



# 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

[www.OpenSocietyFoundations.org](http://www.OpenSocietyFoundations.org)

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Design and layout by Ahlgrim Design Group

Cover photo © Anna Watson/Camera Press/Redux

## Acknowledgments

This paper was co-authored by **Ian Scott**, former director of the Special Investigations Unit in Ontario, Canada, and **Masha Lisitsyna**, senior managing legal officer in the Accountability Division of the Open Society Justice Initiative. It was reviewed by **Erika Dailey**, **Rachel Neild**, and **Robert O. Varenik** of the Justice Initiative, and edited by **David Berry**, the Justice Initiative's senior communications officer.

Research for this paper was conducted by multiple colleagues over several years. The authors are grateful to the participants in the University of Bristol Human Rights Law Clinic (class 2013-2014) for initially identifying promising models of IIAs. Special thanks go to **Erin Nguyen Neff**, **Claudia Bennett**, and **Amalia Ordonez Vahi** for keeping the research updated. Students of the Fletcher School at Tufts and Boston College Law School—**Dana Hatic**, **Amanda Borquaye**, **Jessica Bielonko**, and **Kara Sparling**—provided additional research in 2020 as part of their participation in the Harvard Law and International Development Society (LIDS) Project, under the supervision of attorneys **Lucy Preston** and **Larry Low** from the law firm Orrick.

This publication also benefitted from research conducted by the Justice Initiative in 2013-2014 together with Tian Shan Policy Center of the American University in Central Asia, including research trips to Kingston, Jamaica and Toronto, Canada where we conducted interviews with the staff of investigative agencies, NGOs, and academics.<sup>1</sup> We also benefited from insights offered by participants in the Police in the Spotlight conference co-hosted by Jamaica's Independent Commission of Investigations (INDECOM), Amnesty International-Americas, Open Society Foundations, and the Human Rights Centre of the University of Essex, as well as conferences and workshops held between 2013 and 2018 in Armenia, Georgia, and Kyrgyzstan, organized by the Open Society Foundations.

Many individuals generously shared their expertise regarding particular fields or jurisdictions. The authors are grateful to **Fatima Bokhari**, Musawi, Pakistan; **Adriana Garcia Garcia**, CIDE University, Mexico; **Anna Giudice**, UNODC, Austria; **Lucas Lecour**, XUMEK, Argentina; **Therese Rytter**, Dignity, Denmark; **Martin Schöntheich**, independent consultant on criminal justice reform, USA; and **Mandira Sharma**, International Commission of Jurists, Nepal. We are also grateful to colleagues from the Open Society Foundations: **Betsy Apple**, **Natasha Arnpriester**, **Sophio Asantani**, **Aram Barra**, **Alexandra Cherkasenko**, **Sandra Coliver**, **Christian De Vos**, **Auro Fraser**, **George Kegoro**, **Zaza Namoradze**, **Nina Madsen**, **Susheela Math**, **Fiona McKay**, **Mariana Pena**, **Christopher Scott**, **Jennifer Shaw**, **Waikwa Wanyoike**, **Jillian Winkler**, **Vasylyna Yavorska**, and **Beini Ye**.

Many colleagues generously reviewed a draft of the paper

at different stages of its development. The authors are very grateful for the time and invaluable feedback of **Giorgi Chkheidze**, Promoting Rule of Law in Georgia at East-West Management Institute; **Veronica Hinestroza Arenas**, independent senior consultant on international human rights law, Colombia; **Gareth Jones**, formerly with Special Investigations Unit, Ontario, Canada; **Joseph Martino**, Director of the Special Investigations Unit, Ontario, Canada; **Lukas Muntingh**, Africa Criminal Justice Reform, South Africa; **Kent Roach**, Professor of Law at University of Toronto, Canada; **Christopher Sherrin**, Professor of Law at University of Western Ontario, Canada.

The authors would like to thank the many people working in this field who took time to speak to us. Those interviews were critically important in helping us better understand the work of investigative agencies in different countries, and in developing recommendations that are practical and practicable. The interviews were conducted via video calls unless noted otherwise. The authors are grateful to the following interlocutors for sharing their expertise, challenging our assumptions, and providing examples from their experience in the field: **Fabio Amado**, Public Defender's Office of Rio de Janeiro, Brazil; **Efrat Bergman-Sapir**, Public Committee against Torture (PCATI), Israel; **Yuriy Bielousov**, Head of the Department, Office of the Prosecutor General of Ukraine; **David Bruce**, researcher, South Africa; **Hamish Campbell**, Assistant Commissioner, INDECOM, Jamaica; **John Devitt**, Transparency International, Ireland (via email); **Tammie Gregg**, American Civil Liberties Union (ACLU), USA; **Veronica Hinestroza Arenas**, independent expert, Colombia; **Tamar Hopkins**, lawyer and researcher, Australia; **George Kegoro**, Open Society Initiative for Eastern Africa, Kenya; **Peter Kiama**, Independent Medico Legal Unit, Kenya; **Yevhen Krapivin**, Centre of Policy and Legal Reform, Ukraine; **Nicolás Laino**, Federal Public Defender's Office, Argentina (via email); **Paula Litvachky** and **Mariano Lanziano**, Centro de Estudios Legales y Sociales, Argentina; **Juan E. Méndez**, former UN Special Rapporteur on Torture, Argentina/USA; **Lukas Muntingh**, Africa Criminal Justice Reform, South Africa; **David Nderitu**, Director, Complaints and Legal Services, Independent Policing Oversight Authority (IPOA), Kenya; **Natasha Neri**, researcher and filmmaker working with families of victims of police killings in Rio de Janeiro, Brazil; **Victoria Sentas**, University of New South Wales, Australia; **Carl Takei**, ACLU, USA; **Tamar Zubashvili**, State Inspector's Service, Georgia; **David West**, Director of Police Complaints Authority, Trinidad and Tobago; **Paulo Roberto Mello Cunha Junior**, a prosecutor from Rio de Janeiro, Brazil; **Graham Smith**, University of Manchester, UK; **Laura Pitter**, Human Rights Watch, USA; and a police investigator and a lawyer from Norway who spoke in their personal capacities and asked not to be named.

