

EXECUTIVE SUMMARY



POLICE LINE

WHO POLICES THE POLICE?

**THE ROLE OF INDEPENDENT AGENCIES IN
CRIMINAL INVESTIGATIONS OF STATE AGENTS**

**OPEN SOCIETY
JUSTICE INITIATIVE**



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ISBN: 978-1-940983-92-9

doi: 10.34880/74m3-9s14

Published by:

Open Society Foundations

224 West 57th Street

New York, NY 10019

USA

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Design and layout by Ahlgrim Design Group

Cover photo © Anna Watson/Camera Press/Redux

EXECUTIVE SUMMARY AND MAIN RECOMMENDATIONS

Recent events—ranging from the death of George Floyd and other Black people at the hands of U.S. police officers,²⁴ to the systemic torture of protesters by police in Belarus,²⁵ to the deaths of individuals detained during lockdowns in India²⁶ and Kenya²⁷—provide stark reminders that the state’s use of force, if left unchecked, can easily turn to brutality and unlawful behavior. Modern societies rely on police and other law enforcement agents to maintain order and investigate crimes. The question is: who will investigate crimes allegedly committed by the police themselves? Centuries ago, the Roman poet Juvenal asked, “Who watches the watchmen?” Almost two thousand years later, that question still does not have a fully satisfactory answer.

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The police and the military are the arms of the state endowed with the authority to use force; they are also prohibited from abusing that authority under the basic principle that no one is above the law. Indeed, the rule of law is defined by the United Nations as a principle of governance in which all persons, institutions, and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights norms and standards.²⁸ But if alleged offenders are not brought to justice through effective investigations and prosecutions, purported adherence to the rule of law has no real meaning.

One approach to policing the police has been to use civilian review boards, which engage civilians to oversee law enforcement work. But very few civilian review boards have adequate investigative powers, and most can only make recommendations for disciplinary action or prosecution, with no ability to implement or ensure follow-up on those recommendations. Despite the global growth of such civilian oversight efforts, law enforcement abuse and scandals persist. Clearly, there is a need for more oversight agencies with greater independence and more extensive powers.

The obligation to investigate police and other state agents’ use of excessive force and allegations of torture and deaths in custody is established by international human rights and criminal law. Numerous international conventions, covenants, charters, and authoritative guidance such as protocols and guidelines oblige states to conduct independent, impartial, thorough, timely, and effective investigations. This paper examines and provides examples of how states establish and empower independent investigative agencies (IIAs) to meet those obligations and ensure justice is done, even when crimes are committed by state agents themselves.

This paper explores promising models for seeking police accountability by using IIAs to investigate and prosecute serious crimes allegedly committed by police and other state agents. It examines the approaches that various IIAs take in conducting criminal investigations and prosecutions of state agents for death, serious injury, and allegations of sexual assault and torture, and disappearances of those under its jurisdictional control. This paper focuses on the serious harms inflicted by state agents to the life or personal integrity of individuals and does not consider other crimes such as bribe-taking.

Criminal sanctions against state agents who commit serious crimes are required under international human rights law. Such sanctions provide the clearest expression of societal rejection of criminal actions by the state, while also providing a general deterrent to prevent others in a position of authority from engaging in major wrongdoing.

This paper reviews the essential elements needed for effective investigation and prosecution of state agents who allegedly commit serious crimes against the very people they are sworn to protect. The paper first outlines the legislative framework required to provide guarantees of the independence of an IIA and its director, and the jurisdiction of IIAs over both specific subject matters and specific state agents. It provides examples of the foundational conditions that are necessary for effective investigations, such as the absence of overly broad statutory immunities for police. The paper also addresses the qualifications, powers, and training of IIA investigators; emphasizes the importance of immediate notification of incidents to the IIA; and defines the IIA's role as the lead investigator. Several sections provide detail on the essential elements of an effective investigation, including securing the scene, segregation of involved state agents, the duty to cooperate, post-incident notes and statements, physical evidence, and post-mortem autopsies. One section discusses investigations in situations when a detained person disappears. The paper also discusses victims' participation and the protection of witnesses and whistleblowers. Finally, the paper reviews public reporting by the IIA, and responsibilities for prosecution and adjudication if charges are laid.

