

Who Polices the Police?

The Role of Independent Agencies in Criminal Investigations of State Agents

Executive Summary and Main Recommendations

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January 2021

The events of 2020—ranging from the death of George Floyd at the hands of an officer of the Minneapolis Police Department,¹ to the systemic torture of protesters in Belarus,² to the deaths of individuals detained during lockdowns in India³ and Kenya⁴—provide stark reminders that the state’s use of force, if left unchecked, can easily turn to brutality. 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 watchman?” Thousands of years later, that question still does not have a fully satisfactory answer.

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.⁵ Unless alleged offenders are brought to justice by effective investigations and prosecutions, purported adherence to the rule of law has no real meaning.

There is now a quite extensive history of civilian review boards created specifically to oversee police, but very few had adequate investigative powers and most could 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 civilian oversight efforts, 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 “soft law” norms oblige states to conduct independent, impartial, thorough, timely, and effective investigations. This paper examines and provides examples of how states set up 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 briefing paper explores promising models for seeking police accountability by investigating and prosecuting crimes allegedly committed by police and other state agents. It examines the approaches that various independent investigative agencies (IIAs) take in conducting *criminal* investigations and prosecutions of state agents for death, serious injury, and allegations of sexual assault and torture of those under its jurisdictional control. Criminal sanctions against state agents 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 wrongdoing.



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¹ See <https://civilrights.org/resource/civil-rights-groups-request-doj-investigation-into-death-of-george-floyd>.

² See <https://www.hrw.org/news/2020/09/15/belarus-systematic-beatings-torture-protesters#>.

³ See https://www.washingtonpost.com/world/asia_pacific/lockdown-deaths-in-india-ignite-debate-on-police-brutality/2020/08/16/d70f12fa-e03a-11ea-82d8-5e55d47e90ca_story.html.

⁴ See <https://www.hrw.org/news/2020/04/22/kenya-police-brutality-during-curfew#>.

⁵ See <https://www.un.org/ruleoflaw/un-and-the-rule-of-law/>.

This briefing 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 first section 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, including the absence of overly-broad statutory immunities for police, mandating the use of video recordings of police interactions with citizens, and requiring proper identification of state agents. Subsequent sections address the qualifications, powers, and training of IIA investigators; emphasize the importance of immediate notification of incidents to the IIA; and define the IIA's role as the lead investigator. Several sections provide granular 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. They also discuss investigations in situations when a detained person goes missing. Final sections review post-investigation actions, including support for affected persons and witnesses, public reporting by the IIA, and responsibilities for prosecution and adjudication following the laying of charges.

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 important array of the obligations to criminalize, establish safeguards against, investigate, and prosecute law enforcement officers responsible for death, torture and ill-treatment, and to provide reparations to survivors and family. But investigating abuse by police and other 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 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 if 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.”⁶ In such cases, the burden of proof shifts to the government, requiring it to provide a satisfactory and plausible explanation supported by evidence.⁷

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.

⁶ Open Society Justice Initiative, *Strategic Litigation Toolkit: Drafting Torture Complaints to the United Nations Human Rights Committee or Committee against Torture*, 2018, at p. 34, <https://www.justiceinitiative.org/uploads/507acc52-2c91-4d0f-8410-62c31cb2f391/litigation-toolkit-torture-20180427.pdf>. See also *Krasnova v. Kyrgyzstan*, UN Human Rights Committee, Views of 29 March 2011, CCPR/C/101/D/1402/2005, para 8.3; *Sassene v. Algeria*, UN Human Rights Committee, Views of 29 October 2014, CCPR/C/112/D/2026/2011, para 7.3.

⁷ *Bleier v. Uruguay*, UNHRC, Views of 29 March 1982, UN Doc. A/37/40 (Sup. No. 40), para. 13.3.