## Table of Contents

<b>4</b>	<b>Methodology and Terminology</b>
<b>6</b>	<b>Executive Summary and Main Recommendations</b>
<b>12</b>	<b>1 Introduction</b>
<b>15</b>	<b>2 Independence of Investigative Agencies</b>
15	A Legislation Governing an Independent Investigative Agency
16	B Adequate Budget and Separate Physical Premises
<b>18</b>	<b>3 Independence and Responsibility of IIA Leadership</b>
18	A Independence of an IIA Director
19	B Appointment of the IIA Director
20	C Fixed Term
21	D Dismissal of an IIA Director
21	E Responsibility of the Leadership
<b>24</b>	<b>4 Investigative Authority and Jurisdiction</b>
24	A IIA as Lead Investigative Agency
26	B What the IIA Investigates
28	C Who the IIA Investigates
31	D Temporal Considerations
32	E No Over-reaching Statutory Defenses for State Agents or Statutes of Limitations for Gross Human Rights Violations
<b>34</b>	<b>5 Independence, Competence, and Training of IIA Investigators</b>
34	A Seconded and Former State Agents, or Investigators with No Police Experience
36	B Investigators' Compensation, Identification, and Clothing
37	C Diversity and Cultural Awareness of IIA Investigators
<b>38</b>	<b>6 IIA Powers in Practice</b>
38	A Powers of IIA Investigators
38	B Mandatory Immediate Notification and Duty to Cooperate
40	C Sanctions for Breaches of the Duty to Cooperate
41	D Securing the Scene of the Incident
42	E Segregation of Involved State Agents
42	F Post-Incident Notes and Statements
43	G Rights and Duties of State Agents
45	H Post-Incident Physical Evidence Related to the Subject State Agent
45	I Preservation of Data and Records

<b>47</b>	<b>7</b>	<b>Rights and Participation of Victims, their Representatives, and NGOs in IIA Investigations and Related Prosecutions</b>
48	A	Rights of Victims to Participate in Criminal Proceedings
49	B	Victims' Right to Information
50	C	Review of the Decisions of an IIA
50	D	Role of Non-governmental Organizations and Public Defender's Officers
<b>52</b>	<b>8</b>	<b>Evidentiary Matters</b>
52	A	Forensic Evidence
52	B	Post-Mortem Autopsies
53	C	Suspicion of Torture
54	D	Search for and Criminal Investigation of Enforced Disappearances
<b>56</b>	<b>9</b>	<b>Thorough and Timely Investigation</b>
<b>57</b>	<b>10</b>	<b>Protection of Witnesses and Whistleblowers</b>
57	A	Protection from Reprisals
58	B	State Agents as Whistleblowers
59	C	Immunity from Prosecution
<b>61</b>	<b>11</b>	<b>Transparency</b>
61	A	Public Statements during an Investigation
61	B	Public Statements at the Close of an Investigation
63	C	Report If Charges Are Withdrawn
63	D	Annual Report
64	E	Pattern Analysis
64	F	Demographic Data Collection
<b>66</b>	<b>12</b>	<b>Prosecutions and Trials</b>
66	A	Prosecutions
68	B	Delegated or Private Prosecutions
69	C	Trials
<b>71</b>	<b>13</b>	<b>Conclusion</b>
<b>72</b>		<b>Full Recommendations</b>
<b>76</b>		<b>Annex: List of Resources</b>
76	A	Books, Articles, and Reports
78	B	Select Legal Citations
79	C	Select International Standards
<b>81</b>		<b>Endnotes</b>

# METHODOLOGY AND TERMINOLOGY

## METHODOLOGY

**Research conducted for this paper included desk research,** literature review, and interviews with experts in the field. The paper also benefitted from Ian Scott's earlier research on police oversight and his experience as a director of the Special Investigations Unit in Ontario, Canada. This briefing paper was also informed by earlier research efforts undertaken in 2013 by the Open Society Justice Initiatives in collaboration Tian Shan Policy Center at the American University of Central Asia.<sup>2</sup>

The authors conducted 26 semi-structured interviews with independent investigative agencies (IIAs) employees, scholars, and civil society representatives in the countries covered by the paper, as well as with other experts in the field from North America, South America and the Caribbean, Europe, Africa, and Australia. Of those 26 interviews, 24 were conducted via video conference, with follow-up via email, and two were conducted by email only.<sup>3</sup> Interviews were conducted between November 2020 and April 2021. The interviews sought to identify practical examples on how states around the world approach investigations of alleged crimes by state agents, as well as recommendations for improved practice.

The IIAs studied in this paper all meet the minimum requirement of being independent from the police and other state agencies and mandated to conduct criminal investigations. The list of IIAs studied here is not intended to be comprehensive or representative; rather, the authors sought examples of effective IIAs from different regions and legal systems, to illustrate the many possible models in existence, and the contexts in which they work. The agencies studied vary in their degrees of independence and their competencies, but each has some promising elements and the potential to fulfill an IIA function effectively. The agencies represented a range of experience, from pioneers in the field—such as the 20-year-old Police Ombudsman

for Northern Ireland and the 30-year-old Special Investigations Unit in Ontario—to newer agencies such as the State Inspector's Service in Georgia, which started its operations in November 2019.

### The IIAs studied in this paper include:

1. Canada, Ontario, Special Investigations Unit (SIU)<sup>4</sup>
2. Georgia (Republic of), State Inspector's Service (SIS)<sup>5</sup>
3. Ireland, (Republic of), Garda Síochána Ombudsman Commission (GSOC)<sup>6</sup>
4. Israel, Police Internal Investigations Department (Machash or PIID)<sup>7</sup>
5. Jamaica, Independent Commission of Investigations (INDECOM)<sup>8</sup>
6. Kenya, Independent Policing Oversight Authority (IPOA)<sup>9</sup>
7. Norway, Bureau for Investigation of Police Affairs<sup>10</sup>
8. South Africa, Independent Police Investigative Directorate (IPID)<sup>11</sup>
9. Trinidad and Tobago, Police Complaints Authority (PCA)<sup>12</sup>
10. United Kingdom, England and Wales, Independent Office for Police Conduct (IOPC)<sup>13</sup>
11. United Kingdom, Northern Ireland, Police Ombudsman for Northern Ireland (PONI)<sup>14</sup>

The paper also studies specialized departments within a prosecutor's office that are not, strictly speaking, IIAs, but can serve the same function. These specialized departments have investigative power over the same incidents an IIA should investigate, but they are not fully independent; their functional independence is determined by the policies of the prosecution service to which they are attached. In addition, they lack some investigative competencies that an IIA should have. However, their experience is instructive in considering different oversight models that have the power to conduct criminal investigations.

### Those specialized departments are:

12. Argentina, Procuraduría de Violencia Institucional (PROCUVIN)<sup>15</sup>
13. Ukraine, Office of the Prosecutor General, Department of Procedural Guidance in Criminal Proceedings on Torture and Other Serious Human Rights Violations by Law Enforcement<sup>16</sup>
14. United States, Department of Justice Civil Rights Division, Criminal Section.<sup>17</sup>

The publication also reflects on some of the experiences of a prosecutorial department under the Attorney General in Rio de Janeiro—the Grupo de Atuação Especializada em Segurança Pública (GAESP)—that represented a promising practice, especially in the context of high security risks. The state attorney general disbanded GAESP in March 2021, a regrettable decision making it less likely that victims of state killings will receive justice.<sup>18</sup> Given the importance of the GAESP experience, we chose to retain some examples of its work, despite its recent demise.

It was not possible for researchers to evaluate the independence and effectiveness of each of the investigative agencies or prosecutorial departments included here. Rather, this paper seeks to highlight aspects of the different agencies that illustrate promising practices. It is hoped that policymakers and practitioners in other countries may consider adopting these promising practices in their own contexts. While this paper discusses some of the challenges and shortcomings confronting the agencies studied, the main focus is on the aspects of the agencies that appear to be effective and offer a potential model of promising practice.

## TERMINOLOGY

At certain points, this paper uses technical terms specific to the criminal justice field; where those terms are used, a definition will be provided in the text. However, for certain essential terms that are used frequently throughout the paper, it is important to have a common understanding of their meaning. Those key terms are defined below.