Further, this paper considers varied constitutional, legal, and political contexts when discussing these issues, including the divide between common law and civil law jurisdictions. Despite different investigative and prosecutorial frameworks, all contexts share a common need for an institutional and evidentiary foundation capable of supporting effective criminal investigations and prosecutions against state agents involved in serious crimes.

International human rights law contains an array of obligations to criminalize, establish safeguards against, investigate, and prosecute law enforcement officers responsible for arbitrary killings, torture, and enforced disappearances, and to provide reparations to survivors and family. But investigating abuse by state agents is notoriously challenging. Courts frequently privilege the testimony of police over that of complainants, especially if the latter are themselves charged with criminal offenses. In

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many cases, the individual state agent is part of an oppressive system in which the use of violence is condoned and encouraged or even ordered. Even where this is not the case, strong ties among police and other law enforcement agents, who often are the only witnesses to the crimes of their colleagues, lead to codes of silence.

In this context, international human rights standards and jurisprudence note that the burden of proof in many circumstances “cannot rest alone” on the complainant given that “frequently the State party alone has access to relevant information.”²⁹ In such cases, the burden of proof shifts to the government, requiring it to provide a satisfactory and plausible explanation supported by evidence.³⁰

That said, a *criminal* finding of guilt against the direct perpetrator of a crime or the superior who ordered or failed to prevent the crime must meet the highest level of proof. Meeting this standard (defined in many systems as “beyond a reasonable doubt”) is a daunting task.

Yet it is essential to overcome these challenges and pursue both truth and justice. Effective investigations and prosecutions of state agents who commit serious crimes signal the state’s disapprobation of such conduct and facilitate a culture of intolerance for future behavior of this nature. The goal of these investigations is to bring to justice those state agents who commit serious offenses. This task can only be achieved by independent, thorough, and transparent investigations that will stand up under court scrutiny and the scrutiny of the public. If this objective is attained, the public will have confidence that state agents authorized to use force will be held accountable to the rule of law, providing renewed faith in the state apparatus used to enforce the law.

IIA investigations should be guided by the key criteria for an effective investigation set out in the *Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the “Istanbul Protocol”)³¹ and the *Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* (“Minnesota Protocol”).³² The investigations need to be independent, impartial, prompt, thorough, and transparent, and involve the victims and their families.³³

It is important to note that, with the exceptions of the Norwegian Bureau of Investigations of Police Affairs and Israel’s Machash, the IIAs profiled in this report are strictly investigative bodies, and do not have the authority to prosecute their cases.

While no IIA is perfect, there are agencies that provide examples of promising practices. We identified state agencies around the world that have a high degree of independence and a mandate to conduct criminal investigations. Their experience can provide practical examples of how states should approach the investigations of alleged crimes by state agents. While the list is not comprehensive or representative, this paper identifies 11 examples in different regions and legal systems, ranging from the Ontario

(Canada) Special Investigations Unit (SIU)³⁴ to INDECOM in Jamaica³⁵ to the Republic of Georgia's State Inspector's Service³⁶ to South Africa's Independent Police Investigative Directorate.³⁷

The paper also examines three specialized departments under the prosecutor's office that have investigative functions over the crimes that an IIA should investigate. While they are not strictly speaking an independent investigative agency and lack the guarantees of independence and some of the powers that an IIA should have, their experience is instructive and they also offer promising practices regarding the prosecution of crimes by police and other state agents. Examples of these specialized departments are taken from Ukraine,³⁸ Argentina,³⁹ and the United States.⁴⁰ The paper also includes references to a fourth example of a useful prosecutorial unit in the state of Rio de Janeiro in Brazil⁴¹ that was disbanded by a new attorney general in March 2021.

It is beyond the scope of this paper to fully evaluate the independence and effectiveness of each of the investigative agencies or prosecutorial departments described herein. None of these agencies completely achieves all of the recommendations this paper puts forward. Thus, the paper focuses on highlighting the aspects of different agencies that illustrate promising approaches and should be considered by policymakers and practitioners in other countries. While the paper mentions the difficulties and shortcomings that continue to challenge even the more effective IIAs, its main focus is on promising practices.

