ www.wpa.go.ke/.

¹⁵⁶ OHCHR, “Impunity and the rule of law”, Report, 2011, pp. 44, 48.

funding for the protection activities to occur. Both have proved problematic in Kenya.¹⁵⁷

The ICJ has dedicated a Practitioners' Guide (No. 7) to the issue of impunity: *International Law and the Fight Against Impunity*.¹⁵⁸ As the Guide recalls, the Inter-American Commission on Human Rights has consistently stated that measures of reparation given to victims and their family members, as well as the creation of "Truth Commissions", do not under any circumstances exonerate the State of its obligation to bring the perpetrators of the human rights violations to justice and punish them.¹⁵⁹

The problem of military courts

The ICJ Practitioners' Guide on impunity highlights a particular problem with military courts.¹⁶⁰ Prosecuting members of the armed forces and the police who have committed gross human rights violations in military courts has constituted "one of the greatest sources of impunity in the world".¹⁶¹

One of the essential aspects of the independence of the courts is that its magistrates and judges should be judicial officials and that they shall not be subordinate to, or have any type of hierarchical dependency in relation to, any of the other

¹⁵⁷ See, e.g., W. Gathu, "Big Questions About Witness Protection in Kenya", Institute for War & Peace Reporting ACR Issue 391 (27 May 2014), at: <https://goo.gl/KfuAYU>

¹⁵⁸ ICJ, *International Law and the Fight Against Impunity*, Practitioners' Guide No. 7.

¹⁵⁹ See, e.g., Inter-American Commission on Human Rights Reports: No. 28/92 (Cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311) (Argentina), 2 October 1992, para. 52; No. 36/96 (Case 10.843) (Chile), 15 October 1996, para. 77; No. 136/99 (Case 10.488 Ignacio Ellacuría S.J. and others) (El Salvador), 22 December 1999, para. 230.

¹⁶⁰ ICJ, *International Law and the Fight Against Impunity*, Practitioners' Guide No. 7, Chapter IX, p. 317ff.

¹⁶¹ Ibid., p. 317.

powers, the Executive in particular.¹⁶² This poses particular challenges in the case of military courts.

While the use of military courts cannot be entirely excluded under international human rights law, there is an identifiable trend that their use should be circumscribed when grave violations of human rights are alleged. According to Emmanuel Decaux, for example, the UN Special Rapporteur on the Administration of Justice by Military Courts:

“Contrary to the functional concept of the jurisdiction of military tribunals, there is today a growing tendency to consider that persons accused of serious human rights violations cannot be tried by military tribunals insofar as such acts would, by their very nature, not fall within the scope of the duties performed by such persons. Moreover, the military authorities might be tempted to cover up such cases by questioning the appropriateness of prosecutions, tending to file cases with no action taken or manipulating “guilty pleas” to victims’ detriment. Civilian courts must therefore be able, from the outset, to conduct inquiries and prosecute and try those charged with such violations. The initiation by a civilian judge of a preliminary inquiry is a decisive step towards avoiding all forms of impunity. The authority of the civilian judge should also enable the rights of the victims to be taken fully into account at all stages of the proceedings.”¹⁶³

In this vein, the UN Committee against Torture has systematically emphasized that the suspected perpetrators of torture or other inhumane acts that are crimes must be tried by civil judicial mechanisms and not military courts.¹⁶⁴ Likewise, both the Inter-American Commission on Human Rights and the Inter-American Court on Human Rights have

¹⁶² See ICJ, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors*, Practitioners’ Guide No. 1.

¹⁶³ Issue of the administration of justice through military tribunals – Report submitted by the Special Rapporteur of the Sub-commission for the Promotion and Protection of Human Rights, Emmanuel Decaux, UN Doc. E/CN.4/2006/58 (2006), para. 32.

¹⁶⁴ See the sources cited in the ICJ Practitioners’ Guide No. 7 at p. 340.

affirmed that the main role of a military criminal jurisdiction is the maintenance of order and discipline in the military and, therefore, must apply only to military crimes committed by military personnel. Both bodies reiterated that grave human rights violations should not be part of the competence of military tribunals.¹⁶⁵

¹⁶⁵ Ibid., p. 341 and sources cited in footnote 1381.

4. The Rights of Victims' Families and of Witnesses

The rights of witnesses to protection were accorded relatively scant attention in the original Minnesota Protocol, notwithstanding their critical importance in any investigation. Yet, as the original Protocol acknowledged: "Even when Governments order inquests, investigators often find it difficult to ascertain the facts surrounding arbitrary executions. Eyewitness accounts may be hard to obtain because witnesses fear reprisals or because the only witnesses were those conducting executions themselves."¹⁶⁶

The families of victims similarly require protection against harassment. In the context of a commission of inquiry, the 1991 Protocol stated that the relevant government "shall protect complainants, witnesses, those conducting the investigation, and their families from violence, threats of violence or any other form of intimidation".¹⁶⁷ In other respects, though, the original Protocol had little to say about the rights of victims' families and witnesses.

In considering the rights of victims' families and of witnesses, this Chapter draws both from the 2016 Minnesota Protocol and the ICJ's Practitioners' Guide No. 10 on *Enforced Disappearance and Extrajudicial Execution: the Right of Family Members*.¹⁶⁸

4.1 The right to protection

¹⁶⁶ 1991 Minnesota Protocol, Section II.

¹⁶⁷ Ibid., Section III(D)(9).

¹⁶⁸ ICJ, *Enforced Disappearance and Extrajudicial Execution: the Right of Family Members*, Practitioners' Guide No. 10 (2015), available in English and Spanish at <https://www.icj.org/enforced-disappearance-and-extrajudicial-execution-the-right-of-family-members-icj-practitioners-guide-no-10-now-also-in-english/>

The 1989 Minnesota Principles explicitly require that complainants, witnesses, those conducting the investigation, and their families 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.¹⁶⁹

Similarly, the UN Basic Principles and Guidelines on the Right to Remedy and Reparation call on States to ensure the safety from intimidation and retaliation of the families of victims and of witnesses “before, during and after judicial, administrative, or other proceedings that affect the interests of victims”.¹⁷⁰

The 2016 Minnesota Protocol devotes a specific sub-section to the participation and protection of family members during an investigation. Thus, Paragraph 36 of the Protocol states that:

“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.”

With respect to witnesses, the 2016 Protocol calls for careful assessment of risk, and insists that “strategies and adequate human and financial resources must be in place to ensure the safety and security of all witnesses” in a case. It recalls that families “in some circumstances could, with reason, fear for their safety”.¹⁷¹ The Protocol further calls for a specific strategy to be developed, “especially if a suspect is a State official, to ensure that anyone coming forward will be assured that the

¹⁶⁹ 1989 Minnesota Principles, Principle 15.

¹⁷⁰ Basic Principles and Guidelines on Remedy and Reparation, para. 12(b).

¹⁷¹ 2016 Minnesota Protocol, para. 71.

information they provide will be dealt with confidentially, within the limits of the law".¹⁷²

Such protection may demand "special measures", for instance those described by the Human Rights Committee and referred to above: "round-the-clock police protection, the issuance of protection and restraining orders against potential aggressors and, in exceptional cases, and only with the free and informed consent of the threatened individual, protective custody".¹⁷³

Protection of whistle-blowers

Whistle-blowers¹⁷⁴ may also require special protection. In 2015, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression submitted a report to the UN General Assembly on the protection of sources and whistle-blowers. He recalled that whistle-blower protections rest upon a core right to freedom of expression. Article 19 of the ICCPR emphasizes that "the freedom applies to information and ideas of all kinds. Sources and whistle-blowers enjoy the right to impart information, but their legal protection when publicly disclosing information rests especially on the public's right to receive it."¹⁷⁵

The Special Rapporteur called for personal liability to be established for those who retaliate against whistle-blowers. He recalled that when attacks "are condoned or perpetrated by authorities in leadership positions they consolidate a culture of

¹⁷² Ibid., para. 76.

¹⁷³ Ibid., para. 27.

¹⁷⁴ The UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression in his 2015 report to the UN General Assembly discussed in this section defines a whistle-blower as "a person who exposes information that he or she reasonably believes, at the time of disclosure, to be true and to constitute a threat or harm to a specified public interest, such as a violation of national or international law, abuse of authority, waste, fraud, or harm to the environment, public health or public safety." See UN Doc. A/70/361 (2015), para. 28.

¹⁷⁵ Ibid., para. 5.

silence, secrecy and fear within institutions and beyond, deterring future disclosures".¹⁷⁶ He stated that reprisals and other attacks against whistle-blowers "must be thoroughly investigated and those responsible for those acts held accountable".¹⁷⁷ He cautioned that particular attention be paid "to the ways in which authorities in leadership positions encourage retaliation, tacitly or expressly, against whistle-blowers".¹⁷⁸

4.2 The right of victims' families to remedies and reparation

The right to the truth

The 2016 Minnesota Protocol states that 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".¹⁷⁹ In the view of the Special Rapporteur on extrajudicial, summary or arbitrary executions, States need to take appropriate measures to establish the truth relating to the events leading to the deprivation of life, including revealing the reasons for targeting certain individuals and the procedures employed by State forces before, during, and after the time in which the deprivation occurred.¹⁸⁰ Moreover, 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".¹⁸¹

¹⁷⁶ Ibid., para. 66.

¹⁷⁷ Ibid.

¹⁷⁸ Ibid.

¹⁷⁹ 2016 Minnesota Protocol, para. 11, citing: UN General Assembly Resolution 68/165 (2013); Inter-American Commission on Human Rights, *Report on the Demobilization Process in Colombia*, Doc. OEA/Ser.L/V/II.120, 13 December 2004, para. 18.

¹⁸⁰ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc A/HRC/14/24/Add.6 (2010), para. 93; see Human Rights Committee, General Comment No. 36 on the right to life, para. 28.

¹⁸¹ 2016 Minnesota Protocol, para. 11.

The right to know the truth extends to society as a whole, “given the public interest in the prevention of, and accountability for, international law violations”.¹⁸² Both family members and society as a whole “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”.¹⁸³ The Protocol further recalls that the effective implementation of the right to the truth is supported by a strong national archival system.¹⁸⁴

The right to justice

Family members of victims of unlawful death have the right to equal and effective access to justice.¹⁸⁵ To support this right to justice, it is imperative that all those involved in investigating potentially unlawful death meet the highest professional and ethical standards and work to secure the integrity and effectiveness of the investigation process.¹⁸⁶

There are particular expectations of forensic pathologists, who must act independently and impartially.¹⁸⁷ As the 2016 Minnesota Protocol further stipulates:

“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.”¹⁸⁸

¹⁸² *Slaughter of the Rochela v Colombia*, IACtHR Judgment of 11 May 2007, para. 195; *Bámaca Velásquez v Guatemala*, IACtHR Judgment of 25 November 2000, para. 197.

¹⁸³ 2013 Tshwane Principles on National Security and the Right to Information, Principle 10.

¹⁸⁴ 2016 Minnesota Protocol, para. 170.

¹⁸⁵ *Ibid.*, para. 10.

¹⁸⁶ *Ibid.*, para. 41.

¹⁸⁷ *Ibid.*, para. 44.

¹⁸⁸ *Ibid.*

The right to reparation

The 1989 Minnesota Principles declared that “the families and dependents of victims of extra-legal, arbitrary or summary executions shall be entitled to fair and adequate compensation within a reasonable period of time”.¹⁸⁹ The UN Basic Principles and Guidelines on the Right to Remedy and Reparation require States that have not already done so to ensure that their domestic law “is consistent with their international legal obligations” by making available “adequate, effective, prompt and appropriate remedies, including reparation” for the victims of serious violations of international human rights law and IHL.¹⁹⁰ Moreover, in addition to individual access to justice, States “should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate”.¹⁹¹

With respect to cases of enforced disappearance, the Human Rights Committee has called on States parties to the ICCPR to “bring to justice the perpetrators of such acts and omissions and ensure that victims of enforced disappearance and their relatives are informed about the outcome of the investigation and are provided with full reparation”.¹⁹² Under no circumstances, it affirms, should families of victims of enforced disappearance be obliged to declare them dead in order to be eligible for reparation.¹⁹³

In the 1991 Minnesota Protocol, the landmark decisions of the Inter-American Court of Human Rights in the *Velásquez Rodríguez* case and the *Godínez-Cruz* case were noted.

¹⁸⁹ 1989 Minnesota Principles, Principle 20.

¹⁹⁰ Basic Principles and Guidelines on Remedy and Reparation, para. 2(c).

¹⁹¹ *Ibid.*, para. 13.

¹⁹² Human Rights Committee, General Comment No. 36 on the right to life, para. 58, citing Article 24 of the International Convention for the Protection of All Persons from Enforced Disappearance.

¹⁹³ Human Rights Committee, General Comment No. 36 on the right to life, para. 58, citing its views in *Prutina v Bosnia and Herzegovina*, Communication 1917/2009, UN Doc CCPR/C/107/1917/2009 (2013), para. 9.6.

Therein, the Court ruled that in cases of enforced disappearance the duty to investigate the facts (in those cases, upon the Government of Honduras) continues as long as there is uncertainty about the fate of the person disappeared. It ordered Honduras to pay damages as reparation to the families of the victims for its failure to do so.

According to the UN Basic Principles and Guidelines on the Right to Remedy and Reparation, the extent of reparation "should be proportional to the gravity of the violations and the harm suffered".¹⁹⁴ In its 1990 judgment on reparations in the *Godínez-Cruz* case, the Inter-American Court of Human Rights stated that:

"The compensation due victims or their families under Article 63(1) of the [American] Convention [on Human Rights] must attempt to provide *restitutio in integrum* for the damages caused by the measure or situation that constituted a violation of human rights. The desired aim is full restitution for the injury suffered. This is something that is unfortunately often impossible to achieve, given the irreversible nature of the damages suffered, which is demonstrated in the instance case. Under such circumstances, it is appropriate to fix the payment of "fair compensation" in sufficiently broad terms in order to compensate, to the extent possible, for the loss suffered."¹⁹⁵

The UN Basic Principles and Guidelines on the Right to Remedy and Reparation further state that where a natural or legal person or other entity is found liable for reparation to a victim, they should provide reparation to the victim.¹⁹⁶ States "should endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations."¹⁹⁷

¹⁹⁴ Basic Principles and Guidelines on Remedy and Reparation, para. 15.

¹⁹⁵ *Godínez-Cruz v Honduras*, IACtHR Judgment of 17 August 1990, para. 27.

¹⁹⁶ Basic Principles and Guidelines on Remedy and Reparation, para. 15.

¹⁹⁷ *Ibid.*, para. 16.

5. General Principles of Forensic Investigation of Potentially Unlawful Death

Professional and impartial forensic investigation is critical to facilitating justice in any case of potentially unlawful death. A flawed investigation means that the perpetrators may not be identified, or if they are brought to trial, they may escape conviction. At the same time, forensic evidence, especially impressive sounding probabilities of DNA matches, may sway the minds of lay people and persuade a jury (or even an experienced judge) to convict even if it the evidence is not robust and does not merit a finding of guilt.

The 2016 Minnesota Protocol sets out in detail what practical steps are integral to an effective investigation. Robust forensics are at the heart of such an investigation. Very little had been included in the original 1991 Protocol on these key issues but since its elaboration forensic science has undergone a revolution. Thus, the guidance in the revised Protocol reflects technological and technical developments in forensic investigations, whether the investigation is for the purpose of criminal law or for other means of accountability.

5.1 The key components of an effective investigation

This section describes in general terms seven key components of an effective investigation. They are:

- The elaboration of an investigation strategy;
- Family liaison;
- The development of a victim profile;
- The identification, interviewing, and protection of witnesses;
- Other evidence;
- Financial issues; and
- A chronology of events.

These seven components generally apply to any criminal investigation, not only one in which the State's involvement or responsibility is suspected or alleged.

Investigation strategy

An effective investigation is one that is based on a clearly articulated investigation strategy. The strategy, which should be put in writing, needs to identify and state clearly its goals and enabling objectives. As the 2016 Protocol emphasizes, the overarching strategy of any investigation into potentially unlawful death should be both methodical and transparent, with all legitimate lines of inquiry pursued. Depending on the circumstances, both routine investigative steps and specialized techniques may be needed.¹⁹⁸

As part of the strategy, activities should be planned and resources allocated in order to manage the collection, analysis, and management of key evidence, data, and materials; the forensic examination of important physical locations, including the death/crime scene; liaison with the family of the victim or missing person; development of a victim profile; finding, interviewing, and protecting witnesses; the need for any international technical assistance; telecommunications and other digital evidence; relevant financial issues; and the establishment of a chronology of events.¹⁹⁹

In any investigation, the preservation of life – the lives of both the public and the investigative team – is paramount. The potential involvement of the State in a death is likely to heighten the risks for all stakeholders. Risk assessment should therefore be built into the investigation strategy. Moreover, when activities need to be conducted in areas affected by conflict or other armed violence or insecurity, this will need to be factored in carefully. That said, the Protocol stipulates that members of the public and the investigation team should not be “unduly” placed in harm’s way.²⁰⁰ This implies, correctly,

¹⁹⁸ 2016 Minnesota Protocol, para. 48.

¹⁹⁹ *Ibid.*, para. 52.

²⁰⁰ *Ibid.*, para. 47.

that there is no such thing as an entirely risk-free investigation.

Investigation process

The strategy should be built on evidence as well as hypotheses. Thus, when a report or allegation of a potentially unlawful death is made or is brought to the attention of the authorities, an initial investigation needs to be conducted to identify lines of inquiry and further actions. Once a sufficient body of evidence has been gathered and analysed, preliminary conclusions should be compiled in a document that describes the lines of inquiry that have already been pursued (and their outcome).²⁰¹

This report should, at a minimum, contain the following information:

- The identity of the victim or victims (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);
- What is known about the circumstances of the death;
- The underlying reason(s) for the death(s);
- Who is/are initially believed to be responsible for the death;
- The identity and official status of the individual making the initial report; and
- The circumstances under which the report was made.

Areas in need of further investigation should then be identified.²⁰² On this basis, the resulting strategy will recommend the further inquiries that may advance the investigation and describe how they are to be conducted, and by whom. This includes the process for identifying all sources of potential evidence and the relative priorities to be accorded

²⁰¹ Ibid., para. 50.

²⁰² Ibid., para. 51.

to the collection and preservation of each piece of evidence. When, for instance, the death was seemingly at the hands of the police or other members of the internal security forces, all relevant witness statements should be collected, including – but not limited to – the accounts of the events that law enforcement personnel themselves provide.²⁰³

An investigation into a potentially unlawful death is likely to gather many different types of material, not all of which will be used as evidence in any judicial proceedings. In any event, all materials and observations relevant to the investigation should be secured, recorded, and logged. This includes all decisions taken, information gathered, and witness statements. The source, date, and time of collection of all material must also be logged.²⁰⁴

Family liaison

Wherever it is feasible and appropriate to do so, 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.²⁰⁵ A positive relationship with the family of any missing or deceased person can produce useful information and results for any investigation.²⁰⁶ At the same time, in criminal investigations, a member of the family may have been involved, or may have relevant knowledge to impart. The family liaison expert has a potentially difficult balance to maintain between supporting the family and not ignoring the availability of relevant evidence.

²⁰³ Ibid., paras. 50 and 51.

²⁰⁴ Ibid., para. 49.

²⁰⁵ Ante-mortem data includes hair, blood, saliva samples, dental or chest X-rays, and information about possible bone fractures and other injuries or diseases.

²⁰⁶ 2016 Minnesota Protocol, para. 67.

If one is appointed, the family liaison expert should meet the family at the earliest opportunity, and should thereafter provide regular updates about the progress and results of the investigation, while addressing any concerns the family may have as the investigation progresses. There will, though, be circumstances when the authorities are implicated in a suspicious death, and liaison with the authorities to transmit and receive information about the investigation will therefore be unacceptable to the family. In such circumstances, legal representatives for the family, or the involvement of NGOs such as the ICJ, may help to ensure that important information is available.²⁰⁷

The development of a victim profile

A standard element of any death investigation is the development of a victim profile. Understanding who the victim was and how he or she lived may be critical to identifying how he or she died and any culpability for the death.²⁰⁸ Information may be gathered from the victim's associations, lifestyle, behaviour patterns, and electronic devices (e.g. computer, mobile phone).²⁰⁹

The victim 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. Appropriate sensitivity should, though, be employed with respect to, for example, findings of marital infidelity or other stigmatized sexual behaviour.²¹⁰

²⁰⁷ Ibid., para. 67.

²⁰⁸ For an example of a questionnaire developed by an expert in the United States for use in case of a death that may have been a suicide or a murder staged to look like suicide, see, e.g., D. Vogel, "Equivocal Death: A Questionnaire for Investigators and Experts", at: <https://www.experts.com/Articles/Equivocal-Death-Questionnaire-Investigators-Experts-By-Dan-Vogel>

²⁰⁹ 2016 Minnesota Protocol, para. 68.

²¹⁰ Ibid.

Financial issues

To complement the victim profile, a financial profile of the victim may be valuable. For instance, where a body or remains are located, the financial profile may help to establish the time of death. In cases of missing persons, continued activity on an account may help to determine if the suspected victim is still alive. In all cases, a financial profile can reveal new leads for an investigation.²¹¹

Once a suspect has been identified for perpetration or assistance in an unlawful death, a suspect financial profile should be developed. In particular, evidence of uncharacteristic financial payments or an extravagant lifestyle should be looked for.²¹²

Finding, interviewing, and protecting witnesses

A key element in any investigation is to identify and interview individuals who might have information about a potentially unlawful death. As the Minnesota Protocol recalls, 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 an alleged killing(s), and
- (h) Identify leads in the investigation."²¹³

²¹¹ Ibid., para. 81.

²¹² Ibid., para. 82.

²¹³ Ibid., para. 70.

The purpose of establishing facts relevant to an alleged killing may pertain, for example, to 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 and following the killing.

In the context of certain crimes under international law certain “contextual” facts have to be established. For example, for a crime to amount to a crime against humanity, it has to have been committed as part of a widespread or systematic attack against any civilian population with knowledge of the attack. This part of the investigation can be wide-ranging in its scope and will look at issues such as the scale of the attack, how organized it was, and whether it was carried out pursuant to a State or organizational policy. Likewise, for war crimes, it will have to be established that the underlying acts were committed in the context of an armed conflict.

Such investigations may also collect “linkage” evidence, which is evidence that links persons, often other than the direct perpetrator, to crimes through different forms of responsibility such as command responsibility, ordering, and aiding and abetting. This often involves looking at documentary records, the testimony of “insider witnesses”, statements suspects have made including on social media, and the command structures of security forces.

The investigation should therefore draw up a list of the most significant witnesses and prioritize interviews with them. These would be, notably, individuals who saw or heard a killing being committed and people with relevant knowledge of the victim or suspected perpetrator. Also of importance are people in the same organization or chain of command as the suspected perpetrator, since they may be able to provide information linking people other than the perpetrator to the death. For example, people could be held criminally responsible for international crimes through modes of liability such as

command responsibility; participation in a joint criminal enterprise; ordering a crime; aiding and abetting it; planning it; or instigating it.²¹⁴

In circumstances where documentation of serious human rights violations which may amount to crimes under international law is being conducted, especially where future criminal trials at the national or international level is a possibility, certain considerations should be taken into account.²¹⁵

These include taking steps to mitigate harm that may be caused to witnesses and victims through uncoordinated documentation, re-traumatisation and the creation of multiple prior statements in certain situations.