**Independent Investigative Agency (IIA) and director.** While terminology differs on the name of a jurisdiction’s

independent investigative agency and its leader, for the purposes of this paper the agency will be referred to as the “independent investigative agency” (IIA or “the agency”), and its leader as the “director.”

**State agents.** The paper refers to police officers and other law enforcement personnel who fall under the jurisdiction of IIAs by using the umbrella term “state agents.” The term includes police, correctional officers, and others responsible for detention facilities. In some jurisdictions, the term may include immigration officers, custodians in mental health facilities, and workers in youth detention centers. In accordance with UN guidelines, the definition also includes military personnel when they are performing law-enforcement functions.<sup>19</sup> In some jurisdictions, the term also includes prosecutors.<sup>20</sup>

**Victims and affected persons.** Based on human rights frameworks, the paper defines victims as “persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.”<sup>21</sup> A person may be considered a victim regardless of whether the perpetrator is identified, apprehended, prosecuted, or convicted, and regardless of any familial relationship between the perpetrator and the victim.<sup>22</sup> The term “victim” also includes, where appropriate, the immediate family or dependents of the direct victim, and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.<sup>23</sup> Many agencies will use terms such as “affected persons” to avoid the appearance of the presumption of illegal behavior of state agents.

Different agencies use different terminology when deciding whether a matter should go to trial. In determining whether the evidence is sufficient to lay a criminal charge, some say the threshold is “reasonable prospect of a conviction,” others say the evidence “could sustain a conviction,” still others use the term “reasonable grounds to lay a criminal charge” or “probable cause.” This paper will use the expression **“reasonable grounds to lay a criminal charge,”** meaning the investigation is supported by enough evidence to justify bringing a criminal charge, and the matter ought to go to trial.

# 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,<sup>24</sup> to the systemic torture of protesters by police in Belarus,<sup>25</sup> to the deaths of individuals detained during lockdowns in India<sup>26</sup> and Kenya<sup>27</sup>—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.

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.<sup>28</sup> 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.

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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.”<sup>29</sup> In such cases, the burden of proof shifts to the government, requiring it to provide a satisfactory and plausible explanation supported by evidence.<sup>30</sup>

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”)<sup>31</sup> and the *Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* (“Minnesota Protocol”).<sup>32</sup> The investigations need to be independent, impartial, prompt, thorough, and transparent, and involve the victims and their families.<sup>33</sup>

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)<sup>34</sup> to INDECOM in Jamaica<sup>35</sup> to the Republic of Georgia's State Inspector's Service<sup>36</sup> to South Africa's Independent Police Investigative Directorate.<sup>37</sup>

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,<sup>38</sup> Argentina,<sup>39</sup> and the United States.<sup>40</sup> The paper also includes references to a fourth example of a useful prosecutorial unit in the state of Rio de Janeiro in Brazil<sup>41</sup> 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.

# INTRODUCTION

**The role of law enforcement in society** is currently in the spotlight around the globe. Police functions, mandates, and the appropriate limits to their powers are under renewed scrutiny. The “defund the police” movement in United States focuses on the need to support non-policing forms of public safety and community support, such as social services, youth services, housing, education, healthcare, and other community resources.<sup>42</sup> Violence in the enforcement of COVID-19 lockdowns in many countries and repression and torture of protesters have spurred fresh analysis of the colonial roots of modern policing. Increasing use of the military to enforce lockdowns or conduct joint operations with police also highlights the need for oversight of state agents. At the core of contemporary debates over police powers lies the persistent question of how to prevent serious crimes by state agents, and how to hold police and other security forces accountable for alleged abuses and illegal actions. Impunity for law enforcement officers who commit violent crimes threatens to erode public trust in policing and the legitimacy of the state. Accountability is clearly an inherent part of democratic policing and an essential element in upholding the rule of law.<sup>43</sup>

Multiple international conventions guarantee the right to effective investigation of alleged serious crimes committed by the police and other state agents. The United Nations Human Rights Committee, for example, has stated that the right is derived from Articles 2 and 6 (the right to an effective remedy and the right to life) of the International Covenant on Civil Rights and Political Rights (ICCPR); signatory states must investigate all killings perpetrated by state agents. Article 12 of the UN Convention against Torture (CAT) requires a prompt and impartial investigation when there are reasonable grounds to believe that someone has committed an act of torture or other ill treatment in any territory under the state’s jurisdiction. The obligation to investigate is linked to the duty to provide the right to access complaints mechanisms.<sup>44</sup> Similarly, the Inter-American Commission on Human Rights (IACHR) in *Michael Gayle v. Jamaica*, ruled that Articles 4, 5, 8, and 25 (among other rights, the right to life) of the American Convention on Human Rights together generate a state duty to investigate when state action breaches the right to life, particularly in the context of police action. Since *Gayle*, the IACHR has repeatedly reaffirmed the existence of this duty and condemned inadequate investigations in Colombia, Guyana, and Brazil. The European Court of Human Rights has also read a right to adequate investigations of police killings into Article 2 (the right to life) of its European Convention on Human Rights (ECHR). In *McCann v. United Kingdom and Others*, the court ruled that this right extends to serious injury or serious ill-treatment by state actors under the ECHR’s Article 3 prohibition against torture. Based on judicial interpretations of these international conventions, the right to life may not be abridged by state agents without accountability in the form of an adequate investigation.

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Multiple international conventions guarantee the right to effective investigation of alleged serious crimes committed by the police and other state agents.

International human rights bodies state that such investigations should be handled by specialized bodies. For example, the United Nations Working Group on Enforced or Involuntary Disappearances asserts that “the creation of specialized units for their investigation and criminal prosecution can be an effective approach and can contribute to better coordination of criminal policy.”<sup>45</sup>

But despite the clarity of international conventions and court rulings, efforts to ensure accountability for serious crimes committed by state agents have not always been effective. Those efforts often failed to take a long-term, systemic approach to the problem. More damningly, those efforts often lacked independence from the very police they were meant to investigate.

Today, domestic and international judicial bodies are increasingly ordering governments to ensure that their investigative agencies are independent. Notorious crimes committed by law enforcement make clear why such investigative agencies are needed—and why they must be independent. The Special Investigations Unit in Ontario was created following a 1989 Task Force on Race Relations and Policing report into police shootings of young Black men.<sup>46</sup> In Europe, the publication of videos of torture in prisons in the Republic of Georgia, in addition to several decisions by the European Court on Human Rights on the ineffectiveness of investigations, fed calls to create investigative bodies.<sup>47</sup> In Jamaica, the implementation of the Inter-American Court’s *Gayle* decision led to the establishment of the Independent Commission of Investigations (INDECOM).<sup>48</sup> In Kenya, the Independent Policing Oversight Authority (IPOA) was established following the recommendations of the Commission of Inquiry into the Post Election Violence<sup>49</sup> and the subsequent National Task Force on Police Reform. In South Africa, with its history of apartheid and widespread police abuses, a police complaints and investigative body was written into the Interim and 1996 Constitutions.<sup>50</sup> Finally, in January 2020, the Supreme Court of Nepal ordered the government to develop impartial and effective mechanisms to investigate cases of human rights violations such as extra-judicial executions.<sup>51</sup>

But for an IIA to conduct effective investigations that lead to the identification and prosecution of those responsible for crimes, it needs to have an enabling environment and tools it can use. Overreaching laws granting state agents blanket immunity from criminal liability for their actions render investigations and accountability futile and must be repealed or avoided. Further, there is a need for the mandating of video equipment such as body-worn cameras and CCTV cameras in all lock-ups and detention centers, to capture the activities of state agents. It is equally important for the police and other state agencies to keep accurate records, to record time and names of any officer interacting with others, times of actual arrests, transfers, and any contact with individuals in detention.