Yet it is essential to overcome these challenges and pursue both truth and justice. Effective investigation and prosecution of police and other state agents who commit serious crimes signals the state's disapprobation of such conduct, and facilitates a culture of intolerance for future behavior of this nature. The ultimate goal of these investigations is to bring to justice those state agents who allegedly commit serious offenses. This task can only be achieved by thorough and transparent investigations which will stand up under court scrutiny, as well as 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")⁸ and the *Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* ("Minnesota Protocol").⁹ The investigations should be independent, impartial, prompt, expeditious, and thorough, should involve victim and family, and should be transparent.¹⁰

While no IIA is perfect, there are IIAs that provide models of good practices. We identified state agencies around the world that have a 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 12 examples in different regions and legal systems, ranging from the Ontario (Canada) Special Investigations Unit (SIU)¹¹ to INDECOM in Jamaica¹² to the Republic of Georgia's Office of the State Inspector¹³ to South Africa's Independent Police Investigative Directorate.¹⁴

The paper also examines four specialized departments under the prosecutor's offices that have investigative functions over the crimes that an IIA should investigate. While they are not strictly speaking an internal 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 represent promising practices with regard to the prosecution of crimes by police and other state agents. Examples of these specialized departments are taken from Argentina,¹⁵ Brazil,¹⁶ Ukraine,¹⁷ and the United States.¹⁸

⁸ United Nations Office of the High Commissioner for Human Rights, *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 2004.

⁹ United Nations, *Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, UN Doc. E/ST/CSDHA/12, 1991 (as updated in June 2016).

¹⁰ For more information on requirements for effective investigations see Open Society Justice Initiative, *Toolkit on Drafting Complaints to the UN Human Rights Committee and the UN Committee against Torture*, 2018, pp 55-63.

¹¹ See <https://www.siu.on.ca/en/index.php>.

¹² See <https://www.indecom.gov.jm/>.

¹³ See <https://oig.georgia.gov/>.

¹⁴ See <http://www.ipid.gov.za/>.

¹⁵ Argentina, Procuraduría de Violencia Institucional (PROCUVIN.) See <https://www.mpf.gob.ar/procuvin/>.

¹⁶ Brazil, Rio de Janeiro, Grupo de Atuação Especializada em Segurança Pública (GAESP) See <http://www.mpri.mp.br/conheca-o-mpri/areas-de-atuacao/grupos-de-atuacao/gaesp>.

¹⁷ Ukraine, Specialized Department under Prosecutor General on Torture, Illegal Arrest, Illegal Use of Force.

¹⁸ United States, Department of Justice Civil Rights Division, Criminal Section. See <https://www.justice.gov/crt/criminal-section>.

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 can inspire legislators and practitioners in other countries to consider in their own efforts. While we mention the difficulties and shortcomings that continue to challenge even the more effective IIAs, the main focus of this paper 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 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 given the relevant political context, legal framework, scope of potential abuses, number of state agents that might fall within an IIA's mandate, and the existence of other accountability mechanisms.

If the recommendations below are enacted, citizens and police alike can be secure in the knowledge that they will be treated fairly, and that the rule of law will predominate. But 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.

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 there should be a guaranteed budget line sufficient to cover all of its activities.
- 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. There should be guaranteed protections related to potential early dismissal.
- 3. Sole charging responsibility.** The director alone should have ultimately responsibility for the decision to charge or not charge a state agent after the completion of an investigation.
- 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 and investigation of reports of person missing while last seen in custody. Any further areas of exclusive jurisdiction should be clearly defined in legislation. The IIA should also be empowered to take control over 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 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 or use force against civilians.

6. **Trained and independent investigators.** To minimize conflicts of interest, an IIA should be permitted to employ individuals with no prior police or security service and former—but not seconded—state agents, including from other countries. IIA investigators should receive continued, 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 use of these powers should not be subject to outside approval. State agencies and their employees should have a duty to cooperate with the IIA or be subject to disciplinary and potentially criminal sanctions.
8. **Lead investigative agency and mandatory immediate notification.** The IIA should be the lead investigative agency. Any state agent with knowledge of an incident falling under the IIA's mandate must promptly notify the IIA. Incident scenes where the IIA's mandate is triggered 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 as well as self-initiate investigations falling within its mandate. Only the IIA should have the power to decide whether to carry out an investigation, and the IIA should also have the authority to decline to investigate incidents.
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 complainant and/or family members and subject officers 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.