In particular, key questions individuals and organizations should ask themselves during the planning stage include:

1. Where other individuals, organizations or mechanisms are conducting, or have conducted, similar documentation on the same issue is it possible to coordinate with them in order to minimize potential inconvenience or harm to victims and witnesses (and each other)?
2. Where similar documentation has already been conducted, is further documentation of the same issue necessary?
3. Do the individuals and organisations planning to gather documentation possess the requisite specialist knowledge, experience and training to be conducting

²¹⁴ Ibid., para. 72.

²¹⁵ For a detailed summary of this issue using Myanmar as an example, see: "Myanmar: documentation practices may raise challenges for accountability" Opinio Juris, 24 January 2019: <http://opiniojuris.org/2019/01/24/myanmar-documentation-practices-may-raise-challenges-for-accountability/>

the documentation, particularly of vulnerable persons including children and victims of sexual and gender-based violence (SGBV); if not, should advice and assistance be sought from persons who do?

4. Are any appropriate national or international authorities seized of the same issue and, in those circumstances, would referral to those bodies rather than conducting further documentation have a greater chance of achieving the objectives of the victim or witness and lessen the possibility of causing harm? Note that answering this question may involve an assessment of the whether the authorities in question are willing, capable, and likely in practice, to actually deliver an investigation that is in good faith, independent, thorough, prompt, impartial, competent and effective, in line with relevant international standards.
5. If a potential interviewee could be a witness or victim in ongoing or potential future criminal proceedings, and in light of the objectives and intended use of any statement produced by the interview, could creating a summary or third person record rather than recording a first person statement, signed or otherwise, or audio or video recording, serve the needed purposes while minimising risks of inconsistent prior statements that could unnecessarily negative impact the reliability, credibility or admissibility of the evidence or witness in a criminal proceeding?

Publicizing the investigation may encourage further witnesses to come forward in the knowledge that their information will be dealt with confidentially and sensitively.²¹⁶ A specific approach, though, may need to be developed if a suspect is a State official, to ensure that anyone coming forward will be confident that any information they provide will be dealt with

²¹⁶ Ibid., para. 69.

confidentially.²¹⁷ Careful attention should also be paid to the safety of the investigator, since a witness may be the perpetrator.²¹⁸

Elaborating a chronology of events

The 2016 Minnesota Protocol recommends that a “living” chronology of events be developed as the investigation proceeds. A chronology can help provide an overall understanding of events including the temporal relationship between them, identify gaps in knowledge, and generate new lines of inquiry.²¹⁹

The chronology of events can be developed from any of the material that is obtained during the investigation, but is likely to include some or all of the following:

- (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; and
- (i) Lifestyle data.

If evidence is found that calls into question the existing chronology of events, it must be reassessed. Timing of movements of individuals (victims, suspects, or key witnesses) may change, potentially undermining an alibi in relation to their actions vis-à-vis the deceased. A fictitious example is included below of how this chronology might look.

²¹⁷ Ibid., para. 76.

²¹⁸ Ibid., para. 71.

²¹⁹ Ibid., para. 83.

Date	Time	Fact	Supporting evidence
10 Jan 2018	0915	Kathryn Anderson leaves her house in her Toyota vehicle	Witness statement of Joan Adams, neighbour
10 Jan 2018	0953	Kathryn Anderson arrives at the Mairangi Bay Opportunity Shop	ATM transaction on Kathryn Anderson's Westpac credit card
10 Jan 2018	1004	Kathryn Anderson crosses Auckland Harbour Bridge in her Toyota vehicle	Timestamp on footage of CCTV located on Auckland Harbour Bridge
10 Jan 2018	1155	Kathryn Anderson's body located by John Grimshaw in Albert Park	Witness statement of John Grimshaw

Such a chronology would help establish Kathryn Anderson's time of death (between 10:04 and 11:55 on 10 January 2018 somewhere between the Auckland Harbour Bridge and Albert Park), which may, in turn, help narrow down the possible list of suspects among other things.

6. Forensic Investigation of Potentially Unlawful Death: Types of Evidence and the Chain of Custody

An effective investigation involves the careful collection, analysis, and storage of forensic evidence. This Chapter describes the different types of evidence that are collected and analysed and how they should be logged and stored (the so-called "chain of custody", also sometimes called the "chain of evidence"). The chain of custody of a piece of evidence ("an exhibit") refers to a process that enables the complete history of its custody to be tracked and recreated – who has had care and control of the evidence from the time it was first located and secured to the present (often up until it is ultimately produced by a witness in court).

6.1 Types of evidence

There are four main types of evidence: biological, digital, documentary, and physical.²²⁰ Biological evidence encompasses organic substances collected from the human body or its surroundings. Digital evidence is information and data that are stored on, received from, or transmitted by an electronic device. Digital evidence can be found in images on cameras, on the internet, computers, mobile phones, and other digital media, such as USB sticks. Documentary evidence includes records, papers, and other written or printed documentation. Physical evidence includes tools, weapons, fragments of clothing and fibres, keys, and paint. These different types of evidence are discussed in turn below.

²²⁰ Forensic accounting may be considered a fifth type of evidence or, more commonly, as a method of analysing digital and documentary evidence. Forensic accounting applies accounting, statistical, and economic analysis to a criminal investigation. In the investigation of a suspicious death, it may uncover information that helps to identify a motive for a killing and possible suspects or witnesses. 2016 Minnesota Protocol, para. 146.

In any event, sample sizes of both biological and non-biological evidence for forensic testing need to be sufficient for laboratory analysis and should be such as to allow for repeat testing.²²¹ With respect to DNA²²² profiling, the size of sample needed for analysis has reduced very significantly in the last 20 years. That said, “samples taken from a crime scene may be of low quality, having been subjected to heat, light, and moisture as well as other elements (such as the dye in denim) that degrade the DNA or inhibit the testing process. Even crime-scene samples in good condition can nonetheless behave erratically when there is a low quantity of material available to test.”²²³

Biological evidence

Biological evidence can be collected directly from the human body or from items used by the person in question, such as toothbrushes, hair brushes, and unlaundered clothing. The identification and proper collection and preservation of biological samples from a crime scene demand specialized training. Biological samples from bodies may also be collected at the morgue or forensic anthropology laboratory. The collection of biological reference samples from living persons, for comparison purposes, should be conducted by personnel trained in dealing with victims and their families, and this collection should be based on informed consent.²²⁴

Biological samples are also a source of DNA, which can be used to establish a person’s identity. Samples include the following: bone; teeth; blood; urine; saliva; semen/sperm; hair; and (natural) fingernails and toenails.²²⁵

²²¹ 2016 Minnesota Protocol, para. 131.

²²² DNA (deoxyribonucleic acid) is the main constituent of chromosomes and is present in nearly all living organisms. It is the carrier of genetic information.

²²³ E. Murphy, “Forensic DNA Typing”, *Annual Review of Criminology*, Vol. 1 (January 2018), pp. 497–515, citing J. M. Butler, *Advanced Topics in Forensic DNA Typing: Methodology*, Academic, San Diego, CA, 2012.

²²⁴ 2016 Minnesota Protocol, para. 133.

²²⁵ *Ibid.*, para. 134.

DNA analysis is used to produce profiles that are accepted as identification evidence in many courts worldwide and are individualizing to very high degrees of probability. The quality of DNA evidence, though, depends on the conditions through which it has endured and the manner in which it is gathered, secured, and stored. For instance, damp, humid conditions impede the ability to develop a reliable DNA profile. DNA evidence should therefore be maintained at a constant temperature and sealed in such a way as to minimize the risk of contamination.²²⁶ It is also important to verify how evidence is examined, since often contamination or mix-ups occur in the laboratory. Machines of course have to be properly calibrated in advance of any analysis.

Biological evidence may also be subject to toxicological analysis for drugs and poisons. This applies to biological samples from living persons as well as from the deceased.²²⁷

Digital evidence

Digital evidence has become increasingly important in investigations. But internet and mobile phone service providers frequently keep their data (such as call records) for only a certain period of time. In planning an investigation, therefore, investigators should ensure that information is requested in time.²²⁸ Mobile phone data, for instance, may help to establish the identity, roles, and relationships of "persons of interest" in an investigation and their presence at key locations.

The mobile phones of the deceased and all prime suspects should therefore be legally recovered and relevant data professionally downloaded. Such data includes dialled, missed, and received calls, text (sms) or other messages,

²²⁶ Ibid., para. 135.

²²⁷ Ibid., para. 136.

²²⁸ Ibid., para. 144.

photographs, contacts, and diary entries.²²⁹ Analysis should compare call-data numbers and data, cross-referencing the movements of all people of interest in the case, on pictorial charts, using specialist software, if it is available.²³⁰ In a number of jurisdictions, however, courts have been slow to accept mobile phone data in court proceedings.

In addition to the data itself, which may be recorded as digital photographs, audio recordings, video recordings, email communications, text messages, mobile phone applications, and social media, metadata can also provide valuable information. Metadata is information on who created the image or communication, when it was made, and where the device was located at the time. It is important to bear in mind, however, that metadata can also be easily manipulated. As the Minnesota Protocol emphasizes, authenticating digital evidence is a technical challenge. It therefore recommends that every effort be made to ensure that a qualified forensic expert recovers and/or examines digital evidence if it is expected to be important in an investigation.²³¹

Documentary evidence

Important documentary evidence includes maps, photographs, staffing records, interrogation records, administrative records, financial papers, currency receipts, identity documents, phone records, letters of correspondence, and passports. In addition to the information they contain, there may be associated biological or physical evidence (e.g. fingerprints) that can be obtained and analysed from the documents.

Physical evidence

There is a range of different forms of physical evidence. For instance, **forensic chemistry** is used to identify unknown

²²⁹ Ibid., para. 78.

²³⁰ Ibid., para. 80.

²³¹ Ibid., para. 145.

substances that are recovered as evidence. This includes suspected drugs, toxic substances, gunshot residue from firearms, and explosive materials.²³²

Firearms evidence is derived from the examination of guns and bullets that have been fired; and ballistic information, including the pattern and movement of projectiles from a firearm after discharge.²³³ Analysis of items such as clothing can determine the distance between the impact and the position from which the gun was discharged. Chemical traces on the hands or clothing of a suspect may indicate that he or she has fired a weapon.²³⁴

Trained firearms examiners may also be able to link fired projectiles, cartridge casings, and related ammunition components to a particular firearm. In addition to matching a particular firearm to a fired projectile or used cartridge casing, a firearms examiner may also be able to identify which company manufactured the gun.²³⁵ At the time of drafting of the 2016 Minnesota Protocol, however, toolmark and firearms analysis lacked a precisely defined and universally accepted process.²³⁶ This remains the case today.

Fingerprints are a long-established means by which persons are individually identified with a high level of probability (though the reliability of fingerprint analysis has been found wanting in some high-profile cases in recent years).²³⁷ The comparison is based on the unique patterns of friction ridges

²³² Ibid., para. 137.

²³³ Ibid., para. 138.

²³⁴ Ibid., para. 139.

²³⁵ Ibid., para. 138.

²³⁶ See, e.g., Committee on Identifying the Needs of the Forensic Sciences Community, National Research Council, *Strengthening Forensic Science in the United States: A Path Forward*, US Department of Justice, Washington, DC, 2009, pp. 150–55, at: <http://www.nap.edu/catalog/12589.html>

²³⁷ There are particular problems with partial prints.

and furrows on fingers and thumbs, as well as on palms, feet and toes. Even identical twins have different fingerprints.²³⁸

Fingerprints can be recovered from or visualized on a variety of surfaces, especially smooth, shiny ones. Techniques used to do so include applying a powder and “lifting” the fingerprint with a tape or gel lift. Once it has been enhanced with powder, the print can be photographed. Latent fingerprints can be seen on porous surfaces using chemical enhancement techniques that are particularly effective on paper.²³⁹

Other relevant evidence includes military ordnance and weapons; fibre analysis; footwear impressions or tyre tracks; blood spatter analysis; burn patterns; tool marks; and car paint analysis. In all cases, care needs to be taken to ensure that the analysis of such evidence is underpinned by a validated scientific method.²⁴⁰

6.2 The chain of custody

All relevant material gathered by an investigation should be recorded in both documentary and photographic form. To recover evidence, investigators should be appropriately equipped, including with personal protective equipment; relevant packaging (bags, boxes, and plastic and glass vials/bottles); and recording materials, including photographic equipment.²⁴¹

Every stage of evidence recovery, storage, transportation, and forensic analysis, from crime scene to court and through to the end of the judicial processes, needs to be effectively recorded to ensure the integrity of the evidence.²⁴² Chain of custody requires

²³⁸ 2016 Minnesota Protocol, para. 140.

²³⁹ Ibid., para. 141.

²⁴⁰ Ibid., para. 142.

²⁴¹ Ibid., para. 64.

²⁴² Ibid., para. 65.

that the identity and sequence of all persons who possessed, accessed or handled an item from the time of its acquisition by investigators to its presentation in court needs to be clearly attested. Any gap in the chain of custody may prevent the introduction of the item as evidence against a criminal defendant or may undermine its probative value.

Evidential material should therefore be transported in a manner that protects it from manipulation, degradation, and cross-contamination with other evidence. Each piece of evidence recovered needs to be uniquely referenced and marked to ensure its identification from the moment it is collected through to analysis and storage. The evidence should always include the investigator's details.²⁴³

Storage facilities for evidence should be clean, secure, and suitable for maintaining items in appropriate conditions, and protected against unauthorized entry and cross-contamination.²⁴⁴ Digital evidence should be collected, preserved, and analysed in accordance with international best practice.²⁴⁵

²⁴³ Ibid., para. 65.

²⁴⁴ Ibid., para. 66.

²⁴⁵ See, e.g., Association of Chief Police Officers, "Good Practice Guide for Digital Evidence", United Kingdom, at: http://www.digital-detective.net/digital-forensics-documents/ACPO_Good_Practice_Guide_for_Digital_Evidence_v5.pdf

7. Forensic Investigation of Potentially Unlawful Death: Crime Scene Management and Victim Identification

Certain locations – particularly, but not only the place where a body was found²⁴⁶ – will be especially significant to an investigation. Any physical scene where investigators may locate, record, and recover physical evidence is typically described as a crime scene. The term is used, though, without prejudice to the determination of whether a crime has actually occurred. And even if it transpires that a crime has not occurred, the death scene should be processed in the same careful manner as though it is a crime scene.²⁴⁷

7.1 Crime scene management

Every important physical location in the investigation needs to be located and identified, including the site of encounters between the victim or victims and any identified suspects, the location of any crimes, and possible burial sites. Any forensic analysis, including but not limited to the crime scene, requires documentation by photography, measurement, note-taking, and inventory. These should all be cross-referenced against each other, to improve the independent understanding of a death scene and increase the credibility of the collected evidence. Of course, the discovery of a body in a particular location may or may not be the place where the death actually occurred.

The 2016 Minnesota Protocol sets out detailed guidelines on crime scene investigation. The examination of the scene should be conducted by forensic experts who have been

²⁴⁶ 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.

²⁴⁷ 2016 Minnesota Protocol, para. 58.

trained in the legal and scientific identification, documentation, collection, and preservation of evidence.²⁴⁸ Even experienced professionals may make basic errors if they do not possess the requisite training. In a notorious recent case in the United Kingdom, for instance, an alleged crime boss was found dead in his back garden in Essex in 2015. Police and paramedics who attended the scene concluded that he died of a pre-existing heart condition. But he was later found to have six bullet wounds in his back, with a coroner consequently finding he was unlawfully killed.²⁴⁹

Of course, forensic experts may not always be readily available. In particular, in situations where the rule of law has broken down, such as during armed conflict or while widespread atrocities are occurring, non-forensic experts, such as medical workers, journalists, or human rights practitioners, may be the first to come upon the scene. What they document may be important to future investigations as well as to the proper management of the dead and the identification of victims, even though they may have no formal legal mandate to identify, document or collect evidence.²⁵⁰

In any event, critical documentation of a crime scene consists of photographic records, if possible with a reference scale and direction indicator. While video recording can supplement photographs, due to poor image resolution video should not be considered a primary means of capturing images. The first photographs of a crime scene should capture it *in situ* (as found/in place) before there is any movement of any potential evidence unless there is a legitimate reason for the crime scene to be altered before it can be photographed (for

²⁴⁸ Ibid., para. 167.

²⁴⁹ See, e.g., L. Keay, "Revealed: How 'Goldfinger' crime lord 'was stalked like an animal by hitman who made spyhole in garden fence of his Essex home before shooting him six times'", *Daily Mail Online*, 21 June 2018, at: <http://www.dailymail.co.uk/news/article-5870889/John-Palmer-Goldfinger-stalked-like-animal-hitman-spyhole-Essex-garden-fence-reward.html>

²⁵⁰ 2016 Minnesota Protocol, para. 169.

example, if firearms are lying around in a public space they should be collected for reasons of public safety). The scene should also be measured accurately (length, width, and height (if relevant)), and marked on sketches, diagrams, or maps, or recorded from instruments. Notes should be taken, describing key findings and recording the method of data collection. These photographic and documentary records need to be managed according to chain-of-custody standards, safeguarding them from possible manipulation.²⁵¹ Such documentation is a means for non-experts to contribute to future truth-seeking and/or judicial inquiries. Naturally, the credibility of such documentation is increased when records are kept according to chain-of-custody standards, wherein the identity of the author is verified, the origin of the records is clearly described, and the means of subsequent storage or management is carefully attested to.²⁵²

Once the dimensions of a crime scene have been identified, ideally the scene should be secured. An entry log (documenting who enters and leaves and when) for each crime scene should be opened and maintained until the scene has been fully processed. Securing a crime scene demands limiting access to relevant experts and investigators to the extent this is possible. This helps to establish the requisite chain of custody of evidence. Safety may also be an issue at the scene, especially during or following armed conflict, since items of unexploded ordnance, toxic agents, and/or booby-traps may be present. Precautions against coming under attack might also be necessary.²⁵³

Once it is secure – if this is possible in the prevailing circumstances – the crime scene should then be searched methodically for evidence. The search criteria must be documented in investigators' notes. This identifies which items are pertinent to establishing a sequence of events and can link

²⁵¹ Ibid., para. 168.

²⁵² Ibid., para. 170.

²⁵³ Ibid., para. 172.

suspects, victims, and other physical evidence with the scene.²⁵⁴

Items of physical evidence should be identified with unique photo markers (numerical and/or alphabetical). A site code also needs to be established to allow the location of evidence to be recorded, including in relation to other items present on the scene.²⁵⁵ A standard marking system for all evidence should be set up.²⁵⁶

Photographs should be taken in sequence, with an overlap between one image and the next, allowing third parties to understand the spatial relationship between the items of evidence within the scene.²⁵⁷ A photolog should record the sequence in which photographs were taken and should include the identity of the photographer, the position of a photograph within a sequence, the time the photographs were taken, and the location at which they were taken.²⁵⁸

Digital cameras are especially useful as they can generate a sequential file-numbering system and include metadata embedded in the digital images themselves. This metadata can include date and time, the camera's technical settings, and, when it is connected to a GPS, also longitude and latitude information.²⁵⁹

Three types of photographs need to be included in the documentation of crime scenes and evidence:

- **Overview photographs:** taken from the outside of the scene towards its centre (establishing the spatial dimensions of a crime scene).

²⁵⁴ Ibid., para. 173.

²⁵⁵ Ibid., para. 176.

²⁵⁶ See paras. 4 to 97 of the 2016 Minnesota Protocol on labelling.

²⁵⁷ 2016 Minnesota Protocol, para. 176.

²⁵⁸ Ibid., para. 177.

²⁵⁹ Ibid.

- **Medium-range photographs:** establishing a spatial relationship between items of evidence and their location in a crime scene (with markers identifying the individual items of evidence visible).
- **Close-up photographs:** of individual pieces of evidence (first with a photograph of the marker identifying the evidence and then with photographs of the evidence itself). The evidence should fill the frame of the photograph and a scale should be included.²⁶⁰

Measurements taken at the scene corroborate and supplement the spatial dimensions documented in photographs. Measurements and diagrams should include, at a minimum:

- The name of the investigator taking the measurements;
- A case number;
- Date and time;
- Measured dimensions;
- A north arrow; and
- An index of the items of evidence in the sketch.

A scale and reference points are also needed for measurements.²⁶¹

Notes from the crime scene should include, at a minimum:

- The name of the investigator;
- Date and time; and
- A chronological log of the activities conducted (search criteria, when the search was conducted, when and where photographs were taken, when and where measurements were taken, when and where evidence was collected and packaged, and what types of analysis were conducted).

²⁶⁰ Ibid., para. 178.

²⁶¹ Ibid., para. 179.

Notes should include an inventory and a detailed description of items of evidence, identified with their corresponding photo markers, and should be signed by the investigator carrying out the investigation or analysis.²⁶²

7.2 Recovery of bodies and human remains

The recovery and handling of human remains – the most important evidence at a crime scene – require special attention and care, including respect for the dignity of the deceased and compliance with forensic best practices. Recovery of human remains should, preferably, be conducted under the supervision and advice of a forensic anthropologist (if the remains are of a skeleton) or a forensic doctor (if they contain flesh). When human remains are recovered by police or other untrained personnel, as is often the case, there may be challenges in identifying body parts and/or skeletal elements.²⁶³

When two or more parts of a body are found, it should not be assumed that the separate parts belong to the same body. This determination should be made only by a forensic doctor or forensic anthropologist.²⁶⁴ In any event, photographs of human remains should be taken *in situ*, whether the remains are of a complete body, scattered skeletal remains, or buried bodies.²⁶⁵ The remains should be examined, and any clothing, personal items, and associated evidence should also be photographed, with relevant observations recorded in scene notes.²⁶⁶

Buried remains are found in individual graves or mass graves. Particular concerns arise in relation to the excavation of graves. In all instances, however, archaeological methods

²⁶² Ibid., para. 181.

²⁶³ Ibid., para. 90.

²⁶⁴ Ibid., para. 91.

²⁶⁵ Ibid., para. 92.

²⁶⁶ Ibid., para. 93.

should be used in the excavation of any graves, as described in Section C of the Detailed Guidelines in the 2016 Protocol (included in the Annex to this Practitioners' Guide).

7.3 Identification of bodies and human remains

Human identification is the allocation of the correct name/identity to human remains. Developments in forensic genetics and DNA analysis have made it possible to reliably identify tiny and very old samples of human tissue. As Morris Tidball-Binz of the ICRC has written:

"Since the elaboration of the original Protocol, practice related to identification of the dead has also evolved. While, controversially, some early investigations carried out by the international criminal tribunals for the former Yugoslavia and Rwanda focused on gathering evidence for prosecution over the needs of families to have their loved ones identified,²⁶⁷ forensic scientists examining the dead are now expected to seek to identify remains as a matter of principle and to advance the rights of families.²⁶⁸ The 2003 Conference on The Missing and Their Families, organized by the ICRC, concluded that it is wrong to investigate the dead from armed conflicts or disasters if this investigation is focused exclusively on documenting the cause and manner of death and it does not include efforts also to identify the victims."²⁶⁹

²⁶⁷ See, e.g., A. Rosenblatt, "International Forensic Investigations and the Human Rights of the Dead", (2010) 32 *Human Rights Quarterly* 923; E. Stover and R. Shigekane, "The missing in the aftermath of war: When do the needs of victims' families and international war crimes clash?", (2002) 84 *International Review of the Red Cross* 853.

²⁶⁸ See, e.g., INTERPOL Resolution No. AGN/65/RES/13/1996 "Disaster Victim Identification": "Recognizing that for legal, religious, cultural and other reasons, human beings have the right not to lose their identities after death, and that the identification of disaster victims is often of vital importance for police investigations".