Even proponents of independent investigative agencies acknowledge that IIAs are only one part of a necessary web of accountability. IIAs should have limited, clearly defined mandates to address the most serious abuses by state agents. But other forms of accountability are also needed,

including to address less severe misconduct by police through disciplinary measures and other sanctions. Police and other law enforcement agencies should have their own internal accountability mechanisms built into the institution.<sup>52</sup> Such disciplinary mechanisms can also be administered by independent agencies: several of the IIAs discussed here have the power to levy disciplinary sanctions, in addition to criminal charges.<sup>53</sup>

Victims can seek reparations outside of the criminal process through civil or administrative judicial proceedings, administrative reparations programs, and by filing constitutional or human rights petitions before national courts or international bodies.<sup>54</sup> In some countries, prosecution services can file civil claims after investigating systemic failures by police.<sup>55</sup> In some cases of particularly egregious violations, *ad hoc* commissions of inquiry can play an important role in the quest for accountability.<sup>56</sup> Independent, multi-disciplinary teams focused on specific incidents of enforced disappearances have produced effective results.<sup>57</sup> There are multiple examples of specialized agencies focusing on official corruption, including in law enforcement. Ombudsman and other national human rights institutions, national preventive mechanisms, human rights NGOs, individual activists, and victims' associations all conduct their own monitoring and investigations that combat impunity. Public defenders can play an important proactive role in preventing torture, extrajudicial killings, and other human rights violations.<sup>58</sup> This paper does not seek to address all of the many available means to make police, military, and other security agencies more accountable. Rather, it focuses on the work of IIAs related to criminal investigations into state agent actions that interfere with the right to life and the right to personal integrity on the territory under their jurisdiction.

IIAs are not a cure-all. There are no technical solutions for political problems, nor is political commitment alone enough to prevent and punish serious crimes by state agents. IIAs are a part of the society in which they function and can be expected to reflect that society's strengths and shortcomings alike. To effectively police the police, IIAs need not only to be protected by law, but must also have the independence, power, resources, and technical capacity to do their job. For an investigative agency to be effective, it should have a strong legislative framework, appropriate budget, and the cooperation of other state agencies, as well as competent and committed investigators and other staff. Forensic evidence is an indispensable tool for IIAs investigations, and it is important for state forensic services to be independent of police and other security agencies.<sup>59</sup>

The list of conditions and resources needed for an IIA to be successful is a long one and includes everything from proper equipment to thorough record keeping to the absence of overreaching laws granting state agents blanket immunity from criminal liability for their actions. Those needs are explored throughout this report, along with promising practices taken from the work of IIAs around the world demonstrating how they successfully fulfill their mandate. But the first, most indispensable condition for an IIA to succeed is independence, which is examined in the following two chapters.

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# INDEPENDENCE OF INVESTIGATIVE AGENCIES

## **Independence is the oxygen of an independent investigative agency.**

It is, by definition, an essential precondition for an IIA's existence. Yet such independence is not easily secured, and even after it is won, it can be eroded or undermined in many ways. This chapter examines the need for independence and how that independence can be safeguarded through legislative and budgetary means.

There is an inherent tension associated with independent agencies meant to investigate state misconduct. The investigating agency's independence creates a structural dilemma because its mandate must emanate from the very government it is tasked to investigate for potential crimes (and indeed, the very government that provides the IIA with funding). Practical independence is critically important to achieving both effective investigations and public acceptance of the agencies conducting those investigations.

# 2

## **A. LEGISLATION GOVERNING AN INDEPENDENT INVESTIGATIVE AGENCY**

Independent investigative agencies are generally created through legislation that sets out their mission, scope of duties, and resources. Although thorough, well-drafted legislation does not necessarily guarantee an IIA success, weak or poorly conceived legislation can certainly doom it to failure. Based on the experiences of the IIAs studied in this paper, certain aspects of their founding legislation are particularly significant.

It is important for the law governing the IIA to be set out in statutes and regulations separate and apart from other policing legislation. This helps clarify the IIA's power and purpose, and establishes it as distinct from other law enforcement. South Africa went as far to enshrine the need for "an independent police complaints body established by national legislation" that "must investigate any alleged misconduct" in its Constitution.<sup>60</sup> Indeed, most of the IIAs covered in this paper—including those in Kenya,<sup>61</sup> Jamaica,<sup>62</sup> and Trinidad and Tobago<sup>63</sup>—were created by separate statutes.

For some IIAs, such as the Police Ombudsman for Northern Ireland (PONI) and the Independent Office for Police Conduct (IOPC) of England and Wales,<sup>64</sup> the legislation outlining their powers and responsibilities is included in an omnibus police act which covers many other aspects of police governance. This makes it difficult for a lay reader to understand how the IIA works and aligns the IIA too closely with existing policing

interests. This structure also makes it more complex to amend the legislation governing an IIA.

Being governed by discrete legislation helps clarify the mandate of an IIA and delineate its powers. In Ontario, Canada, legislation governing the Special Investigations Unit was part of its *Police Services Act* for 30 years. On December 1, 2020, the SIU finally became governed by its own stand-alone legislation called the *Special Investigations Unit Act*.<sup>65</sup> The Police Ombudsman for Northern Ireland recently recommended amending the governing legislation to designate the Police Ombudsman as an Officer of the Assembly and consolidate 16 governing legal instruments into a single act.<sup>66</sup> Having separate legislation to govern the IIA helps not only to ensure its independence, but also can help prevent the IIA from being saddled with a remit that is either too narrow or too broad.

Specialized departments in prosecutor's offices—which are not technically IIAs, but can play a similar role—tend to be established by the resolutions put forth by the heads of the prosecution services, as is the case in Ukraine.<sup>67</sup> Although reliance on a single prosecutor's resolution is not ideal, it is one way to establish accountability for serious crimes by state agents. And once accountability is established as a goal, it becomes possible to strengthen that mandate. The experience of Argentina's Procuraduría de Violencia Institucional (PROCUVIN) shows that improvement in the guarantee of independence is possible. PROCUVIN was first established by a decision of the Federal Prosecutor's Office but the *2018 Organic Law of the Public Prosecutor's Office of the Nation*<sup>68</sup> included PROCUVIN as one of seven specialized prosecutor's offices on a permanent basis.<sup>69</sup>

## B. ADEQUATE BUDGET AND SEPARATE PHYSICAL PREMISES

For an IIA, being governed by discrete legislation has many advantages, including helping to establish its independence, and clearly defining its mandate. Another advantage is that legislation often begets budgetary allotment. Clearly, an IIA needs adequate funding, and that funding should be guaranteed in the jurisdiction's budget, preferably on its own dedicated budget line. The IIA's budget should be sufficiently robust that the agency can adequately respond to all incidents falling within its remit.