The paper examines the principles needed for an effective investigative agency and makes a series of recommendations to that end. These recommendations (summarized below and described more fully at the end of the paper) are intended to facilitate the establishment of agencies designed to produce investigations that enhance public trust in—and the legitimacy of—government oversight of state agents' use of force. They are also meant to strengthen victims' access to justice for abuse perpetrated by state agents, while respecting the due process guarantees for involved state agents. The principal recommendations summarized below need to be considered critically with regard to the relevant political context, legal framework, scope of real and potential abuses, number of state agents that might fall within an IIA's mandate, and the existence of other accountability mechanisms.

Without independence and appropriate powers and resources, IIAs will be at best ineffective—and at worst a cruel fiction—and justice for crimes committed by state agents will remain elusive. If the recommendations below are enacted, citizens and state agents alike can be secure in the knowledge that they will be treated fairly, and that the rule of law will predominate.

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SUMMARY OF THE MAIN RECOMMENDATIONS

1 Independent mandate and adequate budget.

To ensure the actual—as well as perceived—independence of an IIA, a dedicated law separate from other policing legislation should define its mandate and the IIA should have a guaranteed budget sufficient to fulfill its mandate.

2 Independent leadership.

The director of an IIA should be appointed for a fixed term and afforded the highest possible guarantees of independence allowed by the legal system, such as appointment by and accountability to the legislature. Candidates should be identified through a public search process that includes participation of civil society and different branches of government. The director should have guaranteed employment protections to prevent unfair dismissal.

3 Responsibility.

Ideally, the director should have ultimate responsibility for the decision to charge or not charge a state agent after the completion of an investigation. In jurisdictions where the charging decision is made exclusively by the prosecution service rather than by the IIA director, that service should report back to the IIA director with written reasons in cases where the prosecutor decides not to prosecute. The director should then have the discretion to make the prosecutor's reasons public.

4 Exclusive but limited jurisdiction.

An IIA should have exclusive jurisdiction over any incidents of death, serious injury, allegations of sexual assault, and torture committed by state agents. An IIA should also have exclusive jurisdiction to investigate reports of enforced disappearances committed by state agents. Any further areas of exclusive jurisdiction should be clearly defined in legislation. The IIA should also be empowered to take control of other investigations, if doing so would be in the public interest.

5 Authority to investigate state agents.

An IIA should have the power to investigate any police, security, corrections, and other law enforcement agents, including those state agents who allegedly abuse their authority while off duty. No individual positions should be *prima facie* excluded from potential investigation. Military personnel should be included if they fulfill police functions.

6 Trained and independent investigators.

To minimize conflicts of interest, an IIA should be permitted to employ individuals who do not possess prior police or security experience. The IIA should also be allowed to employ former—but not seconded—state agents, including former state agents from other countries. IIA investigators should receive continual, robust training into effective criminal investigation methods and policing, as well as in anti-racism, diversity and inclusion, gender-based violence, human rights, mental health, and community history with state agents and policing.

7 Statutory powers and duty to cooperate.

IIA investigators should have the same statutory and common law powers as police officers within the jurisdiction, and the ability to use these powers without outside approval. Other state agencies and their employees should have a duty to cooperate with the IIA at the risk of disciplinary and potentially criminal sanctions.

8 Lead investigative agency and mandatory immediate notification.

The IIA must be the lead agency in investigating serious crimes committed by state agents. Any state agent with knowledge of an incident falling under the IIA's mandate must promptly notify the IIA. The scene of any incident that triggers the IIA's mandate must be secured in the same manner as a crime scene, pending the arrival of IIA investigators. The IIA should also accept complaints and notifications from third parties and should also possess the authority to initiate investigations falling within its mandate. The IIA should have the power to decide whether to carry out an investigation, and also the authority to decline to investigate.

9 Forensic evidence.

An IIA should receive priority for all necessary medico-legal examinations and other forensic examinations and should be able to contract independent, qualified experts for such examinations.

10 Transparency.

At the end of an investigation, the victim and subject state agents should first be informed as to whether or not charges will be laid. If no charges are laid, the director must publish a summary of the investigation and the reasoning for that decision. The IIA should publish an annual report containing budget information, statistics on the number of cases and their outcomes, and legal updates. An IIA should also publish reports analyzing patterns of abuse and relevant systemic issues when doing so would further its mandate.