²⁶⁹ ICRC, *The Missing and their Families*, Report, Doc. ICRC/TheMissing/01.2003/EN/10, Chap. II, Executive Summary, <https://www.icrc.org/eng/resources/documents/report/5jahr8.htm>

In any death investigation, the identification of the body or bodies is a major priority. Good-quality ante-mortem and post-mortem data, properly compared, are required for a valid identification.²⁷⁰ **Viewing and recognition of a dead body by family or friends is often – but not always – reliable.**

A false recognition may be either positive or negative, for instance as a result of partial decomposition or changes to facial congestion or lividity. In some instances, family members may be distressed to the point where they may not even look at the body or face of the deceased. Interpol does not accept visual recognition as a valid form of positive identification.²⁷¹

In any case of potentially unlawful death (and especially as time passes and the body begins to show signs of decomposition, or the facial appearance is altered by the effects of injury or fire), identification by visual recognition must be confirmed whenever possible by using other means, including scientifically reliable methods of identification such as fingerprints, dental examination, and DNA analysis.²⁷² Such scientifically reliable methods are often referred to as “primary” methods of identification.

Assessments of physical characteristics (such as body deformities, scars, or surgical prostheses, as visible on the body or as represented in X-rays), which are compared with records made in life, are generally regarded as secondary

²⁷⁰ 2016 Minnesota Protocol, para. 115.

²⁷¹ Ibid., para. 116. Visual recognition alone should not be relied upon in cases of multiple deaths. Misidentification is more common in such circumstances owing to emotional pressures on those undertaking the viewing. The strain of viewing a row of dead bodies, or a number of dead bodies individually one after the other, reduces the likelihood of a reliable recognition. Additionally, personal effects are not unique, and depending on the processes around the retrieval of the bodies they may have been incorrectly put with the wrong body. Ibid., para. 125. Interpol disaster victim identification (DVI) procedures require loose personal effects to be collected separately at the scene. They must not be allocated to a particular body. Ibid.

²⁷² 2016 Minnesota Protocol, para. 120.

methods, though in some cases they could, individually or collectively, approach the level of being uniquely identifying. The identification of personal effects is also regarded as a secondary method. Primary and secondary methods may be combined to strengthen the evidence for the conclusion.²⁷³

An analysis of all available evidence leads to a final conclusion. This could be:

- **Identification:** where there is consistency between ante-mortem and post-mortem data and there are no discrepancies that cannot be explained;
- **Rejection of a possible identity** when evidence supports the exclusion of a particular hypothesis about the identity of the human remains;²⁷⁴ or
- **No conclusion about the identification** of the human remains.

The relevant findings should be stated in the final report on identity.

In any event, whether the death is that of an individual or of multiple individuals in one event, **families should be involved in and fully informed about the identification process.**²⁷⁵

²⁷³ Ibid., para. 121.

²⁷⁴ There may also be cases when, despite all possible scientific efforts to achieve identification, available information indicates only a probable or even only a possible identity.

²⁷⁵ 2016 Minnesota Protocol, para. 130.

8. Forensic Investigation: The Autopsy

Autopsy (also called a post-mortem examination) is generally central to any investigation of potentially unlawful death. Indeed, an autopsy is often the single most important and determining investigation for establishing the deceased person's identity and the cause, manner, and circumstances of death. It may also provide evidence of torture.²⁷⁶

The specific aims of an autopsy are to:

- Discover and record all the identifying characteristics of the deceased (where this is necessary);
- Discover and record all the pathological processes, including injuries, present;
- Draw conclusions about the identity of the deceased (where this is necessary); and
- Draw conclusions as to the cause of death and factors contributing to death.²⁷⁷

The 2016 Minnesota Protocol states that, given its importance to an investigation of potentially unlawful death, **a decision not to undertake an autopsy should be justified in writing and should be subject to judicial review.**²⁷⁸

²⁷⁶ The new Protocol includes updated and expanded guidance on the documentation of torture, including lessons learned from the use and implementation worldwide of the Istanbul Protocol. *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, OHCHR, 1999, at: <https://www.ohchr.org/Documents/Publications/training8Rev1en.pdf>

²⁷⁷ See, e.g., M. El-Nageh et al., *Ethical Practice in Laboratory Medicine and Forensic Pathology*, World Health Organization Regional Office for the Eastern Mediterranean, Alexandria, Egypt, 1999, pp. 38–39, at: www.emro.who.int/dsaf/dsa38.pdf

²⁷⁸ 2016 Minnesota Protocol, para. 25.

8.1 The conduct of the autopsy

The section on autopsy in the Minnesota Protocol outlines the general principles guiding an autopsy and the duties of forensic doctors in relation to death investigations and reporting.²⁷⁹ Additional guidance for practitioners is provided in the detailed guidelines on autopsy included later in the Protocol²⁸⁰ (this is reproduced in an Annex to this Practitioner's Guide).

To ensure forensic doctors can discharge their professional, legal, and ethical obligations, the body should be made available for a "reasonable minimum period" sufficient to ensure an adequate and unhurried examination (the Minnesota Protocol suggests at least 12 hours). If unacceptable conditions are imposed, a forensic doctor should be able to refuse to perform a compromised examination and should prepare a report explaining this position. If the forensic doctor decides to proceed with the examination notwithstanding the challenging conditions or circumstances, he or she should include in the autopsy report an explanation of the limitations or impediments.²⁸¹ If possible, the forensic doctor should attend the scene of death, preferably with the body *in situ*.²⁸²

The autopsy should be carefully photographed using a high-quality camera/lens. Videotaping of the autopsy may also be considered. If high-quality equipment is not available, then other equipment, such as mobile phones, may be acceptable, bearing in mind that it is important for the photographs to be of sufficient quality to enable the autopsy findings to be independently reviewed. Photographs should be

²⁷⁹ The duties of forensic doctors in relation to death investigations are threefold, namely to: help ensure that the identity of the deceased is established; help ensure that the cause and circumstances of the death are revealed; and exercise care and skill in their work. 2016 Minnesota Protocol, para. 149.

²⁸⁰ Section V(D).

²⁸¹ 2016 Minnesota Protocol, para. 155.

²⁸² *Ibid.*, para. 149.

comprehensive, and must confirm the presence and details of all demonstrable signs of injury or disease commented upon in the autopsy report. Each photograph should contain a ruled reference scale and an identifying case name or number.²⁸³

With respect to other technology, ordinary X-rays continue to play an important part in autopsy. The development of cross-sectional and three-dimensional imaging or scanning (computerized tomography – CT scanning; and magnetic resonance imaging – MRI scanning) offer a number of specific advantages in an autopsy,²⁸⁴ but do not replace the traditional autopsy.²⁸⁵ Moreover, their cost is such that they are unlikely to become widely available in many countries.²⁸⁶

If it is available, then CT scanning of the whole body enclosed in the body bag should be undertaken. (If this is done, further consideration of the need for plain X-rays will still be needed). In the (likely) event that cross-sectional imaging is not available, the body should be radiographed with plain X-rays before it is removed from its packaging. The following X-rays may also be required:

- Dental X-rays (for identification purposes);
- Any skeletal system injury;
- In gunshot cases or knife attack to aid in locating the projectile(s) or knife fragments;
- Skeletal X-rays (to assist in determining the age and developmental status of children and young adults).²⁸⁷

²⁸³ Ibid., para. 255.

²⁸⁴ Parts of the body not easily inspected by traditional means can be seen; in some cases the reconstruction of three-dimensional images from scanning data may assist in interpreting injury or disease; victims of multi-fatality disasters can be triaged, improving prospects for identification, long-term digital storage of the images improves the reviewability of the examination of the dead body; and medico-legal systems where autopsies are rare can obtain information about the body that would otherwise be unavailable. 2016 Minnesota Protocol, para. 159.

²⁸⁵ Ibid., para. 158.

²⁸⁶ Ibid., para. 160.

²⁸⁷ Ibid., para. 256.

Any pacemakers must be removed, especially if cremation is to take place, as they will explode in a fire.

The **external examination**, focusing on a search for external evidence of injury, is in most cases the most critical part of the autopsy. With respect to any and all injuries, their location, size, shape, surrounds, pattern, contents, colour, course, direction, and depth must be recorded. Injuries resulting from therapeutic measures should be distinguished wherever possible from those unrelated to medical treatment.²⁸⁸

If there are gunshot injuries, it needs to be determined whether the bullet wound is an entry or exit wound. If an entry wound is present and no exit wound is seen, the projectile must be found and secured or accounted for.

All injuries should be photographed and labelled.²⁸⁹

The **internal examination** should clarify and augment the findings of the external examination with respect to injuries, and should identify and characterize any natural disease present.²⁹⁰ Appropriate samples should be taken as required for further testing.²⁹¹ Such testing may involve some of the following:

- Histology (the study of the microscopic structure of tissues by microscope);
- Toxicology (including biochemistry);

²⁸⁸ Ibid., para. 260.

²⁸⁹ Ibid.

²⁹⁰ Ibid., para. 261.

²⁹¹ See UN Office on Drugs and Crime, *Forensic Autopsy: Manual for Forensic Pathologists*, Ramallah, October 2015, "Special Investigations", para. 5.6, at: http://www.theapmla.net/files/PEX02_Forensic%20Autopsy%20Manual.opt.pdf

- Microbiology (to assess the presence of disease, for instance);²⁹²
- Entomology (may, for example, help to assess whether the body has been moved after death); and
- Molecular/DNA testing.

Concluding the cause of death

At the end of his/her investigation of the death, the prosecutor (meaning the forensic doctor who performs the post-mortem examination of the body) must conclude the cause of death and identification of the deceased.²⁹³ The internationally accepted format for recording the cause of death is set out by the WHO in "The International Form of Medical Certificate of Cause of Death".²⁹⁴ The part of the form on cause of death comprises two parts: Part I, on diseases or conditions directly leading to death (immediate causes) and antecedent causes (or underlying causes); and Part II, on other significant conditions contributing to death, but not contributing to or causing the conditions listed in Part I.²⁹⁵

The **underlying cause of death** is the disease or injury that initiated the train of morbid events leading directly to death or the circumstances of the accident or violence that led to the fatal injury.

The **contributory cause(s) of death** is/are other significant diseases or conditions that contributed to the death but not to the disease(s) or condition(s) listed in the sequence in Part I as causing the death. Note that a common error is to list the mode of death, such as cardio-respiratory arrest, respiratory failure, or coma as the immediate cause of death.

²⁹² See, e.g., S. Riedel, 'The Value of Postmortem Microbiology Cultures, (2014) 54(4) *Journal of Clinical Microbiology* 1028–1033.

²⁹³ 2016 Minnesota Protocol, para. 265.

²⁹⁴ See: <https://crvsgateway.info/learningcentre/cause-of-death-in-crvs/the-international-form-of-medical-certificate-of-cause-of-death>

²⁹⁵ 2016 Minnesota Protocol, para. 266.

If the cause of death is unknown even after all investigations have been completed, then it should be recorded as “unknown” or “unascertained”.²⁹⁶

The autopsy report

The autopsy report should be sufficiently detailed to enable another forensic doctor, at another time and place (and supported by access to the photographs) to be able to come to his or her own conclusions about the death.²⁹⁷

At the end of the autopsy report the findings should be summarised, including details of the results of any special tests. In addition, the prosecutor should provide his/her opinion about the identity of the deceased, and injuries and disease present, attributing any injuries to external trauma, therapeutic efforts, post-mortem change, or other ante-mortem, peri-mortem, or post-mortem causes.²⁹⁸

The autopsy report must not only include a list of findings and injuries, it must also offer an interpretation of them. If, for example, a forensic doctor believes that specific injuries have been inflicted during assault or torture, he or she “is strongly encouraged” by the 2016 Minnesota Protocol “to provide that opinion in writing in the autopsy report”. While forensic doctors may not make the final determination of whether the deceased in question was assaulted or tortured, it is their duty to interpret and explain, if at all possible, how the injuries occurred.²⁹⁹

²⁹⁶ Ibid., para. 267.

²⁹⁷ Ibid., para. 268.

²⁹⁸ Ibid.

²⁹⁹ Ibid., para. 151.

The full report should be given to the appropriate authorities and to the deceased's family (unless they are implicated in the cause of the death).³⁰⁰

³⁰⁰ Ibid., para. 268.

9. The Effective Prosecution of Individuals Responsible for Unlawful Death

This Chapter addresses the effective prosecution of individuals believed to be responsible for an unlawful death. This combines a range of disparate issues, in particular those involved in the right to a fair trial and the rights of family members and witnesses.

9.1 Fair trial standards under international law

A fair trial – through due process of law – is founded on two main principles: the right of all persons to equality before the law and the courts and the right of all persons to a public hearing with all due guarantees before a legally-constituted, competent, independent, and impartial tribunal (as well as the right to appeal).³⁰¹ The Human Rights Committee and the Inter-American Commission on Human Rights have stated that the right to a fair trial before an independent, impartial, and competent court is an absolute right that cannot be the subject of exception or suspension.³⁰²

Fair trial rights include the right to the following core elements:

- To trial by an independent, impartial, and regularly constituted court;
- To be presumed innocent;
- To receive information on the nature and cause of the charges;

³⁰¹ ICJ, *Trial Observation Manual for Criminal Proceedings*, Practitioners' Guide No. 5, p. 38.

³⁰² Human Rights Committee, General Comment No. 32, para. 19; and *Gonzalez del Rio v Peru*, Human Rights Committee Communication 263/1987, UN Doc CCPR/C/46/D/263/1987 (1992), para. 5.2; and Inter-American Commission on Human Rights, "Report on Terrorism and Human Rights", 2002, para. 261.

- To defend oneself and be assisted by a lawyer of choice;
- To have free legal assistance if the interests of justice so require;
- To be granted sufficient time and facilities to prepare a defence;
- To communicate freely with counsel;
- To be tried without undue delay;
- To examine witnesses and have them examined;
- To the assistance of an interpreter, if the accused cannot understand the language used in the proceedings;
- To be present at trial;
- To not be compelled to testify against oneself or to confess guilt;
- To be tried in public and to have judgment pronounced publicly, unless this would prejudice the interests of justice;
- If convicted, to be advised of available recourse to review or appeal and their time-limits;
- To appeal; and
- To not be punished more than once for the same act or on the same charge (*non bis in idem*).

In general, ordinary criminal trials should be held for the prosecution of individuals who have killed or tortured people in circumstances that amount to human rights violations. In "specific and strictly-defined situations", however, international human rights law accepts the creation of special judicial procedures and specialised jurisdictions or tribunals in criminal matters.³⁰³ Such situations encompass the rights of indigenous peoples and children, "because of the specific nature of those seeking justice. This differential treatment is based on the existence of certain inequalities which, if not dealt with accordingly, may give rise to inequalities in legal treatment."³⁰⁴

³⁰³ ICJ, *Trial Observation Manual for Criminal Proceedings*, p. 39.

³⁰⁴ Ibid.

All tribunals, courts, and judges, however they are constituted, must be independent from the executive and legislative branches of government.³⁰⁵ Tribunals must be free from influences or pressure from the other branches of the State or from any other quarter.³⁰⁶ The judiciary must have jurisdiction over all issues of a judicial nature with exclusive authority to decide whether an issue submitted for decision is within the competence of a court as defined by law.³⁰⁷

As the ICJ has recalled in its Practitioners' Guide on the independence and accountability of justice actors, the independence of the courts and judicial officers must be guaranteed by the constitution, laws, and policies of the country.³⁰⁸ It must also be respected in practice by the government, its agencies and authorities, as well by the legislature.³⁰⁹

The independence of judges and tribunals has two dimensions: institutional independence and personal independence. Both require that neither the judiciary nor the judges who compose it be subordinate to any other public powers. Institutional independence means that judges, courts, and tribunals are independent from other branches of power. It also means that all other State institutions have a duty to respect and abide by the judgments and decisions of the judiciary. Personal independence means that judges are independent from other members of the judiciary.³¹⁰

³⁰⁵ *Ringeisen v Austria* (1971) ECHR 2, para. 95.

³⁰⁶ UN Basic Principles on the Independence of the Judiciary, adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders, 1985 (hereafter the Basic Principles on the Independence of the Judiciary), Principles 1, 2, 3, and 4.

³⁰⁷ Basic Principles on the Independence of the Judiciary, Principle 3.

³⁰⁸ ICJ, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors*, Practitioners' Guide No. 1 (2009), see especially pp. 17-19.

³⁰⁹ ICJ, *Trial Observation Manual for Criminal Proceedings*, p. 41.

³¹⁰ *Ibid.*

There should not be any inappropriate or unwarranted interference with the judicial process. Decisions by courts should not be subject to revision (except through judicial review), or mitigation or commutation of sentence – unless done so by competent authorities, in accordance with the law.³¹¹

9.2 Guidance for prosecutors

The accused is entitled to a trial in which the prosecutor is fair and impartial.³¹² Prosecutors must perform their professional functions impartially and objectively, avoiding discrimination on political, social, religious, racial, cultural, sexual orientation, or any other discriminatory grounds. Prosecutors should, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.³¹³

The ICJ has recalled that the proper exercise of prosecutorial functions requires autonomy and independence from the other branches of the State, though in contrast to the case of judges:

“international law does not contain a provision that guarantees the institutional independence of prosecutors. This is due to the fact that in some systems prosecutors are appointed by the executive or are answerable to it to some degree, thus obliging

³¹¹ Basic Principles on the Independence of the Judiciary, Principles 4 and 14.

³¹² See generally the UN Guidelines on the Role of Prosecutors, adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Prisoners, 1990 (hereafter the UN Guidelines on the Role of Prosecutors); Recommendation No. R (2000) 19 of the Committee of Ministers to Member States on the role of public prosecution in the criminal justice system; and Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

³¹³ UN Guidelines on the Role of Prosecutors, Guideline 12.

them to comply with certain orders issued by the government.”³¹⁴

It is further observed that while an independent prosecutorial authority “is preferable to one that is answerable to the Executive”, in all cases States are duty bound to provide safeguards “so that prosecutors can conduct investigations impartially and objectively”. This means that prosecutors should be able to perform their professional duties without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability. In addition, the office of prosecutor should be strictly separated from judicial functions.³¹⁵

Prosecutors should give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights, and other crimes under international law.³¹⁶ At the same time, prosecutors should not initiate or continue prosecution, or should make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.³¹⁷

Moreover, should prosecutors come into possession of evidence against a suspect they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a gross violation of the suspect’s human rights, especially involving torture or other inhumane treatment or punishment, they should refuse to use such evidence against anyone other than those who used such methods, and should take all necessary steps to ensure that those responsible for using such methods are brought to justice.³¹⁸

³¹⁴ ICJ, *Trial Observation Manual for Criminal Proceedings*, p. 47.

³¹⁵ UN Guidelines on the Role of Prosecutors, Guideline 10.

³¹⁶ Ibid., Guideline 15.

³¹⁷ Ibid., Guideline 14.

³¹⁸ Ibid., Guideline 16.

9.3 The role and rights of victims

The victims of serious violations of human rights and their families have, within the framework of the right to an effective remedy and the right to have their cause and rights be determined by an independent, impartial, and competent court. The ICJ Practitioners' Guide on impunity also stresses the relevance and importance of the related right to truth.³¹⁹

The right of family members in the context of enforced disappearance and extrajudicial executions is the subject of a separate ICJ Practitioners' Guide.³²⁰ Family members, it is asserted, have the right to bring charges against those responsible for the enforced disappearance and extrajudicial execution of their loved ones and to see the corresponding sanctions imposed, if appropriate.³²¹ The Inter-American Court of Human Rights has also affirmed that "victims of violations of human rights, or their relatives, must be able to be heard and act on their respective proceedings, both looking for the clarification of facts and the punishment of the liable parties and a proper compensation."³²²

The ICJ has published a Practitioners' Guide on the observation of criminal trials.³²³ As the Guide highlights, from the perspective of international human rights law, the rights of the victims with respect to criminal proceedings are based legally on three fundamental human rights:

³¹⁹ ICJ, *International Law and the Fight Against Impunity*, Practitioners' Guide No. 7, p. 119.

³²⁰ ICJ, *Enforced Disappearance and Extrajudicial Execution: The Rights of Family Members*, Practitioners' Guide No. 10.

³²¹ Ibid., citing: *Durand and Ugarte v Peru*, IACtHR Judgment of 16 August 2000, para. 129; and *González v Argentina*, Human Rights Committee Communication 1458/2006, UN Doc CCPR/C/101/D/1458/2006 (2011), para. 11.

³²² *Villagrán Morales and others v Guatemala*, IACtHR Judgment of 19 November 1999, para. 227.

³²³ ICJ, *Trial Observation Manual for Criminal Proceedings*, Practitioners' Guide No. 5.

- The right to an effective remedy (encompassing the right to an investigation);
- The right to a fair and public hearing by a competent, independent, and impartial tribunal established by law, in the determination of any rights; and
- The right to reparation.

Victims and their relatives must be treated with humanity and with respect for their dignity and human rights by law enforcement officials, investigating authorities, prosecutors, and judicial authorities at all stages of criminal proceedings. This includes during any preliminary and pre-trial investigation. As discussed in Chapter 4 above, States must take appropriate measures to ensure the safety, physical and psychological well-being, and privacy of victims and their families.

When the integrity of a criminal investigation demands interference into the private life of a victim or his/her relatives, “the authorities should take steps to minimise the inconvenience caused to the victim and his/her relatives and, where appropriate, protect them against unlawful interference with their privacy.”³²⁴ At the same time, the State needs to ensure that, to the extent possible, its domestic laws stipulate that victims who have suffered violence or trauma should benefit from special consideration and care so that they are not subjected to further trauma in the course of judicial proceedings.³²⁵

The ICJ has called on States to ensure that victims or their relatives have access to information that is relevant to their case and necessary for the protection of their interests and the exercise of their rights. At a minimum, such information should include the following:

- The type of support they can obtain;

³²⁴ Ibid., p. 152.

³²⁵ Ibid.

- The type of services or organisations to which they can turn for support;
- Where and how they can report an offence;
- The procedures that will be followed after such a report is made and their role in them;
- How and under what conditions they can obtain protection;
- How and on what terms they can receive legal advice;
- How and in what circumstances the victim can obtain reparation from the offender;
- How to apply for reparation from the State (if eligible); and
- If they are nationals of another State, any special arrangements that may be available to them so that their interests can be protected.³²⁶

States should also ensure that victims or their relatives are kept informed of the outcome of their complaint and the relevant stages in the progress of criminal proceedings, including the preliminary investigation stage.³²⁷ That said, victims or their relatives should be given the opportunity to say if they do not wish to receive such information.

Victims or their relatives should be informed of any progress in the investigation unless doing so would jeopardise an ongoing criminal investigation. However, in cases of enforced disappearance, kidnapping, or hostage-taking, the competent authority should communicate regularly and without delay with the relatives of the victim to let them know the results of the investigation into the fate and whereabouts of the person concerned.³²⁸ The family liaison officer whose work is described in Section 5 is one means by which this can occur.

As one element in the implementation of the right to an effective judicial remedy, the ICJ recommends that States

³²⁶ Ibid., pp. 154–55.

³²⁷ Ibid., p. 155.

³²⁸ Ibid.

guarantee “broad legal standing in criminal proceedings to victims and/or their relatives.”³²⁹ Such legal standing in criminal proceedings should, it is suggested, allow the victims and/or their relatives to, *inter alia*:

- Submit evidence and propose witnesses;
- Have access to documents and evidence;
- Compel the attendance of witnesses;
- Examine and cross-examine witnesses;
- Challenge or rebut the evidence put forward by the defence;
- Secure the participation of experts; and
- Challenge and appeal any decisions taken by the judge or the court, including the final verdict.³³⁰

When national legislation does not allow victims and/or their relatives to have legal standing in criminal proceedings, they should nevertheless be afforded certain minimum rights during any trial.³³¹ These include the rights to:

- Be informed of the date and place of trial hearings;
- Be informed of the charges against the accused;
- Be informed of the timetable and scope of the trial;
- Be informed of their role in the trial;
- Be able to state their case in court during the proceedings;
- Be able to give evidence;
- Be informed of the possibilities available to them to obtain reparation in the course of the criminal proceedings in question;
- Obtain legal assistance and advice; and
- Be told how they can obtain a copy of the judgment.³³²

If called to make a statement or give testimony during criminal proceedings, victims should only be questioned to the extent

³²⁹ Ibid., p. 156.