Under-resourcing of oversight bodies is a way to undermine their ability to conduct effective investigations. Thus, having its own, sufficient budget is an important marker of an IIA's independence, and likely, its effectiveness. The problem of inadequate funding should not be addressed by relying on police support for tasks such as interviewing witnesses or securing and storing evidence. Reliance on police support is one of the two primary indicators of a lack of independence on the part of police oversight agencies.<sup>70</sup>

In Kenya, the first board of IPOA was able to create a positive cycle in which political support led to increased funding, which led to greater public support. As a result, IPOA became the best-funded of all oversight authorities in Kenya.<sup>71</sup>

Having its own, sufficient budget is an important marker of an IIA's independence, and likely, its effectiveness.

Just as an IIA benefits from having its own legislation and its own budget, separate from those of the police, it also needs to be physically located apart from the police. An IIA needs to be in a facility removed from any state agency buildings, and access to an IIA facility should be restricted to authorized personnel. This is important for several reasons, including the perception of independence, security purposes, and providing accessibility for victims of crimes by state agents, who would be reluctant to enter a police building. Depending on its geographic scope, the IIA's budget should be robust enough to establish regional offices to facilitate access to victims and allow investigators to respond quickly to incident scenes. The Independent Police Investigative Directorate (IPID) in South Africa, for example, provides reasonable accessibility despite covering a large area.<sup>72</sup> INDECOM in Jamaica and Machash in Israel also have multiple offices to ensure accessibility for those under their jurisdiction.<sup>73</sup>

In sum, IIAs must have independence, and that independence should be reflected in their governing legislation, their budgets, and even their physical premises. Those conditions for independence should also extend to the IIA's staff, and especially its leadership, as discussed in the next chapter.

# INDEPENDENCE AND RESPONSIBILITY OF IIA LEADERSHIP

**An organization is only as strong as its leadership**, and an independent investigative agency is only as independent as its leadership. Leading an IIA is a complex and fraught position, requiring careful maneuvering among entrenched interests in difficult situations. To successfully lead an IIA, its director must be assured of independence from external pressures, particularly related to how that leader is appointed and potentially dismissed.

## A. INDEPENDENCE OF AN IIA DIRECTOR

An IIA's independence is facilitated by its reporting structure. An IIA needs a director willing to conduct investigations of all incidents of alleged offenses within its mandate, with a view to deciding whether there are grounds to initiate or recommend a criminal prosecution. Often, the agencies report through a line of authority to a minister or head of a government department.<sup>74</sup> Working within government to hold accountable other parts of the government leaves the director vulnerable to either overt political interference—including dismissal—or subtle interference such as inappropriate suggestions from those in authority. One solution—if the jurisdiction's legal system allows—is for the agency to report to the governing legislature, rather than a head of a department.

The agency's leader needs to be protected from governmental interference, a concept that has been elevated to a constitutional norm in some jurisdictions.<sup>75</sup> In South Africa, the Constitutional Court declared that the minister of police's power to suspend or remove the executive director of its IPID was invalid because it contravened the constitutional requirement that IPID be independent.<sup>76</sup> In response to this ruling, the South African National Assembly passed amendments to the law to fix the problem.<sup>77</sup> The only body that can now remove the executive director of IPID is the parliament, with a two-thirds majority vote in the National Assembly.<sup>78</sup>

The Jamaican Independent Commission on Investigations (INDECOM) provides an example of independence in supervision and reporting: the legislative act governing the commission states that it “shall not be subject to the direction or control of any other person or authority,” and removal of its commissioner requires a resolution of both houses of parliament.<sup>79</sup>

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Working within government to hold accountable other parts of the government leaves the director vulnerable to political interference.

It is important for the public to have confidence that the agency and its director are independent, not only from political interference, but also from police culture. Former or current state agents should be disqualified from serving as the director. Most directors of existing IIAs are lawyers. Many of these directors have served as prosecutors, including the first leader of INDECOM in Jamaica. But having prosecutorial experience is not essential. The current director of the Northern Ireland Police Ombudsman is a lawyer who served as the public services ombudsman, and the current director of the Independent Office for Police Conduct in the UK is an experienced accountant.

In Kenya, the Independent Police Oversight Authority (IPOA) is led by a board and managed by a director. The Independent Police Oversight Authority Act (IPOA Act) requires stringent qualification standards for its board members: the chairperson must have qualifications similar to a judge of the High Court, and the seven other board members must have extensive subject-area knowledge, including at least 10 years' experience in the fields of criminology, psychology, law, human rights and gender, medicine, alternative dispute resolution, security matters, or community policing. Significantly, the IPOA board serves as a liaison with parliament, allowing the director to focus on the operations of the agency.<sup>80</sup> However, it is important to note that the mere existence of a board is not a sufficient guarantee of independence for the agency. The director of a Kenyan human rights organization raised concerns about possible political interference with an elected board and emphasized the need to guarantee that the board respects the autonomy of the agency's director.<sup>81</sup>

The need for strict impartiality makes it important for IIAs to avoid leadership candidates with extensive experience in the police and military. In Canada, for example, the law governing Ontario's IIA states that "a person who is a police officer or a former police officer shall not be appointed as a director." Similar provisions apply to the IOPC in the UK, and in Northern Ireland the police ombudsman recommended introducing a similar disqualification into legislation.<sup>82</sup>

In contrast, the law of the Republic of Georgia requires candidates for IIA leadership to have "higher legal education, and at least five years of experience working in judicial or law enforcement bodies or in the field of human rights."<sup>83</sup> Georgia's prosecutor's offices are part of the country's law enforcement system and the law could be interpreted as including prosecutors but, problematically, it lacks a clear prohibition against current or former police officers assuming IIA leadership.

## **B. APPOINTMENT OF THE IIA DIRECTOR**

The director of an IIA should be chosen through a rigorous process that guarantees the maximum degree of independence from influence by the executive and the police. The guarantees should be similar to those extended to ombudsman institutions. *The Principles on the Protection*

*and Promotion of the Ombudsman Institution* (“the Venice Principles”) provide useful guidance in this regard.<sup>84</sup> If those principles are adopted, the procedure for selecting candidates would include a public call for applications, and the entire process would be public, transparent, merit based, objective, and provided for by the law.<sup>85</sup> Creation of a multi-party selection committee—with participation of civil society and relevant institutions—to select candidates based on clear and rigorous criteria announced in a public call is also an important guarantee. Finally, the process should culminate with approval of the new director by a super-majority of the relevant legislature.

In the Republic of Georgia, the *Law on the State Inspector Service* provides for an inter-agency commission—including representatives from parliament, the judiciary, the prosecutor’s office, the ombudsman office, and civil society—to nominate between two and five candidates for consideration by the prime minister. The prime minister then places two of these candidates before the parliament, which makes the final selection. The law explicitly requires that “nomination of the candidates of different sexes should be ensured to the greatest extent.”<sup>86</sup>

Although there are various models for an independent selection process for the head of an IIA, they tend to have in common an emphasis on rigor, objectivity, freedom from influence by the executive or police, and multiple layers of review. Of course, appointing the right leader is only one step. It is also important to ensure that leader serves for an appropriate period and is not forced out prematurely, as examined in the next two sections.