³³⁰ Ibid.

³³¹ Ibid., p. 160.

³³² Ibid.

that is necessary for the purposes of the trial proceedings. Special assistance should be given to vulnerable victims, such as children and the victims of rape and other sexual abuse. In principle, minors and people with mental or physical disabilities should make statements and be questioned in the presence of their parents, guardians, or others responsible for their care or legal representation.³³³

As in the case of any other witness, when victims or their relatives participate as witnesses in a criminal trial, they should be able to testify freely without being subjected to intimidation or pressure of any kind.³³⁴

The right of victims in the context of the International Criminal Court

Particular issues arise in the context of the International Criminal Court (ICC). Within the ICC, the Office of Public Counsel for the Victims (OPCV) provides legal representation to victims throughout proceedings, as well as assistance and support to external lawyers appointed by victims. The OPCV is an independent office, which preserves the privileged relationship between victims and their lawyers.³³⁵

On 31 March 2018, Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud was surrendered to ICC on charges of crimes against humanity and war crimes allegedly committed in Timbuktu. The surrender followed an arrest warrant issued by a Pre-Trial Chamber on 27 March 2018. On 24 May 2018, the Chamber issued a decision on the principles applicable to victims' participation in the case by which, *inter alia*, it approved a joint form for participation and reparations to be

³³³ Convention on the Rights of the Child, Article 12; and Convention on the Rights of Persons with Disabilities, Articles 12 and 13.

³³⁴ ICJ, *Trial Observation Manual for Criminal Proceedings*, Practitioners' Guide No. 5, p. 161.

³³⁵ ICC, "Victims", at: <https://www.icc-cpi.int/about/victims>

used for the purpose of applying for participation and/or reparations in the *Al Hassan* case.³³⁶

10. Specific Guidance for Prosecutors and Defence Lawyers

This Chapter provides more specific practical guidance for prosecutors and defence lawyers engaged in a criminal homicide, enforced disappearance or strategic litigation case. It builds on the forensic aspects discussed in earlier chapters and highlights issues that should be in a prosecution and defence checklist when preparing for criminal proceedings. The first part of the Chapter focuses on the prosecution while the second looks at particular considerations for the defence.

10.1 Guidance for prosecutors

Role of the prosecutor

The UN Basic Principles on the Role of Prosecutors sets out the role of prosecutors in criminal proceedings.³³⁷ It emphasizes, among other things, that they are to perform an active role in criminal proceedings, including in the investigation of crime and supervision over the legality of the investigations.

Prosecutors are to, in accordance with the law, perform their duties fairly, consistently and expeditiously, and to respect and protect human dignity and uphold human rights, thereby helping to ensure due process and the smooth functioning of the criminal justice system. They shall not initiate or continue prosecution, and shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.

³³⁶ Ibid.

³³⁷ UN Guidelines on the Role of Prosecutors.

In addition, when prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or other forms of inhumane treatment or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.

Reviewing the investigation case file

A prosecutor should review an investigation case file before proceeding to trial for an alleged homicide. His or her decision may be that the case is ready, or the prosecutor may feel constrained to suggest additional actions or other lines of inquiry to investigators. At a minimum, investigations must take all reasonable steps to:

- Identify the victim(s);
- Recover and preserve all material probative of the cause of death, the identity of the perpetrator(s) and the circumstances surrounding the death;
- Identify possible witnesses and obtain their evidence in relation to the death and the circumstances surrounding the death;
- Determine the cause, manner, place and time of death, and all of the surrounding circumstances. In determining the manner of death, the investigation should distinguish between natural death, accidental death, suicide and homicide; and
- Determine who was involved in the death and their individual responsibility for the death.³³⁸

³³⁸ 2016 Minnesota Protocol, para. 25.

The Minnesota Protocol 2016 will assist with the review of an investigation case file by acting as a checklist for the steps an investigator should have taken for the investigation to meet international law and standards - for example whether:

- The investigation was carried out independently and impartially (para 28);
- The victim family was informed of the progress of the investigation, during all its phases, in a timely manner (para 35);
- Investigative processes and outcomes were transparent, including through openness to the scrutiny of the general public and of victims' families (para 32);
- Every stage of evidence recovery, storage, transportation and forensic analysis, from crime scene to court and through to the end of the judicial processes, was effectively recorded to ensure the integrity of the evidence (para 65);
- All significant witnesses – including 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 – have been interviewed (para 72);
- Any technical gaps in the investigation have been identified and, where appropriate, international assistance has been sought (para 77);
- A “living chronology” was created and reviewed each time new evidence was collected or obtained (para 83); and
- An autopsy was performed (paras 25, and 148ff and detailed guidelines).

In some circumstances, he or she may advise that the prosecution be stayed or discontinued if the charge is unfounded. And in the event evidence obtained though grave violations of the suspects human rights are contained on the case file, the prosecutor should refuse to use the evidence, inform the court, and take all necessary steps to ensure the perpetrators are brought to justice.

Regarding the crime scene, the first issue will be who processed the crime/death scene (or scene of disappearance, if known). Was access excluded to all but qualified forensic investigators at an early stage after the discovery of the body? Who else could have entered the area after a killing or disappearance and could be accused of planting or tampering with evidence? Was the evidence to be presented discovered during the initial processing of the scene or only later? Who found the evidence and what did they do with it? These issues were central to an infamous murder case in Essex in the United Kingdom in the mid-1980s.³³⁹

In October 1986, Jeremy Bamber was convicted of the murder of his adoptive parents, his adoptive sister, and her six-year-old twin sons at the family farm the previous year. Initially, the deaths had been classified by the Essex police that investigated the killings as a murder-suicide by Mr Bamber's sister. A gun used to kill the others in a house that was locked from the inside had been found in her hands and she had a history of serious mental health issues. Subsequently, however, Mr Bamber's ex-girlfriend cast suspicion on him while under investigation for other offences, claiming he had confessed to having hired a hitman to do the killings. This, combined with new forensic evidence about the gun, persuaded the Essex police and prosecutors that in fact Mr Bamber was responsible for the killings and had staged the death scene of his adoptive sister, Sheila.

One of the key issues concerned whether or not a silencer was on the gun at the time of the killings. When the police found the bodies, the gun did not have a silencer attached. Forensic evidence demonstrated that it would have been impossible for Sheila to have reached the trigger if the silencer was attached. The police had searched the house, including the house's gun cupboard, and had not found it. Three days after the murders, however, the silencer was found by one of Mr Bamber's

³³⁹ *R v Jeremy Bamber*, [2002] EWCA Crim 2912.

relatives (a possible beneficiary under the parent's will), though he did so in front of several witnesses. Instead of alerting the police, though, the family took the silencer to another relative's home. Sticky red substances were discovered on the gun. The expert at the Forensic Science Laboratory that examined the silencer found blood on both the inside and outside surface of the silencer. The blood on the outside was not enough to permit analysis while the blood inside was found to be the same blood group as Sheila's, although it could have been a mixture of the two parents. Mr Bamber was convicted of the murders and is serving a life prison sentence, but continues to protest his innocence.³⁴⁰

Another major issue of concern to prosecutors will be the chain of custody of the evidence once it has been identified and/or secured. Are there unexplained or suspicious breaks in the chain of custody? Is there a possibility that cross-contamination occurred? Or was evidence left in an insecure or inappropriate place at any time after it had been seized? These were critical issues in the OJ Simpson trial in 1995.

As is well known, OJ Simpson was a former American football star who had married a former waitress, Nicole Brown. There was evidence of prior domestic violence against Ms Brown by Mr Simpson and they were divorced before her murder and that of her friend, Ron Goldman, at her house in Los Angeles. The chances of conviction of Mr Simpson at his trial were hampered by the then recent acquittal of Los Angeles Police Department (LAPD) officers on charges of assault against an African American, Rodney King, after a routine traffic stop (which had been filmed by a bystander).³⁴¹ There was also

³⁴⁰ S. Hattenstone and E. Allison, "Jeremy Bamber still waits for the evidence that might clear his name", *The Guardian*, 24 March 2017, at: <https://www.theguardian.com/commentisfree/2017/mar/24/jeremy-bamber-waits-evidence-clear-name-essex-police>

³⁴¹ J. Ross, "That knife allegedly found on O.J. Simpson's property says plenty about why he was acquitted", *The Washington Post*, 6 March 2016, at: <https://www.washingtonpost.com/gdpr->

evidence of pervasive racism within the LAPD, including use of racial slurs by one of the primary investigators in the case.

Forensics, though, also played a key role in Mr Simpson's acquittal. The LAPD failed to gather key blood evidence (a high-quality bloodied fingerprint) identified by the investigators at the death scene. When they later took a blood sample from Mr Simpson, they failed to record the quantity drawn, leading to the impression that some blood had gone missing. To add to the problem, the blood was not immediately turned over as evidence but was carried around for several hours before it was entered into the chain of custody, allowing for speculation of when and how the blood may have disappeared.³⁴² It was alleged that this could have been used to plant evidence at the scene by a "racist" LAPD police officer.

In other problems, a forensic technician who collected blood from Mr Simpson proceeded to analyse blood evidence from the crime scene wearing the same gloves, which meant that there could have been cross-contamination of the blood.³⁴³ The security of LAPD storage and labs was also brought under scrutiny when it was discovered that some pieces of evidence had been accessed and altered by unauthorised personnel. Mr Simpson's Bronco car, witnessed at the death scene, was entered into at least twice by unauthorised personnel while in the police impound yard.³⁴⁴

[consent/?destination=%2fnews%2fthe-fix%2fwp%2f2016%2f03%2f06%2fthat-knife-allegedly-found-on-o-j-simpsons-property-says-plenty-about-why-he-was-acquitted%2f%3f&utm_term=.ed6919fe45cd](https://www.crimemuseum.org/crime-library/famous-murders/forensic-investigation-of-the-oj-simpson-trial/)

³⁴² "Forensics at the OJ Simpson Trial", *Crime Museum*, at: <https://www.crimemuseum.org/crime-library/famous-murders/forensic-investigation-of-the-oj-simpson-trial/>

³⁴³ See, e.g., M. Starr, "Detective Mark Fuhrman refuses to watch FX's 'O.J.' series", *New York Post*, 6 March 2016, at: <https://nypost.com/2016/03/06/why-this-lapd-detective-wont-be-watching-fxs-o-j-series/>; "O.J. Simpson: An Example of Problems with Key Evidence", Texas Education Agency, 2017.

³⁴⁴ "Forensics at the OJ Simpson Trial", *Crime Museum*.

More recently, digital forensics (computers, cell/mobile phone evidence) have played a key role in prosecutions in addition to physical evidence. This includes search history for computers or other devices, physical locations detected from nearby cellphone towers, as well as metadata in photos and documents uploaded online.

The “BTK” (Bind, Torture, and Kill) serial killer, Dennis Rader, evaded capture for more than 30 years. He killed ten people in Kansas (men, women, and children) starting in 1974. Mr Rader sent taunting letters to police and the newspapers, claiming responsibility for his crimes, clearly enjoying the media attention he received while toying with investigators on the case.³⁴⁵ His mistake was to send a floppy disk to the police with a letter on it in 2005. Upon forensic investigation, investigators found a deleted Microsoft Word file. The metadata recovered showed that the last person to edit the file was “Dennis” along with a link to the Lutheran Church where Mr Rader was deacon. The police had previously told him that letters on floppy disks could not be traced.³⁴⁶

10.2 Guidance for defence lawyers

This subsection concerns issues that defence lawyers in a homicide trial should take into account, including during the cross-examination of prosecution witnesses. Whereas prosecutors are looking for robust forensic evidence to help convict the accused, the role of the defence lawyer is to challenge evidence of questionable reliability or credibility, including witnesses, in order to raise a reasonable doubt as to their client’s guilt.

³⁴⁵ “Dennis Rader”, Biography, accessed 15 August 2018, at: <https://www.biography.com/people/dennis-rader-241487>

³⁴⁶ “Cases involving Computer Forensics that made the News”, Infosec Institute, 2018, at: <https://resources.infosecinstitute.com/category/computerforensics/introduction/notable-computer-forensics-cases/#qref>

The 2016 Minnesota Protocol assists in challenging the evidence of prosecution witnesses, including:

- The lead investigator;
- Officers in charge of the crime scene;
- Officers in charge of the storage of exhibits; and
- Experts, including the forensic pathologist who conducted the autopsy.

For example, when cross-examining the officer in charge of the storage of exhibits, in a case where there had not been an adequate record of those who handled exhibits, a line of examination could proceed as follows, using paragraphs 65 and 66 of the Minnesota Protocol 2016:

Q: You have been a police officer for more than twenty years haven't you?

A: Yes

Q: And in that time you have worked on numerous unlawful death cases?

A: Yes

Q: That experience has taught you the importance of proper documentation of the chain of custody of exhibits, hasn't it?

A: Yes

Q: And for the benefit of the Court, what the chain of custody means is that 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?

A: Yes

Q: The identity and sequence of all persons who possessed that item from the time of its acquisition by officials to its presentation in court should be documented?

A: Yes

Q: Evidential material should be transported in a manner that protects it from manipulation, degradation, and cross-contamination with other evidence?

A: Yes

Q: 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?

A: Yes

Q: The transportation, tracking and storage of this evidence should include the investigator's details?

A: Yes

Q: Evidential material should be kept in an appropriate storage facility at all stages of the investigation?

A: Yes

Q: Storage facilities should be clean, secure, suitable for maintaining items in appropriate conditions, and protected against unauthorized entry and cross-contamination?

A: Yes

Q: And this is all necessary to ensure the integrity of the evidence, is that correct?

A: Yes.

This line of questioning using the 2016 Minnesota Protocol, together with it being established that it did not take place in the particular case, would place these standards on the record, which may enable the defence lawyer to make submissions that raise a reasonable doubt in the mind of the judge or jury.

With respect to the forensic pathologist, in a case where an autopsy was carried out but the process was not photographed or videoed, a line of questioning using paragraphs 253 to 255 of the Minnesota Protocol 2016 may be developed as follows:

Q: You are a forensic pathologist with over 20 years experience aren't you?

A: Yes

Q: And you are aware that autopsies should be carried out to a certain standard aren't you?

A: Yes

Q: One such standard is that they should be adequately documented, is that correct?

A: Yes

Q: And that is so that the integrity of the findings of the autopsy may be examined including in a criminal trial such as this one, is that correct?

A: Yes

Q: The date, start and finishing times and the place of the autopsy should be recorded?

A: Yes

Q: The name(s) of the forensic pathologist prosecutor(s), the participating assistant(s) and all other persons present during the autopsy should be recorded, including the medical and/or scientific degrees and professional, political or administrative affiliations(s) of each?

A: Yes

Q: Each person's role in the autopsy should be indicated?

A: Yes

Q: And adequate photographs should also be taken – in fact they are crucial, aren't they?

A: Yes

Q: This is important for the thorough documentation of autopsy findings and for enabling them to be independently reviewed isn't it?

A: Yes

Again, depending on the importance of the findings of the autopsy in the particular case, this line of questioning would place these standards on the record enabling the defence to make submissions that raise a reasonable doubt in the mind of the judge or jury.

Of increasing significance in criminal trials are DNA evidence, fingerprint "matches", and digital forensics.

For instance, judges and juries can be overly impressed by statements such as "The (DNA) evidence is 11.8 quadrillion times more likely to belong to the accused rather than if it

belongs to someone else who is unrelated to the accused.” Such claims do not heed the risks of cross-contamination at the crime/death scene or mix-ups within the forensic laboratory.³⁴⁷ In 2013 in the United States, Lukis Anderson, a California adult male, was freed having spent five months in prison on remand for the alleged murder of a Silicon Valley millionaire. Mr Anderson could not have committed the murder as he was drunk and unconscious at a hospital at the time the victim was killed.³⁴⁸ His DNA had, though, been found by investigators on the fingernails of the victim. It later transpired that the same two paramedics who had treated Mr Anderson for intoxication at a San Jose liquor store in November 2012 had responded to the deceased’s home hours later and transference had inadvertently occurred. Defence lawyers had initially questioned whether the county crime laboratory might have made a mistake.³⁴⁹

In other countries, problems go deeper and it should be carefully considered by defence lawyers whether a systemic challenge to DNA evidence is warranted. In India, the use of DNA evidence in criminal investigation has seen a significant rise in recent years. But the absence of standard practices, quality checks, and regulation has resulted in inaccurate application of the technology. The problems are said to start with inadequate training of police officers in many States on the appropriate collection of DNA evidence. Then when the samples reach the DNA laboratories there is said to be a lack of standards, guidelines, accreditation, and proficiency testing of both the laboratories and their experts. Each laboratory therefore following different testing procedures and issues DNA

³⁴⁷ See, e.g., Police Use of DNA: Mistakes, Error and Fraud”, Forensic Genetics Policy Initiative, at: <http://dnapolicyinitiative.org/police-use-of-dna-mistakes-error-and-fraud/>

³⁴⁸ H. K. Lee, “How innocent man’s DNA was found at killing scene”, *San Francisco Gate*, 26 June 2013, at: <https://www.sfgate.com/crime/article/How-innocent-man-s-DNA-was-found-at-killing-scene-4624971.php>

³⁴⁹ Ibid.

reports in its own style. Proper records of the tests are not maintained for production in a court of law.³⁵⁰

A 2012 draft national law on DNA profiling for India had still not been promulgated as of July 2018. The Union Cabinet, though, had cleared a bill allowing law enforcement agencies to collect DNA samples, create "DNA profiles", and establish special databanks for forensic criminal investigations. The DNA Technology (Use and Application) Regulation Bill 2018, is the latest version of a Bill that originated as a DNA "profiling" Bill, framed by the Department of Biotechnology.³⁵¹ It remains to be seen whether the Act will effectively address the need for national standards and quality control of DNA evidence.

At the same time, in order for defence lawyers to be able to challenge DNA effectively, specialist training is usually required.

In the last decade, the "infallibility" of fingerprint evidence has also come under increasing scrutiny. It used to be the case that a single fingerprint found at the scene of a crime was such powerful evidence that it would be almost an automatic conviction. "Fingerprints never lie: Juries have been told that for more than a century".³⁵² That situation has changed markedly, and defence lawyers should treat all fingerprint evidence with great caution.

A 2012 report of an inquiry in Scotland concluded that fingerprint evidence cannot be treated with "100% certainty or on any other basis suggesting that fingerprint evidence is infallible". The report recommended that fingerprint evidence

³⁵⁰ I. Pallavi Polanki, "DNA experts could also be guilty of giving false results", *First Post*, 11 October 2012, at: <https://www.firstpost.com/india/dna-experts-could-also-be-guilty-of-giving-false-results-486289.html>

³⁵¹ "Union Cabinet clears DNA profiling bill", *The Hindu*, 4 July 2018, at: <https://www.thehindu.com/news/national/union-cabinet-clears-dna-profiling-bill/article24333036.ece>

³⁵² "Study: Fingerprint Evidence Isn't Infallible", *ABC News*, 12 October 2005, at: <https://abcnews.go.com/Technology/DyeHard/story?id=1202813&page=1>

"should be recognised as opinion evidence, not fact", and thus should be treated by courts "on its merits". It further recommended that features in a fingerprint should be "demonstrable to a lay person with normal eyesight" and that explanations "for any differences between a mark and a print require to be cogent if a finding of identification is to be made".³⁵³

One of the most high-profile errors occurred with respect to the 2004 Madrid train bombing. The United States Federal Bureau of Investigation (FBI) was forced to apologise when its over-reliance on digital images of fingerprints led the Bureau to wrongly suspect an Oregon lawyer of involvement in the bombing. An FBI laboratory wrongly linked him to prints recovered by Spanish police investigating the 11 March 2004 terrorist attack. US authorities matched digital images of partial latent fingerprints obtained from plastic bags that contained detonator caps to Muslim-convert Brandon Mayfield, leading to his arrest. But Spanish investigators later matched the fingerprints to an Algerian, leading a US court to clear Mr Mayfield of all charges.³⁵⁴

In 2017, Professor Jay Kadane of Carnegie Mellon University presented his argument to the 69th Annual Scientific Meeting of the American Academy of Forensic Sciences that fingerprint analysis should be considered only circumstantial evidence. He argued that a fingerprint analyst may observe common characteristics between the mark left at a crime scene and a fingerprint on file. However, he observed that no scientific basis yet exists to estimate how many people share these characteristics. In particular, there is no science to support the

³⁵³ E. O'Neill, "Fingerprint evidence 'based on opinion rather than fact'", *The Guardian*, 14 December 2011, at: <https://www.theguardian.com/uk/2011/dec/14/fingerprint-evidence-opinion-fact>

³⁵⁴ J. Leyden, "FBI apology for Madrid bomb fingerprint fiasco", *The Register*, 26 May 2004, at: https://www.theregister.co.uk/2004/05/26/fbi_madrid_blunder/

conclusion that only one person, the person whose fingerprint is on file, could have left the mark.³⁵⁵

There are major challenges for a defence lawyer in reviewing digital evidence. Digital investigators can be influenced by peer pressure. Certain organisations even prohibit their members from working for the defence in criminal cases. As a result, digital investigators who accept this restriction must expect their objectivity to be challenged by defence lawyers in the courtroom.³⁵⁶

Moreover, there is also a major problem with the quality of data. As one expert has noted, each year the world generates or replicates eight zettabytes of information. That is the equivalent of a stack of paper 1.6 trillion miles high. In the contemporary digital investigative analysis profession, "there is no longer such a thing as a 'full forensic analysis'".³⁵⁷ At the same time, a defence lawyer should also check that any agency that uses digital technology in the examination and presentation of evidence has in place robust and comprehensive standard operating procedures for the collection, storage, and analysis of evidence.³⁵⁸

Defence lawyers should also be aware that a raw data-extraction process identifies types of files in the storage media, such as images or documents, but without further analysis, potentially missing crucial evidence. Moreover, the police may not take the time to review all digital data, such

³⁵⁵ "Fingerprint Evidence is Circumstantial, Not an Identification", Dietrich College of Humanities and Social Sciences, 10 February 2017, at: <https://www.cmu.edu/dietrich/news/news-stories/2017/february/fingerprint-science.html>.

³⁵⁶ E. Casey, "Digital Evidence in the Courtroom", Chap. 3 in *Digital Evidence and Computer Crime*, 3rd Edn, Elsevier, 2011, p. 52.

³⁵⁷ O. Carroll, "Challenges in Modern Digital Investigative Analysis", *United States Attorneys' Bulletin*, January 2017, p. 30.

³⁵⁸ Jonathan W. Hak (Crown Prosecutor, Department of Justice, Alberta, Canada), "The Admissibility of Digital Evidence in Criminal Prosecutions", Crime Scene Investigator Network, January 2003, at: <http://www.crime-scene-investigator.net/admissibilitydigitalevidencecriminalprosecutions.html>

as text messages, which may contain exculpatory evidence. A number of recent rape prosecutions in the United Kingdom have led to acquittals or even judicial dismissal of the charges when it transpired that the police had either not identified or passed on to the defence relevant material. In February 2018, the head of the criminal bar said that public faith in the fairness of trials was being eroded and even affirmed that the justice system in England and Wales was approaching “breaking point” due to failures to disclose key digital evidence.³⁵⁹

Over the course of a number of years, Berkeley University’s Human Rights Center has been leading a process working towards international guidelines for the use of online digital forensics in the investigation and prosecution of international crimes.³⁶⁰ That work was ongoing as of writing.³⁶¹

Strategic litigation

Lawyers could use the 2016 Minnesota Protocol to support submissions in strategic litigation cases (sometimes called impact litigation) by highlighting international law and standards when bringing proceedings related to unlawful death in order to achieve a specific outcome, including:

- Raising public awareness of a particular issue in order to put pressure on actors including the government

³⁵⁹ O. Bowcott, “Justice system at ‘breaking point’ over digital evidence”, *The Guardian*, 12 February 2018, at:

<https://www.theguardian.com/law/2018/feb/12/justice-system-at-breaking-point-over-digital-evidence>

³⁶⁰ See Berkeley University’s Human Rights Center, *The New Forensics: Using Open Source Information to Investigate Grave Crimes*, 2018.

³⁶¹ <https://www.law.berkeley.edu/research/human-rights-center/programs/technology/>

to effect institutional change including in the justice sector;

- Seeking to effect the passage of specific domestic laws, or the revocation or amendment of existing laws;
- Requesting that a point of law be established or clarified, or that “bad” legal precedent be overturned;
- Pursuing the establishment of “good” legal precedent;
- Requesting a particular remedy through writs such as *habeas corpus* or *mandamus*.

11. Potentially Unlawful Death in Armed Conflict

A potentially unlawful death that occurs during an armed conflict is, as has already been remarked, legally challenging. It is first necessary to assess which body or bodies of international law apply (in addition, of course, to domestic law). Once this has been done, there may be further challenges in applying the law correctly. This Chapter discusses the various issues that arise when a death occurs during a situation of armed conflict, and then considers how the duty to investigate pertains to that death.

If there is no armed conflict in existence when any given force is used, then any use of force by the State will fall to be determined by the rules governing law enforcement, as influenced by international human rights law. The default rules are that force must be both necessary and proportionate in the circumstances, while firearms may only be used in self-defence or defence of others against an imminent threat of death or serious injury.³⁶² **Intentional lethal use of firearms (or indeed other weapons) is only lawful “when strictly unavoidable to protect life”.**³⁶³

There is also a duty of precaution under international human rights law. States have a duty to plan law enforcement operations in such a way as to minimise the risk of recourse to lethal force.

11.1 Classification of armed conflict under international law

The first step in any assessment of legality is therefore to determine whether an armed conflict exists under international law. Despite occasional suggestions to the contrary, there are

³⁶² Basic Principles on the Use of Force or Firearms, Principle 9.

³⁶³ Ibid.

only two categories of armed conflict under IHL and international criminal law: international armed conflict and non-international armed conflict.³⁶⁴ A valuable and widely cited general definition of the two categories was provided by the International Criminal Tribunal for the former Yugoslavia (ICTY) in a 1995 decision in the *Tadić* case:

“an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”³⁶⁵

International armed conflict

Article 2 common to the four Geneva Conventions (Common Article 2) applies to “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them”. Thus, already two clear scenarios exist for an international armed conflict: a declared war or another form of armed conflict between two or more States. The precise threshold of violence needed to trigger an international armed conflict is disputed but it is generally agreed that it is low, and certainly lower than that needed for a non-international armed conflict to exist. The *Tadić* definition cited above talks of an international armed conflict existing “whenever there is a resort to armed force between States”.

Common Article 2 goes on to clarify that the Conventions “shall also apply to all cases of partial or total occupation of

³⁶⁴ Some commentators have referred to ‘transnational’ or ‘internationalized’ armed conflict. These do not exist as a matter of international law.

³⁶⁵ *Prosecutor v Tadić (aka ‘Dule’)*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), ICTY Case No. IT-94-1, 2 October 1995, para. 70. See generally also ICRC, “How is the term ‘armed conflict’ defined in international humanitarian law?”, ICRC Opinion Paper, March 2008; and S. Vité, ‘Typology of armed conflicts in international humanitarian law: legal concepts and actual situations’, (2009) 91(873) *International Review of the Red Cross* 69–94.

the territory of a High Contracting Party,³⁶⁶ even if the said occupation meets with no armed resistance.” Thus, occupation of another State without valid consent, even if no shot is fired, is sufficient to trigger the application of IHL. This third scenario, a foreign military occupation, is also a form of international armed conflict.³⁶⁷

A further scenario is when one State attacks another by proxy: using an armed group rather than its own, regularly constituted armed forces. The precise threshold for this to occur is debated but is certainly higher than mere training or equipping of an armed group.

Finally, in a highly contested provision, according to Additional Protocol I, certain “wars” of national liberation are deemed to be international armed conflicts rather than non-international armed conflicts, which they would otherwise appear to be.

Non-international armed conflict

To amount to a non-international armed conflict, any given situation must involve regular and intense armed combat between State armed forces and a non-State armed group, or between two or more non-State armed groups. To be party to an armed conflict, the armed group or groups engaged in fighting must be sufficiently “organized”. This means in practice that such groups are a military or paramilitary force with a martial-style hierarchy, and that some of the members are equipped with, at the very least, firearms. They must be capable of mounting military operations, but they do not need

³⁶⁶ The term “High Contracting Parties” is a synonym for states parties under the law of treaties, meaning a state that is party to, and thus bound by, an international convention or treaty.

³⁶⁷ The Elements of Crimes established under the International Criminal Court (ICC) provide that “the term ‘international armed conflict’ includes military occupation”. ICC, “Elements of crimes”, UN Doc. PCNICC/2000/1/Add.2 (2000), note 34. See also, e.g., A. Cullen, “The threshold of non-international armed conflict”, SSRN, 2008, p. 132, at: <https://goo.gl/xk3NYV>

to possess uniforms, nor do they need to actively or even passively control territory.

Especially controversial is the geographical scope of non-international armed conflict. Whereas military operations in an international armed conflict may be regulated by IHL wherever in the world they are conducted, the geographical scope of a non-international armed conflict is far more limited. This is also reflected in the higher threshold imposed by States for its application, both in terms of intensity of armed violence and in relation to the organizational level of an armed group. That a State's armed forces are sufficiently organized is assumed.

Armed conflicts co-existing over the same territory

Different armed conflicts may co-exist over the same territory at the same time. This is generally, though not universally, accepted. In fact, the same hostile act may form part of an international armed conflict and a separate non-international armed conflict. The logic of the international/non-international armed conflict distinction militates in favour of this understanding. This has been accepted by the International Court of Justice³⁶⁸ and by the ICTY.³⁶⁹

11.2 Geneva Law

Geneva Law is the branch of IHL that seeks to ensure the humane treatment of all persons in the power of the enemy. This includes all enemy soldiers who are *hors de combat*, meaning these who are no longer fighting, either because they are unable to (owing to wounds or sickness), or because they are unwilling (and have surrendered). It also protects people in the power of a party to an armed conflict (such as

³⁶⁸ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)*, Merits Phase [1986] ICJ Reports 4, para. 219.

³⁶⁹ *Prosecutor v Tadić*, Trial Chamber Judgment of 7 May 1997, ICTY Case No. IT-94-1, paras. 568, 569.

detainees, whether military or civilian) or civilians in occupied territory. The procedure to be followed in the event of a death occurring to someone protected by Geneva Law is relatively straightforward (especially when compared to the law governing the conduct of hostilities, known as Hague Law).

When a person protected by Geneva Law dies, an investigation must be conducted. The specific procedure to be followed depends in part on who the deceased is and what his status was under IHL. For instance, a member of the enemy armed forces who is captured during an opposing force during an international armed conflict is entitled to prisoner of war status.³⁷⁰ If he or she dies during detention, the detaining power **must** carry out an investigation (termed an "enquiry" under IHL). According to Geneva Convention III:

"Every death or serious injury of a prisoner of war caused or suspected to have been caused by a sentry, another prisoner of war, or any other person, as well as any death the cause of which is unknown, shall be immediately followed by an official enquiry by the Detaining Power.

"Statements shall be taken from witnesses, especially from those who are prisoners of war...."³⁷¹

Moreover, if the enquiry indicates the guilt of one or more persons, the detaining force "shall take all measures for the prosecution of the person or persons responsible".³⁷²

A similar process applies to the death of a civilian who is interned during an international armed conflict, but only if he or she is either an alien in the territory of a State engaged in such a conflict, or is a civilian living in territory that is militarily occupied by a foreign State.³⁷³

³⁷⁰ There is no similar status under non-international armed conflict.

³⁷¹ Geneva Convention III, Article 121.

³⁷² Ibid.

³⁷³ Geneva Convention IV, Article 131.

Other deaths that occur to civilians or fighters, in particular during a situation of non-international armed conflict, must be investigated in the manner set out in the Minnesota Protocol. Ordinarily, there would not be insurmountable obstacles to such an investigation occurring, unless, for example, the personnel or facilities where the death occurred, or the authorities charged with such an investigation, come under attack or lack the capacity to discharge their responsibility. The rules that apply in determine whether the death was unlawful would be the rules governing law enforcement, as set out above.

During any armed conflict, all parties to the conflict 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.³⁷⁴

In the event of any 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 body and by marking the location of graves.

All parties to an international armed conflict must at least endeavour to facilitate the return of the remains of the deceased at the request of, *inter alia*, the next of kin.³⁷⁵ Moreover, they are required to establish an information bureau to forward any information regarding the death of protected persons³⁷⁶ in its hands to the power to which these persons

³⁷⁴ Additional Protocol I (which applies to international armed conflict only), Articles 32-33; and ICRC, Study of Customary IHL, Rule 117, which applies the rule to all armed conflicts.

³⁷⁵ ICRC, Study of Customary IHL, Rules 116 and 114; Geneva Convention I, Articles 16-17; Geneva Convention II, Articles 19-20; Geneva Convention III, Article 120; Geneva Convention IV, Articles 129-130; and Additional Protocol I, Article 34.

³⁷⁶ Protected persons include prisoners of war; alien civilians in one of the parties to the armed conflict; and civilians in occupied territory, but only in situation of armed conflict.

belong.³⁷⁷ Where relevant, this duty applies, *mutatis mutandis*, to enforced disappearance.

11.3 Hague Law

Much more complicated to assess legally is the situation when a death occurs during the conduct of hostilities (i.e. combat between opposing armed forces or groups). Before considering the substance of the legal rules, though, it is first necessary to understand when a death is to be deemed to have occurred in the conduct of hostilities, therefore falling to be regulated by Hague Law. This is a contentious issue.

What amount to acts in the conduct of hostilities?

A relevant act by a belligerent during and in connection with an armed conflict falls to be judged by the rules of **either** Geneva Law **or** Hague Law. In many instances, it is perfectly clear which applies: Geneva Law to the conditions of detention and treatment of a prisoner; Hague Law to a pitched battle between the conflict parties, for example. But there are many circumstances in which it may be unclear which of the two legal regimes applies.

As a rule of thumb, hostilities are the use, during and in direct connection with an armed conflict, of means and methods of warfare by one party to the conflict against the armed forces or other military objective of an adverse party, or against civilians or civilian objects in that party's territory **when they are not in the power of the attacking force**. As a consequence, a detainee will almost always be protected by Geneva Law rather than Hague Law.

Also difficult to distinguish, however, are acts that fall within the conduct of hostilities from acts for the purpose of law

³⁷⁷ Geneva Convention I, Article 16; Geneva Convention II, Article 19; Geneva Convention III, Articles 120 and 122; and Geneva Convention IV, Articles 136.

enforcement. As a 2013 publication by the ICRC noted, for instance, "It is not entirely clear in international law which situations in the context of an armed conflict are governed by the conduct of hostilities paradigm and which are covered by the law enforcement paradigm."³⁷⁸ But it is clear that the default situation for use of force by the State, even in armed conflict, remains law enforcement; only in situations of combat do the rules governing the conduct of hostilities apply.

For instance, armed bank robberies continue to occur during an armed conflict. These robberies do not amount to hostilities. In general, combatting this phenomenon is to be considered a law enforcement task, even if hostages are taken and the robbers do not make a successful getaway. This is still the case even if it is known that the robbers belong to an armed group that is party to a non-international armed conflict and the robbery is expected or intended to fund the group's future activities.

Moreover, in a non-international armed conflict (but not an international armed conflict), hostilities are geographically limited to areas where regular and intense fighting is occurring. What happens, then, if an attack involving a State and a rebel group occurs hundreds of miles away from such an area? The answer is not settled, but there is evidence that the rules that apply to the actions of the State remain those that govern law enforcement, not IHL.³⁷⁹

When an act is one that is to be considered undertaken in the conduct of hostilities and therefore does fall to be judged by IHL, the rules are generally the same whether the conflict is international or non-international. The two most important rules (also called principles owing to their importance) are distinction in attack and proportionality in attack.

³⁷⁸ G. Gaggioli, *Expert Meeting: The Use of Force in Armed Conflicts. Interplay between the Conduct of Hostilities and Law Enforcement Paradigms*, Report, ICRC, Geneva, 2013, p. 1.

³⁷⁹ See, e.g., *Finogenov and others v Russia* (2011) ECHR 2234.

The principle of distinction

Under this rule, parties to any armed conflict must direct attacks only against lawful military objectives (military personnel or objects of concrete military value) and never against the civilian population, individual civilians, or civilian objects. The basic rule, as set out in Additional Protocol I to the Geneva Conventions, is as follows:

"In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."³⁸⁰

According to an ICRC study of customary IHL, the core of the customary rule of distinction in attack is reformulated as two distinct norms:

"The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.

"The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects."³⁸¹

Civilians are persons who are not members of the armed forces (or armed groups) while the civilian population comprises all persons who are civilians.³⁸²

³⁸⁰ Additional Protocol I, Article 48.

³⁸¹ ICRC Study of Customary IHL, Rule 1 ("The Principle of Distinction between Civilians and Combatants"); and Rule 7 ("The Principle of Distinction between Civilian Objects and Military Objectives").

³⁸² ICRC Study of Customary IHL, Rule 5 ("Definition of Civilians").

Civilian objects are defined as any objects that are not military objectives, which in turn "are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."³⁸³ Thus, at any given point in time a specific object or piece of land is either a civilian object or a military objective: it cannot be both simultaneously. Where an object serves a "dual-use" function, such as a road, bridge, power station, or airport runway, whether it is a civilian object or a military objective under IHL depends on the circumstances. Notwithstanding civilian use or occupation, when any object makes an effective contribution to military action *and* its destruction or neutralization, in the prevailing circumstances, offers a definite military advantage, Hague Law considers it to be a military objective.

In addition to prohibiting direct attacks on civilians and civilian objects, on the basis that attacks may only lawfully be directed against military objectives, the rule of distinction also prohibits indiscriminate attacks. Such attacks are those:

- That are not directed at a specific military objective
- That employ a means or method of combat that cannot be directed at a specific military objective; or
- That employ a means or method of combat whose effects cannot be limited in accordance with law of armed conflict rules; and, consequently
- In each such case are of a nature to strike military objectives and civilians or civilian objects without distinction.³⁸⁴

This means that if a weapon or tactic cannot be, or is not, directed with sufficient accuracy against a military objective

³⁸³ ICRC Study of Customary IHL, Rule 8 ("Definition of Military Objectives").

³⁸⁴ ICRC Study of Customary IHL, Rule 11 ("Indiscriminate Attacks"); and Rule 12 ("Definition of Indiscriminate Attacks").

(the level of accuracy required is unclear), or if the effects of the attack will inevitably extend or spread over such an area that they do not comply with the rule of distinction, the attack is indiscriminate and therefore unlawful.

The war crime of attacking civilians is set out in a number of IHL and international criminal law treaties and by the ICRC in its assessment of customary international law. In the Statute of the International Criminal Court (ICC Statute), the Court is potentially given jurisdiction over the war crime of: "Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities".³⁸⁵

The ICRC affirms that under customary international law the war crime is '[m]aking the civilian population or individual civilians, not taking a direct part in hostilities, the object of attack'.³⁸⁶ As the ICRC explains, to meet the requirement that the violation be of a serious nature, it is sufficient that the conduct *endangers* persons or objects that are protected by the law:

"The majority of war crimes involve death, injury, destruction or unlawful taking of property. However, not all acts necessarily have to result in actual damage to persons or objects in order to amount to war crimes. This became evident when the Elements of Crimes for the International Criminal Court were being drafted. It was decided, for example, that it was enough to launch an attack on civilians or civilian objects, even if something unexpectedly prevented the attack from causing death or serious injury. This could be the case of an attack launched against the civilian population or individual civilians, even though, owing to the failure of the weapon system, the intended target was not hit."³⁸⁷

³⁸⁵ ICC Statute, Article 8(2)(b)(i).

³⁸⁶ ICRC Study of Customary IHL, Rule 156 ("Definition of War Crimes"), "List of War Crimes", (ii)(i), at: <https://goo.gl/xIOyKz>.

³⁸⁷ Ibid., "Serious nature of the violation", (i).

Arguably, though, the ICTY erred in its finding of law by holding, on a number of occasions, that indiscriminate attacks may qualify as direct attacks on civilians. Perhaps the best example of where the Tribunal went wrong is the *Galić* case. In his appeal against conviction by the Trial Chamber, General Galić's defence team presented its brief on 19 July 2004, arguing that neither disproportionate attacks nor indiscriminate attacks may qualify as direct attacks on civilians.³⁸⁸ This is a correct statement of the law. The ICRC, for example, in its findings of customary law distinguishes the war crime of making civilians the object of attack, set out above, from three other such crimes:

- Launching an indiscriminate attack resulting in loss of life or injury to civilians;
- Using prohibited weapons;
- Launching an attack in the knowledge that such attack will cause incidental loss of civilian life, injury to civilians or damage to civilian objects which would be clearly excessive in relation to the concrete and direct military advantage anticipated.

There is also, despite its omission from the ICC Statute, the war crime, distinct from direct attacks on civilians, of indiscriminate attack. There is also the war crime of using an indiscriminate weapon. None of these should be conflated with the war crime of directly attacking civilians.

The principle of proportionality in attack

Even if an attack is targeted at a lawful military objective in compliance with the principle of distinction, the decision to launch the attack must also respect the rule of proportionality. According to this customary Hague Law rule, an attack against a lawful target will be unlawful where it "may be expected" to

³⁸⁸ Defence Appeal Brief, 19 July 2004, para. 50; see *Prosecutor v Galić*, Appeals Chamber Judgment of 30 November 2006, ICTY Case No. IT-98-29-A, para. 131.

cause incidental civilian harm that is “excessive” compared with the “concrete and direct military advantage anticipated”.³⁸⁹ Civilian harm encompasses deaths or injuries to civilians, destruction of or damage to civilian objects, “or a combination thereof”. Proportionality therefore has “nothing to do with injury to combatants or damage to military objectives”.³⁹⁰

It is important to bear in mind that the assessment of likely civilian harm is made by the attacker ***in advance of the attack***. It is not an analysis based on the extent of any civilian casualties or damage to civilian objects actually inflicted.

The challenge in applying the proportionality rule is focused on the inherent imprecision of the term “excessive”. As Yoram Dinstein has observed, the rule is a balancing act: the greater the anticipated military advantage, the greater the extent of foreseeable civilian harm that may not be unlawful.³⁹¹ In the view of the US Department of Defense in 2015:

“The weighing or comparison between the expected incidental harm and the expected military advantage does not necessarily lend itself to empirical analyses.³⁹² On the one hand, striking an ammunition depot or a terrorist training camp would not be prohibited because a farmer is plowing a field in the area.³⁹³ On the other hand, a very significant military advantage would be necessary to justify the collateral death or injury to thousands

³⁸⁹ The ICRC has expressed the customary IHL rule as follows: “Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.”

³⁹⁰ Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge: Cambridge University Press, 2nd Edn, 2010), p. 129.

³⁹¹ *Ibid.*, p. 131.

³⁹² ICTY, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, 13 June 2000, para. 48.

³⁹³ *Ibid.*, citing also Rogers, *Law on the Battlefield*, pp. 64–65.

of civilians.³⁹⁴ In less clear-cut cases, the question of whether the expected incidental harm is excessive may be a highly open-ended legal inquiry, and the answer may be subjective and imprecise....³⁹⁵

The assertion that only “very significant” military advantage could justify the incidental death of, or injury to, thousands of civilians was narrowed in the US Department of Defense (USDOD)’s revised Law of War Manual in December 2016. In coming closer to the state of Hague Law it was now affirmed that: “...an *extraordinary* military advantage would be necessary to justify an operation posing risks of collateral death or injury to thousands of civilians” (emphasis added).³⁹⁶

Nonetheless, the innate imprecision of the notion of “excessive”, combined with additional *actus reus* and *mens rea* requirements over and above the primary Hague law rule, makes prosecution for the war crime of a disproportionate attack extremely challenging. A prosecutor at the ICC, for instance, would need to prove, *inter alia*, that the relevant commander “intentionally” launched an attack “in the knowledge” that it would cause “clearly excessive” civilian harm in relation to the “concrete and direct overall military advantage anticipated”.³⁹⁷ There have been very few successful prosecutions for the war crime of a disproportionate attack, and none so far in the ICC.

According to the ICTY’s Trial Chamber judgment in the *Galić* case, in determining whether an attack was proportionate it is necessary to examine “whether a reasonably well-informed person in the circumstances of the actual perpetrator, ... making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result

³⁹⁴ M. Greenspan, *Modern Law of Land Warfare* (Berkeley: University of California Press, 1959), p. 335.

³⁹⁵ USDOD 2015 Law of War Manual, para. 5.12.4.

³⁹⁶ USDOD December 2016 Law of War Manual, para. 5.12.3.

³⁹⁷ See ICC Statute, Article 8(2)(b)(iv).

from the attack".³⁹⁸ To establish the *mens rea* of the war crime of a disproportionate attack, the ICTY has held that the Prosecution must prove that the attack "was launched wilfully and in knowledge of circumstances giving rise to the expectation of excessive civilian casualties".³⁹⁹

11.4 The duty under IHL to investigate deaths occurring during the conduct of hostilities

The complexity of the application of the principles of distinction and proportionality in attack make the investigation of deaths occurring during the conduct of hostilities a significant challenge. Under IHL, there is not only a duty on States to investigate and take remedial action where war crimes are alleged or suspected to have been committed. Each of the Geneva Conventions requires States parties to "take measures necessary for the suppression of all acts contrary to the provisions of the ... Convention other than the grave breaches...."⁴⁰⁰ This applies also to the provisions of Additional Protocol I⁴⁰¹ (though not, explicitly, to Additional Protocol II, which applies to certain non-international armed conflicts).

The general duty to suppress violations of Hague Law is complemented by the duty under Article 1 common to the four Geneva Conventions whereby each State party undertakes "to respect and to ensure respect" for all of the provisions of the conventions "in all circumstances". Consonant with these obligations, the 2016 Minnesota Protocol states that:

"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. ... Where any death is suspected or

³⁹⁸ *Prosecutor v Galić*, Appeals Chamber Judgment of 30 November 2006, ICTY Case No. IT-98-29-A, para. 58.

³⁹⁹ *Ibid.*, para. 59.

⁴⁰⁰ Geneva Convention I, Article 49; Geneva Convention II, Article 50; Geneva Convention III, Article 129; and Geneva Convention IV, Article 146.

⁴⁰¹ Additional Protocol I, Article 85(1).

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."⁴⁰²

Where a violation, especially a serious violation, of Hague Law rules has occurred, such as of the principles of distinction or proportionality in attack, the State whose forces or agent have perpetrated the violation will bear responsibility under international law. Under the Draft Articles on Responsibility of States for Internationally Wrongful Acts, issued by the International Law Commission:

"Every internationally wrongful act of a State entails the international responsibility of that State.