## C. FIXED TERM

The Venice Principles recommend: “The term of office of the Ombudsman shall be longer than the mandate of the appointing body. The term of office shall preferably be limited to a single term, with no option for re-election; at any rate, the Ombudsman’s mandate shall be renewable only once. The single term shall preferably not be stipulated below seven years.”<sup>87</sup> These guidelines should be applied to the term of an IIA director as well. Limiting the IIA director’s tenure ensures that the position does not become a lifetime sinecure, prevents burnout, and protects against a long-serving director becoming too closely allied with police or other institutional interests.

The length of an IIA director’s employment should be fixed and should be long enough to attract senior candidates. An IIA director should serve a maximum of two terms. Georgian law allows one, non-renewable, six-year term and Northern Ireland allows a single seven-year term. In Jamaica, the director can serve two five-year terms. Such limits—and the renewal in leadership they impose—help ensure the vitality of the IIA.

## D. DISMISSAL OF AN IIA DIRECTOR

An effective IIA director may make enemies—especially among those the IIA seeks to hold accountable for serious crimes—and those enemies may seek to undermine the director or even pursue the director’s dismissal. Thus, it is essential that the dismissal process be governed by strong safeguards to prevent reprisals against the director.

Dismissal of the director before the end of their term may only take place for just cause and should only be accomplished through a procedure with sufficient protection, such as a vote by two-thirds majority of the governing legislature. The Venice Principles can serve once again as guidance for legislation related to dismissal of an IIA director. On this point, those Principles state that an ombudsman, “... shall be removed from office only according to an exhaustive list of clear and reasonable conditions established by law. These shall relate solely to the essential criteria of ‘incapacity’ or ‘inability to perform the functions of office,’ ‘misbehaviour’ or ‘misconduct,’ which shall be narrowly interpreted. The parliamentary majority required for removal – by Parliament itself or by a court on request of Parliament – shall be equal to, and preferably higher than, the one required for the calling of an election. The procedure for removal shall be public, transparent and provided for by law.”<sup>88</sup>

Unlike the directors of IIAs, the heads of specialized departments within prosecution services typically do not have individual guarantees of tenure in their positions. This was demonstrated in March 2021 when a new attorney general disbanded the specialized department, GAESP, that was pursuing accountability for serious crimes by police in the Brazilian state of Rio de Janeiro. Individual prosecutors who worked there have strong guarantees as public prosecutors and cannot be dismissed without just cause from the divisions established by law to which they were originally appointed.<sup>89</sup> But these protections did not prevent the dissolution of GAESP. In fact, the fate of GAESP illustrates why IIAs are often more effective than specialized departments within prosecution offices, and why IIA directors in particular must be protected against unlawful dismissal.

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## E. RESPONSIBILITY OF THE LEADERSHIP

Should the director make the decision to charge a state agent, or should the director make a recommendation to another body, such as its prosecution service? Although practices vary—often based on the historical relationship between the police and the prosecution service—it is generally preferable for the IIA director to decide whether to charge a state agent. In Ontario, the government maintains a bright line between policing and the prosecution service; while prosecutors may provide advice to the police, the police conduct investigations and lay charges, not the prosecutors. This practice extends to Ontario’s IIA, the Special Investigations Unit, meaning its director decides if a criminal charge is to be laid against a subject police

officer.<sup>90</sup> After the charge is laid, a specialized unit of prosecutors carries out the prosecution.

Most of the IIAs referred to in this paper, however, do not have the power to charge. Instead, they make recommendations to the prosecution service, which may or may not decide to take a matter to trial. The shortcomings of this approach can be seen in Trinidad and Tobago. After the Police Complaints Authority (PCA) of Trinidad and Tobago completes its investigation, the director makes a recommendation to the Director of Public Prosecutions (DPP). If the DPP agrees with the recommendation to prosecute, it refers the matter back to the police to lay the charge, and the police often conduct their own second investigation. Instead, the DPP should issue a fiat to prosecute to the PCA, allowing them to take the case forward.<sup>91</sup>

In Jamaica, INDECOM's first commissioner adopted a strong strategic approach under which the agency laid its own charges against state agents. This was supported by the Jamaican Supreme Court for a number of years, but a subsequent challenge by Jamaica's police federation led to a 2020 ruling by the United Kingdom Privy Council that INDECOM had neither the authority to lay charges nor to substitute its judgement for that of the prosecution service.<sup>92</sup> INDECOM and the Director of Public Prosecutions (DPP) signed a Memorandum of Understanding agreeing that the DPP will make a decision on whether to lay charges and proceed with the prosecution of INDECOM's cases within 30 days from the submission.<sup>93</sup> Additionally, the Privy Council confirmed that INDECOM does have the power to prosecute obstruction of its investigative work, and to compel state agents to cooperate with its work.<sup>94</sup>

At the Norwegian Bureau for Investigation of Police Affairs, the director decides on prosecutions of crimes that can bring up to 10 years of imprisonment.<sup>95</sup> But for more serious crimes, the Director of Public Prosecutions takes the decision.<sup>96</sup> In Israel, the Police International Investigations Department under the Ministry of Justice also has the responsibility, with some exceptions, for laying charges and prosecuting the crimes under its jurisdiction.<sup>97</sup>

In Kenya, the board members of its investigative agency, IPOA, jointly decide on recommendations at the end of an investigation. While this process dilutes personal responsibility, a Kenyan human rights lawyer noted that a group might be more insulated from outside pressures than an individual would be.<sup>98</sup> At IPOA, investigators work in close coordination with the legal department that is responsible for preparing the recommendation to the Director of Public Prosecutions, and the recommendation is reviewed by the technical committee of the board to ensure it meets the required standard and before being signed by the director.<sup>99</sup> Similarly, prosecutors in GAESP in Rio de Janeiro, before its dissolution, signed the documents together to avoid being targeted for individual retaliation, a practice developed after a judge who issued a decision to arrest police officers was targeted and killed.<sup>100</sup>

The most effective approach is to have the director of the IIA be the one who decides whether to charge a state agent. By legislating this authority in the office of the director, a specific individual can be held accountable

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for the decision. Further, the decision will be made independently of the prosecution service. In those jurisdictions where the director does not make the ultimate charging decision, and the decision is made externally—typically by the prosecution service—it is important to guarantee the transparency and accountability of that process. The prosecution service should provide written reasons to the IIA director in cases where the decision is made not to prosecute. The director should then have the discretion to make those reasons public.

As this chapter has sought to document, it is essential for an IIA to have independent leadership and, ideally, that leadership should have the power to lay charges directly. This ensures the IIA can operate effectively and impartially, even when investigating the most serious crimes committed by the most powerful state actors. Exactly what an IIA should investigate and whom it should have jurisdiction over are addressed in the following chapter.