"The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act."⁴⁰³

An internationally wrongful act is an action or omission attributable to a State under international law that constitutes a breach of an international obligation of that State.⁴⁰⁴ In 2005, the International Court of Justice observed "that it is well established in general international law that a State which bears responsibility for an internationally wrongful act is under an obligation to make full reparation for the injury caused by that act".⁴⁰⁵

Under customary IHL, a State responsible for violations of that law "is required to make full reparation for the loss or injury caused".⁴⁰⁶ In the view of the ICRC, State practice establishes

⁴⁰² 2016 Minnesota Protocol, para. 21.

⁴⁰³ Draft Articles on Responsibility of States for Internationally Wrongful Acts, Articles 1 and 31(1).

⁴⁰⁴ *Ibid.*, Article. 2.

⁴⁰⁵ *Armed Activities on the Territory of the Congo (Congo v Uganda)*, ICJ Rep (2005), para. 259.

⁴⁰⁶ ICRC Study of Customary IHL, Rule 150 ("Reparation").

this rule as a norm of customary international law applicable in both international and non-international armed conflicts.⁴⁰⁷ This obligation adds to the duty to provide reparation to individual victims of IHL violations. In practice, however, the victims of violations of IHL in the conduct of hostilities have struggled to secure reparation. When compensation for harm has been provided by States, it has often been on an *ex gratia* basis and without admission of any legal responsibility. For instance, in Afghanistan in addition to the Afghan authorities themselves, Australia, Canada, Germany, Italy, the Netherlands, Norway, Poland, the United Kingdom, and the United States have each offered *ex gratia* payments for the acts of their armed forces.⁴⁰⁸

An exception to the general trend followed the particularly grave incident that occurred at around 2am, a US Air Force AC-130 gunship attacked Médecins sans Frontières (MSF)'s Trauma Centre in the city of Kunduz in northern Afghanistan. The airstrikes seemingly lasted at least one hour.⁴⁰⁹ MSF doctors and other medical staff were reportedly shot by the aircraft's gunners while running to safety in a different part of the compound.⁴¹⁰ MSF's internal report on the air strike stated that the total number of dead was "at least 30, including: 10 known patients, 13 known staff, and 7 more bodies that were burnt beyond recognition".⁴¹¹

On 7 October 2015, US President Barack Obama apologised for the airstrike and announced the US would be making payments to the families of those killed. Subsequently, a US Department of Defense report whose findings were made

⁴⁰⁷ Ibid.

⁴⁰⁸ V. Cadelo, 'Redress and reparation for victims of armed conflict: a critical review of practice in 2013', in S. Casey-Maslen (ed.), *The War Report: Armed Conflict in 2013*, (Oxford: Oxford University Press, 2014), p. 570.

⁴⁰⁹ Médecins Sans Frontières, "Initial MSF internal review: Attack on Kunduz Trauma Centre, Afghanistan", November 2015 (publicly released 5 November 2015), p. 7.

⁴¹⁰ Ibid., p. 10.

⁴¹¹ Ibid., p. 12.

public on 29 April 2016 stated that "condolence" payments had been made to more than 170 individuals and families and \$5.7 million had been approved to reconstruct the MSF facility. General Joseph Votel, the commander of US Central Command, said in a news briefing to release the report that \$3,000 had been paid to the survivors, and \$6,000 to the relatives of those killed in the attack.⁴¹²

The investigation found that a combination of factors had caused both the ground force commander and the air crew to believe mistakenly that the air crew was firing on the intended target, an insurgent-controlled site approximately 400 metres away from the MSF Trauma Centre. General Votel said that: "The investigation concluded that certain personnel failed to comply with the rules of engagement and the law of armed conflict. However, the investigation did not conclude that the failures amounted to a war crime."⁴¹³

⁴¹² Ibid.

⁴¹³ "News Transcript: Department of Defense Press Briefing by Army General Joseph Votel, commander, US Central Command, Press Operations, Army General Joseph Votel, commander, U.S. Central Command", 29 April 2016.

Annex

The Detailed Guidelines in the Minnesota Protocol

(Extracts)

A. Detailed Guidelines on Crime-Scene Investigation

1. Introduction

167. Crime-scene examinations aim to identify scientifically, document, collect and preserve court- admissible evidence that may link suspects, victims and physical evidence with the scene. Such examinations should be conducted by forensic experts who have been trained in the legal and scientific identification, documentation, collection and preservation of evidence.

168. Documentation consists of:

- (a) **Photographic documentation.** Photographs can also include a reference scale and direction indicator. Video documentation can supplement photographic documentation, but owing to poor image resolution should not be considered a primary means of capturing images
- (b) **Measurements** (e.g. length/width/height, marked on sketches, diagrams or maps; instrument results)
- (c) **Notes** describing findings and recording data collection.

These records need to be managed according to chain-of-custody standards, safeguarding them from possible manipulation.

169. In situations where the rule of law has broken down, such as during armed conflict, investigations may not be carried out by local authorities, and in such cases international bodies may not establish jurisdiction until long after any crimes have occurred, if at all. Under these circumstances, non-forensic experts, such as medical workers, journalists, or human rights activists, may be the first to come upon the scene. What these witnesses document may be important to future investigations as well as to the proper management of the dead and the identification of victims, even though they have no formal legal mandate to identify, document or collect evidence.

170. Nonetheless, documentation through methodical photographing and/or video recording, measurements and thorough note-taking is a means for such non-experts to contribute to future truth-seeking and/or judicial inquiries. The credibility of such documentation is increased when records are kept according to chain-of- custody standards, allowing for independent verification of the identity of the author, the origin of the records

and how they were subsequently stored or managed. The effective implementation of the right to the truth is also supported by a strong national archival system.

171. Crime-scene investigators are individuals trained in identifying, documenting, collecting and preserving physical evidence for further analysis. At an early stage, it should be established which type of scientific expertise will be needed in the field and, later on, in forensic laboratories. Some of the experts who may need to be consulted include:

- Forensic pathologists/doctors
- Forensic anthropologists
- Forensic archaeologists
- Forensic entomologists
- Forensic odontologists
- Forensic botanists
- Forensic radiologists
- Ballistics and firearms experts
- Chemists (e.g. with expertise in chemical weapons) and/or toxicologists
- Human identification experts (e.g. fingerprint experts, mass fatality management experts, molecular biologists/forensic DNA experts, or forensic dentists)
- Digital data experts (e.g. mobile phones, memory sticks, computers or social media), and
- Facial reconstruction experts.

Within the overall investigatory strategy, recognized forensic laboratories should be identified for subsequent laboratory examinations and analysis of evidence.

172. Once its dimensions have been identified, the scene needs to be secured. A crime scene entry log should be opened and maintained until the crime scene has been fully processed. Securing the scene entails:

- (a) **Limiting access:** Access to the geographic area of the scene is documented and limited to relevant experts and investigators. Access that may have contributed to the contamination and degradation of evidence, as well as any evidence of a manipulation of the scene that may have occurred or could possibly occur, need to be identified and documented
- (b) **Personnel safety:** The scene is rendered safe for access for the identification, documentation and collection of evidence. In circumstances such as ongoing armed conflict, or areas where items such as unexploded ordnance, toxic agents, and/or booby-traps are suspected, specialists with expertise in rendering such items safe need to be consulted. They include explosive ordnance disposal personnel and chemical, biological and/or radiological ex-

perts. Precautions against coming under armed attack might also be necessary in some circumstances

- (c) **Evidence security:** Limiting access to a death scene entails establishing a chain of custody that originates when an individual crime-scene investigator identifies evidence.

173. The crime scene should be searched for evidence. Where possible, the search should be conducted jointly with an investigator who is aware of background information on the death, although great care should be exercised so as not to bias the investigation. The search criteria must, at a minimum, be documented in investigators' notes. This serves to identify which items are pertinent to establishing a sequence of events and can link suspects, victims and other physical evidence with the scene of death.

174. Items of physical evidence need to be identified with unique photo markers (numerical and/or alphabetical). The site code also needs to be identified. This allows for their location and their relation to other items of evidence within the death scene to be comprehensively documented, including for inventory and chain-of-custody purposes. A standard marking system for all evidence should be introduced – see Paragraphs 94 to 97 on labelling.

175. Any forensic analysis, including but not limited to the crime scene, requires the following documentation methods: photography, measurements, note-taking and an inventory. These should all be cross-referenced against each other, to improve the independent understanding of a death scene and increase the credibility of the collected evidence.

2. Photographic documentation

176. The photographic documentation of a death scene and of any physical evidence is a two-dimensional depiction of a three-dimensional space or object. Photographs should therefore be taken in sequence, with an overlap between one image and the next, allowing an outside observer or examiner to understand the spatial relationship between the items of evidence within a defined space such as a death scene.

177. The sequence in which such photographs were taken should be documented by a photolog, identifying, at a minimum, the identity of the photographer, the position of a photograph within a sequence, the time the photographs were taken and the location at which they were taken. Where the technology exists, digital cameras should be used. Check that the date and time on the camera is set correctly. Digital cameras can generate a sequential file-numbering system and include metadata embedded in the digital images themselves. Such metadata can include date and time, the camera's technical settings and, when it is connected to a global positioning system (GPS) longitude and latitude information. Relevant information

should be included in a photolog. The same data should be recorded if analogue (film) cameras are used.

178. Three types of photographs need to be included in the documentation of crime scenes and evidence:

- (a) **Overview photographs** visually establish the spatial dimensions of a crime scene. Overview photographs should be taken from the outside of the scene towards its centre, ideally from along the outside perimeter of the scene. If possible, photo markers should be distinguishable in these photographs
- (b) **Medium-range photographs** establish a spatial relationship between items of evidence and their location in a crime scene. Photo markers identifying the individual items of evidence should be visible in these photographs
- (c) **Close-up photographs** visually establish the characteristics of individual pieces of evidence. They should include an initial photograph of the photo marker identifying the evidence and then subsequent photographs of the item of evidence. Close-up photographs should fill the frame of the photograph with the item of evidence and should include a scale.

3. Measurements

179. Measurements taken at the scene corroborate and elaborate on the spatial dimensions documented in the photographs. If resources allow, they can be generated through computer-aided design software and technology, such as laser scanners or theodolite systems, or can be hand-drawn. Such measurements and resulting diagrams should include, at a minimum, the name of the investigator taking the measurements, a casenumber, a date and time, measured dimensions, a north arrow and an index of the items of evidence located in the sketch via measurements taken at the scene. A scale and reference points are needed for measurements.

4. Note-taking/data collection and compiling an inventory

180. Existing forms are available. Notes establish a written record by an individual death-scene examiner or forensic expert. Often, such notes are handwritten, adding to the credibility of the work by individualizing the record itself through the handwriting. The fact that such records are relatively difficult to falsify and/or manipulate subsequently also increases their credibility.

181. Notes should include, at a minimum, the name of the investigator, a date and time, and a chronological log of the ac-

tivities conducted (such as search criteria, when the search was conducted, when and where photographs were taken, when and where measurements were taken, when and where evidence was collected and packaged, and what types of analysis were conducted). Notes should include an inventory and a detailed description of items of evidence, identified with their corresponding photo markers, and should be signed by the investigator carrying out the investigation or analysis.

182. These methodical scientific documentation techniques (i.e. photography, measurements and notes) should be included in any forensic documentation. This applies both at a crime scene and in the laboratory, for example when bloodstains on an article of clothing are being documented, or when a medical examiner is documenting a human body.

B. Detailed Guidelines on Interviews

1. Introduction

183. These Guidelines look in detail at the conduct of an interview: how to prepare, how to start one, how to elicit facts and how to conclude. They also deal with how to interview a suspect, the role of interpreters, and recording an interview.

2. Preparation and setting

184. Identify the purpose of the interview and how it fits into the overall investigative strategy.

185. Learn what you can about the interviewee prior to the interview, such as their relationship to events, possible biases and potential security risks.

186. Gather information, including documents and photographs, that might be referred to during the interview.

187. Prepare the best possible strategy and interview structure to elicit information, but remain flexible. Compile a list of key points to cover during the interview.

188. Consider the gender, ethnicity, religion and other profile factors of interviewers and interpreters, to respect the interviewees' culture and to help put them at ease. When interviewing people about sexual or gender-based crimes, consider the gender of interviewers and interpreters. Consult with experts before interviewing victims of sexual violence.

189. Consult with experts on approaches to interviewing children, people with disabilities, the bereaved and others who are vulnerable or po-

tentially prone to retraumatization. Examples include holding shorter interviews, using simpler language and having trusted support persons present.

190. Whenever possible, conduct the interview in a secure and private place where the likelihood of disruption is minimized as far as possible.

191. Whenever possible, conduct the interview in a one-to-one setting, considering the interviewee's preferences and needs. In some circumstances the protection of human rights and the quality of the investigation may call for more than one interviewer, or the presence of a support person for the interviewee.

192. Allocate enough time to conduct a thorough interview without rushing, and allow time for breaks.

3. Starting the interview

193. Record the interview from the very beginning using the means chosen.

194. The interviewers should introduce themselves and their affiliation and should clearly communicate the purpose and intended use of the interview.

195. Informed consent should normally be sought from the interviewee before proceeding. This requires:

- (a) Discussing any risks associated with the interview
- (b) Agreeing on security measures to protect the interviewee and others, without offering assurances that cannot be guaranteed. This includes whether a person's identity will be kept confidential and if so, how this will be done
- (c) Explaining that participation is voluntary and that the interviewee may stop the interview at any time, or may choose not to answer any questions, without adverse consequences
- (d) When interviewing children, consider the best interests of the child, including whether there are other ways to obtain the information than through the interview. Ensure that the child understands the purpose and intended use of the interview, and obtain his/her consent. Whenever possible, inform the child's parents or legal guardians of the interview, unless there are reasonable grounds not to do so. The child's parents or legal guardians, or another trusted person, may be present during the interview if the child so requests
- (e) When interviewing people with mental or intellectual disabilities, clearly explain, and repeat if necessary, the purpose and intended use of the interview. Use simple, accessible language (orally and/or in written format) and allow the interviewee sufficient time to make a decision.

196. Ask the interviewee to describe everything that he/she knows to the best of their ability, and to make it clear when they are talking about something they have observed or heard directly versus information they have obtained from others.

197. Act fairly and with integrity. The use of duress, deception or unfair means to elicit information or to obtain a confession could result in evidence being excluded from consideration by a court. It is not permissible in any circumstances to use torture or cruel, inhuman or degrading treatment to obtain information from an interviewee.

198. For interviews with people who may be traumatized, try to ensure their privacy and comfort. Avoid questions that imply victim-blaming; avoid jumping back and forth between sensitive and "safe" topics; and limit detailed questions about violent incidents, especially sexual and gender-based crimes, to what is essential for the investigation.

199. Build rapport and show empathy as appropriate.

200. Use neutral and culturally sensitive language.

201. Keep an open mind, be objective and remain non-judgmental.

4. Fact-finding

202. Record the interviewee's identity, personal and contact details in a way that takes into account any security concerns.

203. Record the identity, personal and contact details of all others present at any time during the interview, taking into account security concerns.

204. Begin with non-controversial and less sensitive questions, to establish a rapport before addressing difficult topics.

205. Establish the interviewee's relationship to events (e.g. is the person an eyewitness, a relative, an expert?).

206. Ask open-ended questions to understand the overall picture, such as "describe", "explain" and "what happened next?".

207. Avoid questions that imply a certain answer (leading questions) or that elicit yes/no answers (closed questions).

208. Keep questions as short and simple as possible; repeat or rephrase a question if the answer was unclear.

209. As the interview progresses, ask for details to establish timelines, identify relevant individuals and elicit facts that can later be checked.

210. Do not always accept the first answer given: persistent questioning, done respectfully, helps to obtain accurate information.

211. Test information obtained from an interviewee against what the interviewer already knows or what can reasonably be established.

212. Ask interviewees to support their assertions with documents and other corroborative material.

213. Ask interviewees to draw maps and diagrams for clarification and, when safe, to show the interviewer locations relevant to the investigation.

214. Ask a wide range of questions to obtain information, but keep questions appropriate to the case.

215. When interviewing more than one person at a time is unavoidable, clearly record which person has provided what information.

216. Carefully observe the interviewee for signs of retraumatization. Take breaks or stop an interview when appropriate. Traumatized interviewees may have gaps or inconsistencies in their recollection of events.

217. The interviewee should be observed for any inappropriate or inconsistent responses to questions, which may transform the interviewee into a suspect.

218. When interviewing children – which, preferably, should be undertaken by a specially trained interviewer – use plain language, ask short questions and take frequent breaks. Stay attuned to the child's medical and psychosocial needs, and provide service referrals as appropriate.

219. When interviewing people with disabilities, make sure they feel comfortable and safe. Speak directly to the person and maintain eye contact rather than interacting directly with a support person or, if present, the sign language interpreter. When interviewing someone who is blind or has limited vision, the interviewers should identify themselves and any others present. When interviewing someone with a mental or intellectual disability, ask simple questions and repeat them until understood. Provide referrals for medical and psychosocial needs as appropriate.

5. Concluding the interview

220. Read or play the record of interview back to the interviewee and allow the person to correct or clarify the contents. Ask if the interviewee has anything to add.

221. Ask if the interviewee can suggest others to interview.

222. Obtain, with permission, any material referred to in the interview, such as photographs, medical reports and court records.

223. With the interviewee, review security measures and ways to stay in contact after the interview.

224. Ensure that the interviewee certifies in writing or on audio or video that:

- (a) The interviewee's statement has not been made under any form of unlawful duress

- (b) The content of the interview is true and correct to the best of the interviewee's knowledge and recollection
- (c) The interviewee was not threatened or forced to give the statement, nor were any promises or inducements offered in this regard
- (d) The interviewee is aware that the statement may be used in legal proceedings and that they may be called to give evidence
- (e) The interviewee may be liable to prosecution for contempt of court, for interfering in the administration of justice, or for giving false testimony if they say anything in the statement that they know to be false or do not believe to be true.

225. Ensure that the interviewee signs and dates every page of a written interview record. Any document or material, such as diagrams and photographs, to which the interviewee refers or which s/he creates during the interview should also be signed or otherwise authenticated and should be attached to the interview record.

226. Ensure that all records from the interview are stored securely to protect privacy and to maintain security.

227. Identify points arising from the interview to follow up in the investigation, including other people to interview and potential lines of inquiry.

6. Additional guidance when interviewing a suspect

228. In addition to the guidance set out above, suspects must be granted and informed of at least the following rights:

- (a) To be presumed innocent until proven guilty, which includes a fair opportunity to provide their account of relevant events
- (b) Not to be compelled to incriminate themselves
- (c) To remain silent
- (d) To the presence and assistance of a lawyer during questioning, and to consult the lawyer in private
- (e) To have the interview recorded, including place(s) and date(s) of questioning; the place of detention, if any; the start and end times of each interview session; the intervals between sessions (including rest periods); the identities of the interviewer(s) and all others present; and any requests made by the individual being questioned
- (f) To be interviewed in a language he or she understands
- (g) If the person is arrested or detained, to be informed immediately of the reason for the arrest and to be told promptly of any charges

- (h) For foreign nationals, to access consular officials of their State of nationality; or, in the case of stateless persons, refugees, or asylum seekers, their relevant national authorities or UNHCR.

7. The role of interpreters

229. In some situations an interpreter may be required to assist with the interview of a witness, victim, suspect, or other person relevant for the investigation. The interpreter's role is to facilitate communication in a neutral and objective manner. Interpreters should be limited to that role, have appropriate interview training, be accredited by the relevant authorities, understand the terminology specific to the investigation, and apply internationally agreed standards and best practice. The interpreter should declare any potential conflict of interest in advance.

230. When selecting an interpreter, consider the interviewee's gender, sexual orientation, gender identity, nationality, ethnicity, religion, education, literacy, language and dialect, and any of their preferences. An interviewee should have the right to express the wish for a different interpreter.

231. An interpreter should:

- (a) Only interpret for the language(s) for which they are qualified, authorized, or accredited
- (b) Provide a complete and accurate interpretation without alterations or omissions
- (c) Demonstrate a high level of professionalism and ethics and maintain their integrity, impartiality and independence
- (d) Disclose any real or perceived conflicts of interest, including prior knowledge of, or dealings with, the person being interviewed
- (e) Avoid soliciting or accepting any gratuities or taking personal advantage of any information obtained in the course of their work
- (f) Maintain confidentiality, and protect information obtained in the course of the work from unauthorized individuals
- (g) Sign and give any notes they have made during the interview to the primary interviewer.

232. An interpreter's qualifications should be certified prior to the start of a session. At the end of the interview, the interpreter should certify, either in writing or on audio or video, that they have read the record of the interview back to the interviewee and that the interviewee has confirmed its accuracy.

C. Detailed Guidelines on the Excavation of Graves

233. The following procedures apply to the excavation of all areas containing buried human remains.

234. Record the date, location, start and finishing times of the disinterment and the names of all workers and other persons present.

235. Record the information in narrative form, supplemented by sketches and photographs. Videotaping may also be considered.

236. Photograph the work area from the same perspective before work begins and after it ends every day, to document any disturbance not related to the official procedure.

237. If recording equipment, such as a total station, is not available, establish a datum point, then block and map the burial site using an appropriate-sized grid and standard archaeological techniques. In some cases it may be adequate simply to measure the depth of the grave from the surface to the skull and from the surface to the feet. Associated material may then be recorded in terms of its position relative to the skeleton.

238. Remove the overburden of earth, screening the dirt for associated materials. Record the level (depth) and relative co-ordinates of any such findings. The type of burial, especially whether it is primary or secondary, influences the care and attention that needs to be given to this step. Associated materials located at a secondary burial site are unlikely to reveal the circumstances of the primary burial but may provide information on events that have occurred after it.

239. Search for items such as bullets, or personal items such as jewellery – for which a metal detector can be useful – particularly in the levels immediately above and below the level of the remains.

240. Once the level of the burial has been located, circumscribe the body and – after documenting archaeological findings such as the dimensions of the grave (noting in particular the edges of the grave outline), the deposition patterns and the characteristics of the matrix of the burial (the hole where the body is buried), including tool marks, where possible – open the burial pit to a minimum of 30 cm on all sides of the body.

241. Expose the body as clearly as possible to ensure that its full extent is visible before removal from the scene. Make sure to expose similarly all associated artefacts before removal. Carefully expose the burial area by digging on all sides to the lowest level of the body (approximately 30 cm). Also expose any associated artefacts.

242. Expose the remains using a soft brush or whisk broom (or other implement appropriate for the soil type). The remains may be fragile, and the interrelationships between elements are important and may be easily dis-

rupted if not handled carefully. Damage can seriously reduce the amount of information available for analysis.

243. Photograph and map the remains in situ. All photographs should include an identification number, the date, a scale and an indication of magnetic north

- (a) First photograph the entire burial, then focus on significant details so that their relation to the whole can be easily visualized
- (b) Anything that seems unusual or remarkable should be photographed at close range. Careful attention should be given to evidence of trauma or pathological change, either recent or healed
- (c) Photograph and map all associated materials (e.g. clothes, hair, coffin, artefacts, bullets, casings). The map should include a rough sketch of the skeleton and of any associated materials.

244. Before displacing anything, measure the remains:

- (a) Measure the total length of the remains and record their position in the grave
- (b) If the skeleton is so fragile that it may break when lifted, measure as much as possible before removing it from the ground.

245. When exhuming skeletal remains, the only way to ensure the recovery of complete and individual bodies is the to remove its skeletal elements according to the anatomical articulation of the skeleton in the grave.

246. When recovering skeletal remains, the general principle is that bones should not be separated from clothing until the remains are in the more controlled conditions of a laboratory. The remains should be recovered taking all due care to minimize the loss of evidence, such as firearm discharge residue. Where skeletal remains are clothed, they should be removed using the clothing as containers (i.e. the trousers containing the legs and pelvis, the upper garments containing the chest and arms). Bearing in mind the possibility of commingling, each individual set of remains (bones, clothing and associated evidence) needs to be appropriately packaged and labelled (e.g. in a cardboard box, in the case of completely skeletonized remains) for transport to the laboratory.

247. Special attention must be given to commingled bodies. It might not be possible to exhume complete bodies at one time if they are intertwined. In such cases, it is important to follow the anatomical articulation of the remains. Either partially remove them (in cases of skeletal remains), or move the remains and free them from each other in order to recover a complete set. This needs to be carefully documented to ensure that the remains are recovered whole and as individual bodies.

248. Special attention must be paid to the exhumation, labelling and packaging of each individual set of remains in order to ensure that no mixing of individual bodies or body parts, their clothing or any associated evidence occurs.

249. Excavate and screen the level of soil immediately under the burial. Document and recover, as per the recovery strategy, any "finds" within the soil. A level of "sterile" (artefact-free) soil should be located before ceasing excavation.

D. Detailed Guidelines on Autopsy

3. Background and key principles

250. These Guidelines should be followed during an autopsy of a potentially unlawful death.¹⁰⁹ The order in which things are done needs to be carefully thought about in advance, priorities established, and procedures prepared for, in accordance with the particular circumstances of the case. A complex autopsy may take an entire working day or even longer, as the examiner may need to return for further examinations.

251. These Guidelines may be of value to the following:

- (a) Experienced forensic doctors or pathologists, who may follow them to ensure a systematic examination and to facilitate meaningful positive or negative criticism by later observers
- (b) General pathologists or other physicians who have not been trained in forensic pathology or medicine but who are familiar with basic autopsy techniques. It may also alert them to situations in which they should seek consultation
- (c) Independent consultants whose expertise has been requested in observing, performing, or reviewing an autopsy and may cite these Guidelines and their proposed minimum criteria as a basis for their actions or opinions
- (d) Governmental authorities, international political organizations, law enforcement agencies, families or friends of the deceased, or representatives of potential defendants charged with responsibility for a death
- (e) Historians, journalists, attorneys, judges, other physicians and representatives of the public, who may use the Guidelines as a benchmark for evaluating an autopsy and its findings
- (f) Governments or individuals who are attempting either to establish or to upgrade their medico-legal system for investigating deaths, who may use the Guidelines as a basis.

252. Use of these Guidelines will help thwart the speculation and innuendo that are fuelled by unanswered, partially answered, or poorly answered questions arising from the investigation of a potentially unlawful death.

253. The date, start and finishing times and the place of the autopsy should be recorded.

254. The name(s) of the forensic pathologist prosector(s), the participating assistant(s) and all other persons present during the autopsy should be recorded, including the medical and/or scientific degrees and professional, political or administrative affiliations(s) of each. Each person's role in the autopsy should be indicated. If there are multiple prosectors, one should be designated as the principal prosector with authority to direct the performance of the autopsy.

255. Adequate photographs are crucial for the thorough documentation of autopsy findings and for enabling them to be independently reviewed:¹¹⁰

- (a) Photographs should be taken using a high- quality camera/lens. If high-quality equipment is not available, then other equipment, such as mobile phones, may be acceptable, bearing in mind that it is important for the photographs to be of sufficient quality to enable the autopsy findings to be independently reviewed. Each photograph should contain a ruled reference scale and an identifying case name or number. A description of the camera and the lighting system should be included in the autopsy report. If more than one camera is used, the identifying information should be recorded for each. Photographs should also include information indicating which camera took each picture, if more than one camera is used. The identity of the person taking the photographs should be recorded
- (b) Serial photographs reflecting the course of the external examination should be included. Photograph the body prior to and following undressing, washing, shaving or hair cutting
- (c) Close-up photographs should be supplemented with distant and/or medium-range photographs to permit the orientation and identification of the close-up photographs
- (d) Photographs should be comprehensive, and must confirm the presence and details of all demonstrable signs of injury or disease commented upon in the autopsy report. Photographs of injuries should include a scale with the autopsy number
- (e) After the body has been washed or cleaned, identifying facial features should be portrayed with photographs of a full frontal aspect of the face and right and left profiles of the face.

256. The role of cross-sectional scanning has been discussed at Paragraphs 158 to 163 above. If it is available, then CT scanning of the whole body enclosed in the body bag should be undertaken. (If this is done, further consideration of the need for plain X-rays will still be needed). In the likely event that cross-sectional imaging is not available, the body should be radiographed with plain X-rays before it is removed from its packaging. X-rays should be repeated both before and after undressing the body. Fluoroscopy (looking for foreign bodies such as projectiles) may also be performed.¹¹¹ The following X-rays may also be required:

- (a) Dental X-rays may be necessary for identification purposes
- (b) Any skeletal system injury should be documented by X-ray. Skeletal X-rays may also record anatomic defects or surgical procedures. Check especially for fractures of the fingers, toes and other bones in the hands and feet
- (c) X-rays should be taken in gunshot cases to aid in locating the projectile(s). Any projectile or major projectile fragment seen on an X-ray must be recovered, photographed, recorded as an exhibit and secured. Other radio-opaque objects (such as knife fragments) should also be documented with X-rays, removed, photographed, recorded as exhibits, and secured. If necessary for the purposes of identification, metallic prostheses must be removed and examined, and any identifying features recorded, photographed and secured. Any pacemakers must be removed, especially if cremation is to take place, as they will explode in a fire
- (d) Skeletal X-rays can assist in determining the age and developmental status of children and young adults.

2. The clothed body

257. Before clothing is removed, the clothed body should be photographed.

258. If it has not already been done, and is indicated by the circumstances, the hands should now be swabbed for firearm discharge residues. If not done at the scene, the clothed body should be carefully inspected for any traces that might constitute evidence. If any traces are found, they should be described, retrieved, recorded as exhibits and secured.

259. The clothing should be carefully removed (preferably without damage) over a clean sheet or body pouch. The clothing and any jewellery should all be individually examined, described, recorded, labelled, photographed and secured.

3. External examination

260. The external examination, focusing on a search for external evidence of injury, is in most cases the critically important part of the autopsy.

- (a) All of the body area must be photographed
- (b) The body must be examined and the deceased's apparent age, height, weight, sex and gender, head-hair style and length, nutritional status, muscular development, and colour of skin, eyes and hair (head, facial and body) must be examined and recorded
- (c) In babies, the head circumference, crown-rump length and crown-heellength should also be measured
- (d) The degree, location and fixation of rigor and livor mortis should be recorded
- (e) Body warmth or coolness and state of preservation should be noted as should any decomposition changes, such as skin slippage. The general condition of the body should be evaluated and note taken of adipocere formation, maggots, eggs, pupae, or anything else that suggests the time or place of death
- (f) With all injuries, their location (related to static anatomic landmarks), size, shape, surrounds, pattern, contents, colour, course, direction and depth must be recorded. Injuries resulting from therapeutic measures should be distinguished wherever possible from those unrelated to medical treatment
- (g) In the description of firearm wounds, note the presence or absence of marginal abrasions, lacerations or defects in the margins of the wound, foreign contents within the wound, singeing or grease marking the margins of the wound, and soot and/or gunpowder stippling or tattooing around the wound. If firearm discharge residue is present, this should be photographed and preserved for analysis. It should be determined whether the bullet wound is an entry or exit wound. If an entry wound is present and no exit wound is seen, the projectile must be found and secured or accounted for
- (h) All injuries should be photographed, and labelled with the autopsy identification number on a scale that is oriented parallel or perpendicular to the injury. Shave hair where necessary to clarify an injury, and take photographs with a photographic scale both before and after shaving. Save all hair removed from the site of the injury. Take photographs before and after washing the site of any injury. Wash the body only after any blood or material that may have come from an assailant has been collected and secured
- (i) Examine the skin. Note and photograph with a photographic scale any scars, areas of keloid formation, tattoos, prominent moles, areas of increased or decreased pigmentation, and anything distinctive or identifying, such as birthmarks. Note any bruises and incise them for delineation of their extent. Some, if not all of them, should be excised for microscopic examination as this may be useful for as-

sessing the time between injury and death. The head and genital area should be checked with special care. Note any injection sites or puncture wounds. Note any bite marks; these should be photographed to record the dental pattern, swabbed for saliva testing (before the body is washed), and excised for microscopic examination. The evaluation of bite marks is highly contentious and they should also be evaluated by a forensic dentist with training and experience in such evaluation, if possible. Note any burn marks and assess the possible cause (e.g. burning rubber, a cigarette, electricity, a blowtorch, acid, hot oil) by sampling for histology and other analysis if possible. Note any gunpowder residue on the hands. Document this photographically and save it for analysis. Excise any suspicious areas for microscopic examination, as it may be possible in some circumstances to distinguish between burns caused by electricity and those caused by heat or cold

- (j) Identify and label any foreign object that is recovered, including its relationship to specific injuries. Foreign objects should be placed in a container that should be processed in accordance with established procedures to maintain the chain of custody. Do not scratch the sides or tip of any projectiles. Photograph each projectile and large projectile fragment with an identifying label, and secure them individually in a sealed, padded and labelled container in order to maintain the chain of custody¹¹²
- (k) Examine the head and external scalp, bearing in mind that injuries may be hidden by the hair. Shave hair where necessary. Check for fleas and lice, as these may indicate unsanitary conditions prior to death. Note any alopecia, as this may be caused by malnutrition, heavy metals (e.g. thallium), drugs, or traction. Pull – do not cut – 20 representative head hairs and save them, as hair may be useful for detecting some drugs and poisons. (It may also be of value in stable isotope analysis)
- (l) Examine the teeth and note their condition. This should be performed by a forensic odontologist if possible. Record any that are absent, loose or damaged, and record all dental work (e.g. restorations, fillings) using a dental identification system to identify each tooth (e.g., Annex 5). Check the gums for periodontal disease. Photograph dentures, if any, and save them if the deceased's identity is unknown. Check the inside of the mouth and note any evidence of trauma, injection sites, needle marks or biting of the lips, cheeks or tongue. Note any articles or substances in the mouth. In cases of suspected sexual assault, save oral fluid, or get a swab for spermatozoa and acid phosphatase evaluation. (Swabs taken at the tooth-gum junction and samples from between the teeth provide the best specimens for identifying spermatozoa.) Also take swabs

from the oral cavity for seminal fluid typing. Dry the swabs quickly with cool, blown air if possible, and secure them in clean plain-paper envelopes. (If rigor mortis prevents adequate examination, a complete oral examination may need to be deferred until later, during the internal examination. At that time, after subcutaneous dissection to expose the structures of the neck and face to permit better exposure of the oral cavity, the masseter muscles may be divided)

- (m) Examine the face and note if lividity, congestion and/or petechiae are present
 - (i) Examine the eyes and view the conjunctivae of both the globes and the eyelids. Note any petechiae in the upper or lower eyelids. Note any scleral icterus. Save contact lenses, if any are present. Collect at least 1 ml of vitreous humour from each eye
 - (ii) Examine the nose and ears and note any evidence of trauma, haemorrhage, or other abnormalities. Examine the tympanic membranes
- (n) Examine all aspects of the neck externally and note any contusions, abrasions or petechiae. Describe and document injury patterns to help differentiate manual, ligature and hanging strangulation. Examine the neck at the conclusion of the autopsy (after removal of the brain and the thoracic contents), when the blood has drained out of the area, as this limits the formation of artefactual bruising associated with dissection
- (o) Examine all surfaces of the extremities – arms, forearms, wrists, hands, legs and feet – and note any “defence” wounds. Dissect and describe any injuries. Note any bruises about the wrists or ankles that may suggest restraints such as handcuffs or suspension. Examine the medial and lateral surfaces of the fingers, the anterior forearms and the backs of the knees for bruises
- (p) Note any broken or missing fingernails. Take fingerprints in all cases. (If it is not possible to have fingerprints taken, explore all possible avenues – e.g. removing the epidermal “glove” of the fingers, or keeping the body so that fingerprints can be taken in the following days – to avoid the unacceptable prospect of having to remove the fingers). Save fingernail clippings and any under-nail tissue (nail scrapings). Examine the fingernail and toenail beds for evidence of objects having been pushed beneath the nails. Nails can be removed by dissecting the lateral margins and proximal base, and then the under-surface of the nails can be inspected. If this is done, the hands must be photographed before and after this dissection. Carefully examine the soles of the feet, noting any evidence of beating. Incise the soles to delineate the extent of any injuries. Ex-

amine the palms and knees, looking especially for glass shards or lacerations

- (q) Examine the external genitalia and note the presence of any foreign material or semen. Note the size, location and number of any abrasions or contusions. Note any injury to the inner thighs or peri-anal area. Look for peri-anal burns
- (r) In cases of suspected sexual assault, examine all potentially involved orifices. A speculum should be used to examine the vaginal walls. Collect foreign hair by combing the pubic hair. Pull and save at least 20 of the deceased's own pubic hairs, including roots. Aspirate fluid from the vagina and/or rectum for analysis (e.g. acid phosphatase, blood group and spermatozoa). Take swabs from the same areas for seminal fluid typing. Dry the swabs quickly with cool, blown air if possible and secure them individually in clean plain-paper envelopes
- (s) The back, the buttocks and extremities including wrists and ankles must be dissected subcutaneously to look for deeper injuries. The shoulders, elbows, hips and knee joints must also be dissected subcutaneously, and possibly further, to look for ligamentous and related injury.

4. Internal examination

261. The internal examination should clarify and augment the external examination insofar as injuries are concerned, and should identify and characterize any and all natural disease present. Remember to photograph the internal manifestations of injury and any other abnormalities identified. Ideally, photograph all organs and their cut surfaces. Before removing the organs, obtain fluid specimens, e.g. blood, urine, bile.

- (a) Be systematic in the internal examination. Perform the examination either by body regions or by systems, including cardiovascular, respiratory, biliary, gastrointestinal, reticuloendothelial, genitourinary, endocrine, musculoskeletal and central nervous systems. Record the volume, colour, consistency and nature of any collections of fluid, and retain samples for further investigation if required. Record the weight, size, shape, colour and consistency of each organ, and note any neoplasia, inflammation, anomalies, haemorrhage, ischemia, infarcts, surgical procedures, or injuries. Take sections of normal and any abnormal areas of each organ for microscopic examination. Take samples of any fractured bones for further radiographic and microscopic estimation of the age of the fracture
- (b) Examine the chest. Note any abnormalities of the breasts. Record any rib fractures, noting whether cardiopulmonary resuscitation was at-

tempted. Before opening the chest, check for pneumothoraces. Record the thickness of subcutaneous fat. Immediately after opening the chest, evaluate the pleural cavities and the pericardial sac for the presence of blood or other fluid, and describe and quantify any fluid present. Save any fluid present until foreign objects are accounted for. Note the presence of air embolism, characterized by frothy blood within the right atrium and right ventricle. Trace any injuries before removing the organs. If blood is not available from other sites, collect a sample directly from the heart. Examine the heart, noting degree and location of coronary artery disease or other abnormalities. Examine the lungs, noting any abnormalities including the presence of blood or other material in the trachea and bronchi

- (c) Examine the abdomen and record the amount of subcutaneous fat. Note the interrelationships between the organs. Trace any injuries before removing the organs. Note any fluid or blood present in the peritoneal cavity, and save it until foreign objects have been accounted for
- (d) Remove, examine and record the quantitative information on the liver, spleen, pancreas, kidneys and adrenal glands. Remove the gastrointestinal tract and examine the contents. Note (and photograph) any food present and its degree of digestion. Save the contents of the stomach. If a more detailed toxicological evaluation is desired, the contents of other regions of the gastrointestinal tract may be saved. Examine the rectum and anus for burns, lacerations, or other injuries. Locate and retain any foreign bodies present. Examine the aorta, inferior vena cava and iliac vessels
- (e) Examine the organs in the pelvis, including ovaries, fallopian tubes, uterus, vagina, prostate gland, seminal vesicles, urethra and urinary bladder. Trace any injuries before removing the organs. Remove these organs carefully so as not to injure them artefactually. Note any evidence of previous or current pregnancy, miscarriage, or delivery, and any surgery. Save any foreign objects within the cervix, uterus, vagina, urethra, or rectum
- (f) Palpate the head and examine the external and internal surfaces of the scalp, noting any trauma or haemorrhage. Note any skull fractures. Remove the calvarium carefully and note epidural and subdural haematomas. Quantify, estimate the age, and save any haematomas present. Remove the dura to examine the internal surface of the skull for fractures. Remove the brain and note any abnormalities. (Preferably, retain the brain in fixative for some days prior to examination, if possible, with the assistance of a neuropathologist.) Dissect and describe any injuries. Cerebral cortical atrophy, whether focal or generalized, should be specifically commented upon

- (g) Evaluate the cerebral vessels
- (h) Examine the neck after the thoracic organs and brain have been removed and the neck vessels have been drained. Remove the neck organs, including the tongue, under direct vision having reflected the skin of the front of the neck. Take care not to fracture the hyoid bone or thyroid cartilage. Dissect and describe any injuries. Check the mucosa of the larynx, pyriform sinuses and oesophagus, and note any petechiae, oedema, or burns caused by corrosive substances. Note any articles or substances within the lumina of these structures. Examine the thyroid gland. Separate and examine the parathyroid glands, if they are readily identifiable
- (i) Dissect the neck muscles, noting any haemorrhage. Dissect the muscles from, and note any fractures of, the hyoid bone or thyroid or cricoid cartilages. Consider also a posterior neck dissection if it is at all possible; there may be soft tissue or skeletal injuries there
- (j) Examine the cervical, thoracic and lumbar spine. Examine the vertebrae from their anterior aspects and note any fractures, dislocations, compressions or haemorrhages. Examine the vertebral bodies
- (k) In cases in which spinal injury is suspected, dissect and describe the spinal cord. Examine the cervical spine anteriorly and note any haemorrhage in the paravertebral muscles. The posterior approach is best for evaluating high cervical injuries. Open the spinal canal and remove the spinal cord. Make transverse sections every 0.5 cm and note any abnormalities.

5. Further testing

262. The autopsy is a specialized medical investigation that includes the collection of samples, tissues and fluid for further testing.¹¹⁵ The specimens and the manner of collecting them, together with their storage and transport and period of retention, should be agreed with the laboratory that will be undertaking the further testing. If there is no such laboratory, samples, tissues and fluid should still be retained, as testing may be organized later.

263. After the autopsy has been completed, saved specimens must be recorded and listed in the report. Label all specimens with the name of the deceased, the autopsy identification number, the date and time of collection, the name of the prosecutor (if applicable), and the contents. Carefully secure all evidence and begin the chain of custody record with the appropriate release forms. There should be agreement with the investigating officer about how the samples will be stored and then transported to the laboratory undertaking the analysis. The transport of such samples is usually a police responsibility exercised following full chain of custody requirements which ensure the security of the samples.

- (a) **Large organ and tissue specimens:** Very occasionally, large organ and tissue specimens may be retained by the forensic doctor for:

- (i) Better examination of an organ of particular importance in the case (e.g. the brain)
- (ii) Further examination by an expert, including one acting for an accused person
- (iii) Use as direct evidence.

The next of kin should be informed and preferably their consent to the retention obtained. If consent is not provided, and the retention is still regarded as being necessary, then formal authorization of the retention should be obtained. Such retention must be in accordance with local law and ethical guidelines, and take into account the family's preferences for the burial or disposal of such organs and tissues.

- (b) **Histology:** In all cases of potentially unlawful death, small representative samples of all major organs, including areas of normal and any abnormal tissue, should be retained in 10% formalin, processed histologically and stained with haematoxylin and eosin (and other stains as indicated). The wet tissue, paraffin blocks and slides should be kept indefinitely. Many forensic doctors are not trained to evaluate histology material. Arrangements should be made for a suitable histopathologist, preferably one with forensic training and experience, to report on the histology.

This should be done in consultation: the histopathologist needs to understand the history and findings from the autopsy; and the forensic doctor needs to understand the conclusions, and any limitations, of the histopathologist

- (c) **Toxicology (including biochemistry):**

Communication with the testing laboratory is very important. The fluids and volumes required, and the tissue required (if any), will vary from laboratory to laboratory. In all cases, the site from which the specimen has been obtained must be carefully recorded

- (i) **Blood:** If possible, at least 10 ml, preferably obtained from a peripheral site (e.g. the femoral vein) prior to the commencement of the autopsy. To avoid post collection fermentation and putrefaction, add 1% w/v sodium fluoride (NaF) to the collection tube. If peripheral blood is not available, a central site (e.g. the heart) can be used. As a last resort, blood from a body cavity can be obtained, although this will almost certainly be contaminated owing to leakage from other structures (e.g. stomach or bowel con-

tents, mucus, urine, pus or serous fluids) and thus the interpretation of the results will be seriously compromised

- (ii) **Urine:** If possible, at least 10ml is usually obtained by direct needle puncture of the exposed bladder after the abdomen has been opened. Alternatively, a urinary catheter inserted via the urethra can be used
- (iii) **Vitreous Humour:** 2–3 ml can be obtained by needle puncture of each globe. As it is relatively viscous, a 15- or 17-gauge needle should be used
- (iv) **Bile:** Up to 10ml
- (v) **Tissue:** Liver, muscle, kidney, brain, adipose tissue (if possible, 100 mg of each), skin site (e.g. if an insulin injection is suspected). The tissues should be placed in separate, clean, glass or plastic jars without a fixative. Consider freezing the samples if delays are anticipated before transport to the laboratory, or before analysis. If volatile substance inhalation is suspected, an entire lung should be taken and sealed in a nylon bag. (Polyethylene/plastic bags are permeable to volatile substances)
- (vi) **Stomach contents:** Ideally, prior to removing the abdominal contents, the stomach can be isolated by clamping or tying the lower oesophagus and duodenum. After removal, the stomach should be opened inside a large clean dish. After describing and photographing the contents, submit them in secure, clean, screw-top glass or plastic jars
- (vii) **Hair and fingernails:** These may be useful in cases of heavy-metal poisoning or certain drugs. Obtain hair samples by plucking the hair, thereby including the root; do not cut with scissors. Nail samples should comprise the whole nail.
- (d) **Microbiology:** This is not a routine autopsy investigation but can be useful if the collection technique is good and samples are collected in the early post-mortem period. Differentiating between pathogens and normal post-mortem flora complicates the assessment of results. Possible samples include:
 - (i) Blood, taken using a sterile needle and syringe under direct vision from the femoral vein or artery (or other suitable vessel), accessed in a sterile manner prior to commencing the autopsy
 - (ii) Sampling a small piece of tissue (e.g. lung, spleen) under conditions that are as sterile as possible

The specimen should be taken to the microbiology laboratory without undue delay. Otherwise, the specimen should be kept in a refrigerator until (the earliest possible) transfer.