# INVESTIGATIVE AUTHORITY AND JURISDICTION

**Defining what the IIA investigates** and over whom it has jurisdiction is critical to its effective functioning and the fulfillment of its mandate. There will inevitably be resistance by state agencies to ceding jurisdiction to an independent agency over which they have little or no control. For that reason, it is important that the IIA's sphere of jurisdiction be well delineated, so affected state agencies know when their duty to notify the IIA arises and what their responsibilities are after notification. Once the IIA is notified and determines the incident falls within its jurisdiction, it may invoke its exclusive powers to conduct an investigation.

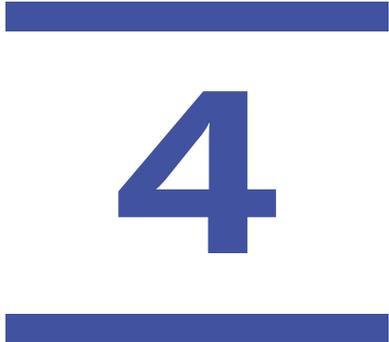
It is important for an IIA to have exclusive jurisdiction over a limited number of the most serious incidents or allegations of crimes. But the director should also have discretion to decide to take over the investigations of other abuses by state agents in cases where doing so would be in the public interest. The resources allocated to an IIA are almost never sufficient, and a jurisdiction that is too broad might stifle the effectiveness of the investigations or lead to the investigation of less serious or less complex offenses. When there are widespread abuses by state agents, having a narrower mandate for exclusive jurisdiction might give the IIA a better chance to be effective.

This chapter will examine the role of the IIA as lead investigative agency, the alleged crimes and perpetrators the IIA should have jurisdiction over, temporal considerations that should be taken into account, and finally, the statutory defenses that should be avoided if the IIA is to be effective.

## A. IIA AS LEAD INVESTIGATIVE AGENCY

Nearly all incidents falling under the jurisdiction of an IIA and spurring an investigation by that IIA will overlap with other investigations of the same incident, conducted by other agencies. For example, many jurisdictions have legislation permitting coroners or medical examiners to conduct investigations into fatality incidents. Often, complainants who suffered significant injuries, ill-treatment, or torture will be under investigation themselves for criminal offenses. When a single incident is the focus of multiple investigations by different agencies, confusion can ensue.

But these circumstances should not give any other investigative agency license to conduct a parallel investigation during the IIA investigation. The



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IIA needs to be the lead agency because it is independent, while other investigative agencies have potential conflicts of interest. Additionally, the IIA is conducting an investigation that could lead to criminal charges, the most serious societal response to alleged wrongdoing and one with potentially dire consequences for a subject state agent. The IIA needs to be the primary evidence gathering tool to ensure the evidence's integrity if a trial takes place.

The legislation governing an IIA should make it clear the IIA becomes the lead investigative agency as soon as its mandate is invoked.

Being the lead agency means that mere supervision or monitoring of an investigation carried out by investigators directly or indirectly connected with the state agency in question is not sufficient. That approach will not satisfy public confidence that an independent investigation has occurred. Instead, both the supervision of the investigation and the actual exercise of the investigation must be conducted by the IIA. The investigation which led to the European Court of Human Rights decision in *Kelly et al v. United Kingdom*, where an Irish Republican Army attack on a police station resulted in the shooting deaths of nine persons by a special forces unit of the British Army, was supervised by an independent police monitoring authority, as required by law at that time. But, crucially, the investigation itself was carried out by police—not investigators from the IIA. The court criticized this arrangement, noting that “this cannot provide sufficient safeguard where the investigation has been for all practical purposes conducted by police officers connected, albeit indirectly, with the operation under investigation.”<sup>101</sup>

In contrast, Ontario's *Special Investigations Act* establishes that “the SIU Director is the lead investigator in the investigation of an incident or matter under this Act, and shall have priority over any police force investigating the incident.”<sup>102</sup> Most IIAs act as lead investigative agencies but not every one is governed by legislation that so clearly lays out its mandate and clarifies primacy among multiple investigating agencies. Further, the on-the-ground investigation of any incident is seldom as neat as the legislation would have it.

For example, legislation in Kenya includes an unambiguous provision that IPOA shall “investigate any complaints related to disciplinary or criminal offences committed by any member of the service.” But that legislation does not provide clear guidance on how it relates to the National Police Service Act, which entrusts the Directorate of Criminal Investigations to undertake investigations of serious crimes. The overlapping investigative powers of the two institutions result in turf wars or, in some instances, waste and imprudent application of scarce public resources.<sup>103</sup>

There may be circumstances where the IIA, by necessity, has to delegate some investigative steps to a regular law enforcement agency. For example, an incident scene may need to be secured by more personnel than the IIA has available. But any such delegation should be minimized, and should be closely monitored by the IIA.

The IIA needs to be the primary evidence gathering tool to ensure the evidence's integrity if a trial takes place.

The State Inspector's Service in Georgia has exclusive jurisdiction over crimes committed by state agents, and responsibility to investigate those crimes. However, it cannot carry out important investigative actions, such as search and seizure, without the approval of the prosecutor's office. Similarly, the specialized prosecutor's department in Argentina needs the consent of regular prosecutors to investigate cases. This dynamic negatively affects an IIA's ability to effectively investigate cases under its jurisdiction.<sup>104</sup>

It is important for an IIA to be the lead investigative agency—and equally important that other government entities understand this.

## B. WHAT THE IIA INVESTIGATES

The typical mandate of an IIA is to conduct effective criminal investigations into death, serious injury, torture, and allegations of sexual assault by state agents. (As noted earlier, this paper does not seek to address accountability for other crimes, such as bribery, committed by state agents. IIAs are intended to investigate the most serious crimes committed by state agents, and the agencies would be overwhelmed if they sought to investigate every allegation against the police.) Some states are confronted with the phenomenon of people disappearing after being detained, and such disappearances should be also be investigated by an IIA. These serious crimes harm not only the victims and their families, but also the body politic because they undermine state authority.

All state agencies should have a duty to notify their IIA in circumstances of death, serious injury, or disappearance involving state agents. All state agencies should also refer allegations of sexual assault, torture, or enforced disappearances by police officers. It is not acceptable for a state agency to wait until a complaint is made by the victim or the victim's family before notifying the IIA. If an IIA only responded to victim complaints, many serious incidents would escape investigation.

There should be a detailed definition and clear understanding of the circumstances in which the IIA's mandate is triggered. Notification is critical to the IIA's ability to effectively investigate because it prompts a series of important steps, including the IIA's assuming its position as the lead investigative agency, permitting it to secure the scene, seize evidence, and take other steps discussed later in this paper.

An IIA should have exclusive jurisdiction to investigate when an individual sustains any of the following harms.

1. **Death.** Any death that is *prima facie* attributable to state agents or occurs while the deceased is under arrest, detention, or in custody.
2. **Serious injury.** Serious injury needs a well-developed definition because without one, it can be the subject of too much discretion by state agencies. The definition should not be unduly restrictive. The definition below is used by Ontario's Special Investigations Unit:

All state agencies should have a duty to notify their IIA in circumstances of death, serious injury, or disappearance involving state agents.