- (e) **Entomology:** The collection of appropriate samples of larvae, beetles, flies and other insects on or in the body requires consultation with an entomologist. This includes eggs, maggots and pupae as well as adult insects. Samples may be useful for toxicological analysis as well as helping to assess the minimum post-mortem interval and/or possibly to assess whether the body has been moved some distance after death
- (f) **Molecular/DNA testing:** This is a rapidly developing technological area. The importance of liaising with the relevant laboratory cannot be overemphasized. Splenic tissue is one of the best organs for DNA recovery, although liver, muscle, kidney and brain tissue may also be used. At least 2g of tissue should be placed in a plastic tube without fixative or preservative. The specimen may then be frozen if it is not to be used immediately. In the case of decomposed or skeletonized remains, a sample of bone may be submitted, often the mid shaft of the long bones or teeth (without reparation or cavity), or part of the shaft of the femur. Techniques using less invasive samples such as cartilage, phalanges, fingernails, or toenails have been developed in some centres
- (g) **In addition**, other evidence that may need to be collected, recorded and secured includes:
 - (i) All foreign objects, including projectiles, projectile fragments, pellets, knives and fibres. Projectiles must be subjected to ballistic analysis
 - (ii) All clothes and personal effects of the deceased, either worn by or in the possession of the deceased at the time of death
 - (iii) Fingernails and under-nail scrapings
 - (iv) Hair, foreign and pubic, in cases of suspected sexual assault
 - (v) Head hair, in cases where the place of death or location of the body prior to its discovery may be an issue.

As mentioned at the beginning of this Section on further testing, there must be active discussion between the prosecutor and the investigator, and concrete decisions made about the fate of all the specimens.

264. After the autopsy, all organs not retained should be replaced in the body, and the body should be well embalmed to facilitate a second autopsy in case one is desired at some future point. Cremation of the remains will of course prevent a second autopsy.

6. Concluding the cause of death

265. At the end of his/her investigation of the death, it is a fundamental responsibility of the prosecutor to conclude the cause of death and identification of the deceased. It is a surprise for many that only in a small number of deaths can the cause of death be determined from the autopsy findings alone without any other information about the death. In some jurisdictions, the forensic doctor is also required to conclude the manner of death; in other jurisdictions, the system leaves this conclusion to judicial officers.

266. The internationally accepted format for recording the cause of death is set out by the WHO in "The International Form of Medical Certificate of Cause of Death".¹¹⁸ The part of the form on cause of death includes the following sections:

- (a) Part I – includes diseases or conditions directly leading to death (immediate causes) and antecedent causes (or underlying causes)
- (b) Part II – other significant conditions contributing to death, but not contributing to or causing the conditions listed in Part I.

267. All forensic doctors should clearly understand the following concepts involved in correctly concluding the cause of death according to the standard WHO format:

- (a) Underlying cause of death – defined as the disease or injury that initiated the train of morbid events leading directly to death or the circumstances of the accident or violence that led to the fatal injury
- (b) Contributory cause(s) of death – other significant diseases or conditions that contributed to the death but not to the disease(s) or condition(s) listed in the sequence in Part I as causing the death
- (c) A common error is to list the mode of death, such as cardio-respiratory arrest, respiratory failure or coma as the immediate cause of death
- (d) If there is only one cause of death (e.g. Gunshot wound to the head; where death has apparently occurred rapidly at the scene) this should be listed as I(a). In the terminology above, this is both the immediate and the underlying cause of the death
- (e) If the cause of death is unknown even after all investigations have been completed, then it is correct to record it as "unknown" or "unascertained".

7. The autopsy report

268. The autopsy report should be sufficiently comprehensive for another forensic doctor, at another time and place (and supported by access to the photographs) to be in possession of all the relevant observations required in order to come to his or her own conclusions about the death. At the end of the autopsy report should be a summary of the findings, including the

results of special tests. In addition, the prosecutor should provide his/ her opinion about the identity of the deceased, and injuries and disease present, attributing any injuries to external trauma, therapeutic efforts, post-mortem change, or other ante-mortem, peri-mortem, or post-mortem causes. As mentioned above (see Paragraph 151), an opinion as to how the injuries might have been caused, and whether they caused or contributed to the death, should be provided. Reasonable, evidence-based conclusions about the circumstances of the death (including where appropriate the manner of death) should be made. Finally, the formal cause of death, as discussed above, should be provided and explained. The full report should be given to the appropriate authorities and (except if they are implicated in the cause of the death) to the deceased's family.

8. Autopsy signs of possible torture

269. Torture, in brief, is the intentional infliction of severe mental or physical pain or suffering by or with the consent of State authorities for a specific purpose.

270. Forensic doctors are at the forefront of detecting torture, and never more so than when undertaking the autopsy of a person who has died in the custody of the State.

271. This Section has extracted much of the information in Table 2 (overleaf) from both the original Minnesota Protocol and from the Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. It is intended as an aide-memoire for forensic doctors who may be about to undertake the autopsy of a potentially unlawful death where the deceased has been, or may have been, in the custody of the State. The annex is not a comprehensive list of all the signs of torture or mistreatment that could occur. In particular it does not cover the myriad effects of neglect (including deprivation of food and water) and withholding medical care.

272. Notwithstanding the aide-memoire, it is crucial that as part of the autopsy examination the prosecutor should detect, photograph and record in writing all injuries, whether old or recent. This means recording their site, size, shape, symmetry, surrounds, colour, contour, surface (scaly, crusty, ulcerating), course, direction, depth, any associated bruising or oedema and any surrounding pallor/melanosis. Much torture will be missed if there is not an inquiring approach to the autopsy. There should be a willingness to undertake subcutaneous dissection – it is a well-known principle of forensic medicine that deeper injury is often not visible externally and must be sought. Fractures and dislocations may occur in relatively unusual places for autopsy dissection – often the limbs and the facial bones. Again, these will be missed if not searched for. For these reasons, if whole-body cross-sectional scanning (e.g. CT scanning) is available, its use should be very se-

riously considered, even if it means having to transport the body to another location.

273. In the conclusions of the report, comments should be made both on the overall pattern of the injuries (the number and location of different injury types) and what this might mean, and also on individual injuries with sufficient specificity to suggest their cause.

TORTURE TECHNIQUE	PHYSICAL FINDINGS AND NOTES ON THEIR DETECTION
Acute (single episode) and chronic (repeated episodes of) injury	<p>Abrasions, bruises, lacerations, scars; fractures (and, if multiple, some at different stages of healing), especially in unusual locations, which have not been treated</p> <p>Skull fractures, scalp bruising, laceration, cerebral contusions and other intracranial manifestations of trauma; after time, cerebral cortical scars and atrophy</p> <p>Consider cervical spine trauma when facial trauma present</p> <p>Assess nasal bone alignment, crepitation, deviation of the septum; consider plain X-ray, CT scan for the septum. Assess for rhinorrhoea and orbital plate/crista galli fracture</p> <p>Consider fractures of the temporomandibular and laryngeal structures. Assess these as part of a detailed neck and facial examination following subcutaneous dissection. At the same time also look for tooth avulsions and fractures; dislocated dental fillings; broken dental prosthesis; bruised tongue; lesions from forcible insertion of objects into the mouth, electric shocks or burns</p> <p>Specific injuries may disclose a shape suggestive of the causative object, e.g. tramline bruising from rods, truncheons or canes</p> <p>Consequences of blunt force injuries to the orbit, including "blow out" fractures (and/or loss of integrity of the globe), conjunctival haemorrhage, lens dislocation, subhyaloid haemorrhage, retrobulbar haemorrhage, retinal haemorrhage</p>
Suspension by the wrists ("La bandera")	<p>Bruises or scars around the wrists. A chronic linear zone around a wrist or ankle, with few hairs or follicles, is most likely to be a cicatricial alopecia from the prolonged application of a tight ligature. There is no differential diagnosis of spontaneous skin disease for such an appearance</p>

Suspension by the neck or arms (e.g., "cross suspension" – spreading the arms and tying them to a horizontal bar; "butchery" – tying the hands upwards together, or one by one)	Bruising or scars at the site of binding; prominent lividity in lower extremities; neck trauma (often minimal but may include fractures to larynx)
Suspension with the feet upwards and head downwards ("reverse butchery", "murciélagos")	Bruises or scars around the ankles; ligamentous damage, dislocations to ankles or other joints
Suspension from a ligature tied around the elbows or wrists with the arms behind the back; or the forearms bound together behind the back with the elbows flexed to 90 degrees and the forearm tied to a horizontal bar ("Palestinian hanging")	Abrasions, bruises, scars around the wrist(s); dislocation of shoulder joint, or ligamentous damage, muscular tears and/or necrosis to upper arm or pectoral muscles; myoglobinuric renal damage or failure
Suspension of a victim by the flexed knees from a bar passed below the popliteal region, usually while the wrists are tied to the ankles ("parrot perch", "Jack", "pau de arara") (can lead to cruciate ligament tears)	Abrasions, bruises, and/or lacerations, scars on the anterior forearms and backs of the knees; abrasions, bruises to the wrists and/or ankles
Forcible immersions of head in water often contaminated with urine, faeces, vomit or other impurities ("wet submarine", "pileta", "latina")	Signs of drowning/near drowning; faecal or other debris in the mouth, pharynx, trachea, oesophagus or lungs. In survival, pneumonia
Many other forms of positional torture, tying or restraining victims in contorted, hyperextended or other unnatural positions	Fractures, dislocations, injuries to ligaments, tendons, nerves and blood vessels, both recent and old
Blunt abdominal trauma while lying on a table with the upper half of the body unsupported ("operating table", "el quirófano")	Abdominal bruises, back injuries, injuries to abdominal viscera including rupture. Intramuscular, retroperitoneal, intra-abdominal haemorrhage
Hard slap of palm to one or both ears ("teléfono")	Rapid increase of pressure in ear canals causes ruptured ear drum(s); after time, these will appear scarred. There may be injuries to the external ear. Use otoscope
Whipping	Multiple depigmented, linear hypertrophic scars surrounded by a zone of hyperpigmentation are most likely the consequence of whipping. Exclude plant dermatitis
Forcible removal of a fingernail or toenail	Acutely, laceration and bruising to the nail bed and skin of the distal phalanx; other injury

	<p>ries associated with restraint. Later, an overgrowth of tissue may be produced at the nail fold forming a pterygium.</p> <p>Lichen planus is the relevant differential diagnosis, and this is usually accompanied by other skin lesions. Fungal infections produce thickened yellowish crumbling nails</p>
Burns	<p>Cigarette, hot objects acutely result in characteristic burns (after time, these cause atrophic scars with narrow hypertrophic and hyper-pigmented periphery. Spontaneously occurring inflammatory processes lack this characteristic marginal zone); when the nail matrix is burnt, subsequent growth produces striped thin deformed nails, sometimes broken up in longitudinal segments</p>
Electric shock (wires connected to a source of electricity; e.g. "cattle prod"/"la picana": pointed electric instrument, metal on the tip)	<p>Electric shock to hands, feet, fingers, toes, ears, nipples, mouth, lips or genitalia. Gels or water often used to prevent detectable burns. The appearance is of burns and depends upon the age of the injury. Immediately: red spots, vesicles and/or black exudate. Within a few weeks: circular reddish macular scars. At several months: small, white, reddish or brown or hyperpigmented spots (picana)</p>
Heated metal skewer inserted into the anus ("black slave")	<p>Peri-anal or rectal burns</p>
Repeated blunt trauma to the soles of the feet (and occasionally the hands or hips) ("falanga", "falanga", "bastinado")	<p>May be missed on cursory external examination; even if signs are present, swelling and not bruising may be the dominant appearance. Closed compartment syndrome may lead to muscle necrosis (aseptic), or vascular compromise of toes or even the distal foot. Fractures of carpal and metatarsals can occur. The aponeurosis and tendons may be torn. After time, irregular scars involving the skin may occur</p>
Sexual assault	<p>Sexually transmitted disease; pregnancy; injuries to the breasts or genitalia</p> <p>All the signs of penetration of vagina, anus or mouth and their differential diagnoses</p>

E. Detailed Guidelines on the Analysis of Skeletal Remains

1. Introduction

274. These Guidelines describe the process to be followed in the analysis of skeletal remains.

2. Infrastructure for the analysis of skeletal remains

275. The analysis of skeletal remains requires infrastructure, in particular a laboratory. In terms of security, chain of custody and biosecurity, the laboratory is set up in the same way as a mortuary. The laboratory should be used exclusively for the analysis of skeletal remains as ordinarily it takes longer than an autopsy (sometimes days or even weeks) for the analysis to be completed. The following list sets out some of the basic conditions required. These will vary depending on the number of cases under analysis at any one time:

- (a) Sufficient space to place the tables where the remains will be analysed. The tables should be large enough to lay out skeletal remains anatomically
- (b) Good lighting
- (c) Good ventilation
- (d) Areas for the deposit and storage of remains and associated evidence (refrigeration is not required for skeletonized remains)
- (e) Cleaning area (with access to running water)
- (f) Photography area
- (g) Area for taking samples for genetic analysis (this needs to take into account potential cross-contamination issues)
- (h) Access to plain X-rays
- (i) The availability of exhaust air filtration to address odours and the accidental dispersal of infectious materials, spores, etc.
- (j) When the body is in an advanced stage of decomposition, a special room for removing flesh to allow the bones to be examined.

3. Preparing skeletal remains for analysis

276. The importance of properly recovering the remains cannot be over-emphasized. Failures in recovery further complicate an already complicated task, and may render it impossible to produce reliable and valid conclusions concerning all of the issues to be addressed in the analysis of the remains.

277. After receiving the remains at the laboratory, and following all the steps relating to chain of custody and documentation, the forensic anthropologist must establish:

- (a) Whether or not the remains are human

- (b) Whether the case is one of medico-legal interest, and not one relating to a historical or pre-historical context
- (c) What is the minimum number of individuals represented by the remains.

278. In cases of very fragmented remains it may be difficult to establish macroscopically whether or not the remains are human. If so, histological, genetic or chemical methods should be used.

279. In some cases it is critical to establish if the remains are of medico-legal interest, as they could date from historical or prehistoric times. In those situations, the method of disposal of the remains, the associated objects (e.g. stone tools) found with the remains and their position inside the grave may play a key role in the assessment. Also, certain features of the bones (e.g. strong muscle insertions) and teeth (extreme dental wear) may indicate their historical nature. Such features need to be interpreted with care, however, as contemporary populations may also show such features. The presence of dental restorations will, obviously, indicate a more contemporary context.

280. If the remains have arrived at the laboratory commingled, a proper strategy for sorting them is required in order to establish what is called the Minimum Number of Individuals (MNI) present. Possible approaches include: pair-matching, articulation, process of elimination, osteometric comparison, taphonomy and, finally, genetic analysis.

281. Once established as a case of forensic interest, the remains should be prepared in the following sequence:

- (a) **Inventory:** Which bones and teeth are present, the condition of these individual elements, and whether there is more than one individual (identified by repetition of same bones/teeth)
- (b) **Plain X-rays:** Any bone showing signs of damage, for example by gunshots, must be X-rayed for metallic objects invisible to the naked eye. Chemical tests can be used to identify the presence of lead or copper, e.g. from projectiles. X-rays are also very useful for evaluating bone pathology

X-rays should be taken before any cleaning of the remains occurs. This is particularly important with partially decomposed remains, where commingling might not be detected upon exhumation

- (c) **Cleaning/sampling:** If their condition allows, all the bones and teeth should be washed with simple running water and no other product. A trap must be in place to capture any material that might be dislodged by the water. In a case of severely decomposed skeletal remains, however, washing can be detrimental. A brush with soft bristles, such as a toothbrush, may be used to remove dirt, special

care being taken with worn bones, such as the epiphyses of the long bones and the faces of the pubic symphysis. Teeth not permanently attached to the alveolar bone should be removed and washed separately, to prevent their loss

In cases where the remains are not completely reduced to bone, and soft tissue is still attached, a non-chemical method should be used for cleaning, under strict control. Such a process shall only be undertaken once the forensic pathologist has evaluated and properly documented the remains and the necessary samples have been collected. Once the remains have been washed, they should be allowed to dry, preferably away from light and without exposing the bones to the sun. A fan can be used to speed up the process

- (d) **Sampling:** The main reason for taking samples when analysing skeletal remains is to perform a genetic analysis that could help in identification. This procedure must be coordinated, as sampling methods vary according to the requirements of the DNA laboratory. Depending on the condition of the skeleton and the number of individuals represented, the anthropologist has to decide how many samples to take. This decision is more complicated in commingled cases, and must take into account the wider strategy on how to analyse such complex cases. Usually, two or three healthy teeth and a sufficient quantity of a long bone, such as a femur or tibia, are enough for the sampling of a complete individual skeleton. (It is preferable for such sampling to take place before the teeth and bones are cleaned, to avoid new contamination)
- (e) **Reconstruction:** The bones presenting peri- or post-mortem trauma may have to be reconstructed. Special glue, which allows the fragments to be separated without damage in the event of an error, should be used.

4. Establishing a biological profile of the remains

282. Once the remains have been prepared, the anthropologist compiles the biological profile of the individual: the assessment and determination of age, sex, ancestry and stature.

283. **Age:** This is estimated within a range, and is not exact. The older the individual, the wider the range. From the foetal stage to approximately 25 years of age, the human skeleton undergoes continuous development and growth. Several indicators are evaluated, including dentition development, length of long bones and the appearance and fusion of epiphyses in early ages; and, in later stages of development, the pubic symphysis and the morphology of the sternal end of the fourth rib. Once development stops, degenerative changes begin to appear, especially in the joints, such as signs of osteoarthritis (e.g. osteophytes).

284. **Sex:** The sexual dimorphism in the skeleton is seen after puberty, so before that period determination of sex is not very reliable. In older individuals, there are two main ways to determine the sex:

- (a) Morphological traits in specific areas of the pelvis and skull, and
- (b) Metric assessments, which involve measurements of various dimensions of limb bones and articular surfaces

In cases where the remains are fragmented or no bones diagnostic of sex are available, a genetic analysis (amelogenin) could also be applied to determine the sex. Determining the sex (amelogenin) is undertaken as standard in the genetic analysis of bones.

285. **Ancestry:** Ancestry refers to the geographic region and/or the ancestral origin of a particular population group. It is assessed by evaluating specific traits in the skeleton, mainly in the skull, that can be present or absent, or present to some degree. At the same time, several measurements can be taken in the skull and post-cranial skeleton. Software is available to process the measurements and produce an assessment of the ancestry of the skeleton under analysis, when appropriate.

286. **Stature:** The stature of a skeleton is usually estimated following one of two methods:

- (a) Measuring the height/length of some specific bones (skull, spine, femur, tibia and talus), adding those measurements and correcting for the missing soft tissue, or
- (b) Measuring one complete long bone (such as the femur, tibia or humerus) or the combination of two such bones (femur and tibia ideally), and applying a regression formula to the result
- (c) Regression formulae are also available for fragmented bones. In all cases, information on sex and ancestry are required in order to select the correct reference table to use.

5. Remaining analysis and report

287. After a biological profile has been established, the analysis continues with the following steps:

- (a) Analysis of any indicator of **ante-mortem trauma**, pathological conditions or skeletal variations (which may or may not be symptomatic) that can provide information about the cause and circumstances of the death or specific information leading to identification
- (b) Analysis of possible **post-mortem changes** in the bones, due to taphonomic processes (see Paragraph 289) that could affect the body after death. It is critical to distinguish these changes from the injuries relating to peri-mortem trauma

- (c) Dental analysis, to contribute to age estimation and possibly even identification. (This should be undertaken by a forensic odontologist if possible.)

288. Establishing the **period of time since death** is difficult, especially in cases of skeletal remains. In the case of historical or prehistoric remains, several methods of dating have been developed. For cases of forensic interest, covering periods from a few days to up to 30 or 40 years, there is no scientific method, relying on an analysis of bones or teeth, to establish whether a person died one, five, or ten years ago. However, new studies of radiocarbon are being applied in some specific contexts. Circumstantial information and other material with the skeletal remains, or in some instances even satellite imagery, may help to establish when the events (or burial) took place.

289. **Forensic taphonomy** is a field that studies the various changes to the human body after death. On some occasions this may enable post-mortem changes observed in the skeleton to be understood (e.g. action of scavengers, plant activity), but it will generally not provide any degree of certainty about the time since death. In that sense, archaeological dating methods, using objects associated with the remains, such as coins or cartridge case, may provide a better general estimation.

290. Methods used in the analysis of skeletal remains must meet standards accepted by the scientific community. In the event that indicators and databases relying on local data collection are used, they must be endorsed by publication in reputable peer-reviewed publications.

291. All analysis must be properly documented, with photos, drawings, notes and specific forms. A precise record of the samples taken from the remains must be kept, the samples must be correctly labelled and records of security and the chain of custody kept. If the remains are to be buried before formal identification, the process must be properly documented. This includes recording the exact location of the disposal of the remains, proper labelling of the container holding the remains, and appropriate notation on the chain-of-custody form.

292. The final forensic anthropology report must include all information relating to the reception of the remains; procedures followed for the analysis; samples taken and to whom they were given; and the conclusions and any recommendations. (In some circumstances it may be necessary or desirable to include forms and diagrams). This report must be integrated with those produced by other specialists in order to present to the authority an integrated forensic report.

Commission Members

March 2019 (for an updated list, please visit www.icj.org/commission)

President:

Prof. Robert Goldman, United States

Vice-Presidents:

Prof. Carlos Ayala, Venezuela

Justice Radmila Dragicevic-Dicic, Serbia

Executive Committee:

Justice Sir Nicolas Bratza, UK

Dame Silvia Cartwright, New Zealand

(Chair) Ms Roberta Clarke, Barbados-Canada

Mr. Shawan Jabarin, Palestine

Ms Hina Jilani, Pakistan

Justice Sanji Monageng, Botswana

Mr Belisário dos Santos Júnior, Brazil

Other Commission Members:

Professor Kyong-Wahn Ahn, Republic of Korea

Justice Chinara Aidarbekova, Kyrgyzstan

Justice Adolfo Azcuna, Philippines

Ms Hadeel Abdel Aziz, Jordan

Mr Reed Brody, United States

Justice Azhar Cachalia, South Africa

Prof. Miguel Carbonell, Mexico

Justice Moses Chinhengo, Zimbabwe

Prof. Sarah Cleveland, United States

Justice Martine Comte, France

Mr Marzen Darwish, Syria

Mr Gamal Eid, Egypt

Mr Roberto Garretón, Chile

Ms Nahla Haidar El Addal, Lebanon

Prof. Michelo Hansungule, Zambia

Ms Gulnora Ishankanova, Uzbekistan

Ms Imrana Jalal, Fiji

Justice Kalthoum Kennou, Tunisia

Ms Jamesina Essie L. King, Sierra Leone

Prof. César Landa, Peru

Justice Ketil Lund, Norway

Justice Qinisile Mabuza, Swaziland

Justice José Antonio Martín Pallín, Spain

Prof. Juan Méndez, Argentina

Justice Charles Mkandawire, Malawi

Justice Yvonne Mokgoro, South Africa

Justice Tamara Morschakova, Russia

Justice Willly Mutunga, Kenya

Justice Egbert Myjer, Netherlands

Justice John Lawrence O'Meally, Australia

Ms Mikiko Otani, Japan

Justice Fatsah Ouguerouz, Algeria

Dr Jarna Petman, Finland

Prof. Mónica Pinto, Argentina

Prof. Victor Rodríguez Rescia, Costa Rica

Mr Alejandro Salinas Rivera, Chile

Mr Michael Sfard, Israel

Prof. Marco Sassoli, Italy-Switzerland

Justice Ajit Prakash Shah, India

Justice Kalyan Shrestha, Nepal

Ms Ambiga Sreenevasan, Malaysia

Justice Marwan Tashani, Libya

Mr Wilder Tayler, Uruguay

Justice Philippe Texier, France

Justice Lillian Tibatemwa-Ekirkubanza, Uganda

Justice Stefan Trechsel, Switzerland

Prof. Rodrigo Uprimny Yepes, Colombia

ISBN 978-92-9037-260-8



P.O. Box 91
Rue des Bains 33
CH 1211 Geneva 8
Switzerland

t +41 22 979 38 00
f +41 22 979 38 01
www.icj.org