“Serious injury includes any injury that is likely to interfere with the health or comfort of the complainant that is more than transient or trifling in nature. An injury is initially presumed to be serious when the complainant is:

- (i) taken to hospital;
  - (ii) suffers a fracture to the skull, or to a limb, rib or vertebra;
  - (iii) burns to a significant portion of a person’s body;
  - (iv) the loss of any portion of the person’s body; or
  - (v) a loss of vision or hearing.”<sup>105</sup>
3. **Allegations of sexual assault.** How this offense is defined within a jurisdiction’s penal code will vary, but its essence is always non-consensual touching of a sexual nature. These allegations should fall under the mandate of an IIA whenever a complainant alleges they have been sexually assaulted by an on-duty state agent. Many jurisdictions contain a definition of sexual assault which vitiates consent where the accused abuses his position of power or authority, a relevant consideration when a complainant is detained and makes allegations of this nature.<sup>106</sup>
4. **Allegations of torture.** Article 1 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from or inherent in or incidental to lawful sanctions.”<sup>107</sup>
5. **Allegations of enforced disappearance.** As defined by Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance, “enforced disappearance is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.”<sup>108</sup>

Many oversight agencies may choose to have a broader mandate covering more incidents than the ones listed above. There are multiple uses of force that could fit within an IIA’s mandate, such as police discharge of a firearm where the bullet misses its intended target, or the deployment of pepper spray or other “less-lethal” weapons which ostensibly do not cause serious

physical injury. Some IIAs respond to incidents involving allegations against off-duty state agents where there would appear to be no nexus between abuse of authority and the alleged criminal misconduct.<sup>109</sup> The mandate could include allegations of ill-treatment if it is defined separately in domestic criminal law.<sup>110</sup> All of these areas are important. But of paramount importance is having a clear definition of the crimes that require an IIA investigation. Involved state agencies must understand when their duty to notify the IIA is triggered.

Further, some agencies have a public interest component in their mandate, which permits a director to investigate when they believe there is a significant public interest in an investigation—even if the incident falls outside of the IIA’s statutory mandate.<sup>111</sup> In those circumstances, the IIA will only have jurisdiction when it places the state agency in question on notice that the IIA is now the lead investigative agency.

Given the potential demand on limited IIA resources, there may be a need for a screening procedure to prioritize cases according to the seriousness of the allegation. Without a system for prioritizing cases, an IIA can become overwhelmed, or may misallocate resources. A report on the South African Independent Police Investigative Directorate (IPID) recommended that, because it was under-resourced, the IPID should implement a case screening procedure to prioritize cases based on the severity of the alleged crimes.<sup>112</sup>

## C. WHO THE IIA INVESTIGATES

### Perpetrators

The question of over whom the IIA should have jurisdiction is perhaps not as clear-cut as it may seem. Who should be included in the definition of “state agent?” Immigration officers? Members of the military? Members of the military, but only at certain times or while performing certain tasks?

This paper recommends the definition of relevant state agents as, minimally, law enforcement personnel. The most obvious class would be police and correctional officers, and those responsible for detention facilities because of their role in arrest and detention. How far the class goes beyond these law enforcement personnel will be largely a function of budget, political will, and jurisdiction in a federated state. It could also include border control agents,<sup>113</sup> custodians in mental health hospitals, or youth workers in youth detention centers. The military is also included in some jurisdictions—typically when performing police functions.

The scope of personnel defined as “state agents” varies from one IIA to another. The overriding consideration is to have a clear definition of who falls under the IIA’s jurisdiction, so that all parties know when the mandate of the IIA is triggered.

Potential criminal liability will be extended to those who aid, abet, or counsel the main participant(s), or act as an accessory after the fact if their acts or omissions fit under that jurisdiction's criminal law principles of party liability. Further, if state agents are under a legal duty to protect an individual within their custody or care, they could be held criminally liable as a party to an offense when they fail to act—if failing to act aided the commission of the offense. For example, a Canadian police corporal, who was in charge of the Vancouver City Police lock-up and present when an unidentified officer stomped on a prisoner's knee, was found guilty of aggravated assault as a party—even though he was never identified as the perpetrator—due to his duty to protect those in his custody and his failure to intervene.<sup>114</sup> Courts in South Africa have issued similar decisions.<sup>115</sup>

Further, criminal liability may attach to those who attempt to suppress evidence or otherwise interfere with an IIA investigation, even if not directly involved with the incident in question. These offenses are typically referred to as “offenses against the administration of justice” and are not offenses against the person. However, an IIA should have jurisdiction to investigate these related allegations.

Offenses committed by state agents when they are off duty do not fit the typical definition of abuse of state authority. However, there may be incidents where a state agent uses the power of their office in committing an offense, and these should be pursued by an IIA. South African authorities word the question of whether an officer is on duty this way: there must be “enough of a connection between their employment as police officers and their illegal acts” before its Independent Police Investigative Directorate assumes jurisdiction.<sup>116</sup> Thus, the definition of “state agents” should embrace circumstances when they abuse the power of state authority even when off duty.

## Superior/Command Responsibility

Governments and law enforcement agencies must ensure that superior officers are held responsible if they know, or have a legal duty to know, that law enforcement officials under their command are resorting, or have resorted, to the unlawful use of force and firearms, and they did not take all measures in their power to prevent, suppress, or report such use.<sup>117</sup>

Concepts of party liability can be used to attach criminal liability to those in a superior/command position even when the superior is not directly responsible for the criminal act in question. While there can be difficult questions of proof in determining the role of officers in a command position when harm is caused by those under their command, there is every reason to include them in an investigation if the evidence points in their direction. No legislation governing an IIA should articulate an exclusion of potential criminal liability at any level. No one should *prima facie* be excluded from an IIA investigation if a credible allegation links them to serious harm or death as previously defined. (Unfortunately, the Republic of Georgia's recent law establishing the State Inspector's Service fails to meet this standard.<sup>118</sup> The Committee for the Prevention of Torture has criticized “the

**Criminal liability may attach to those who attempt to suppress evidence or otherwise interfere with an IIA investigation, even if not directly involved with the incident in question.**

relatively narrow” scope of the remit of that office because it excludes senior political officials.<sup>119)</sup>

Strong powers to investigate the obstruction of an IIA’s investigation can also help to bring senior officers to account. The *Diah* case in Jamaica is instructive. In August 2013, INDECOM received a report and commenced an investigation into the fatal shooting of a young woman in St. Catherine Parish. During the investigation, then Deputy Superintendent Albert Diah refused to comply with instructions from INDECOM investigators and prevented certain investigative steps, namely the processing of firearms. He was charged with obstruction of INDECOM and failure to comply with a lawful requirement. After almost seven years of litigation, the Judicial Committee of the Privy Council decided he was guilty.<sup>120</sup>

In March 2019, the Federal Criminal Court in Neuquén, Argentina sentenced 14 prison officers to life sentences for the torture and death of Argentineo Pelozo Iturri, as well as for actions to conceal their crime.<sup>121</sup> The court also convicted the director of the prison unit and sentenced him to six years and six months in prison for the crime of failing to prevent the application of torture. The deputy director and head of internal security of the unit were sentenced to six and seven years in prison, respectively, for the same crimes. In addition, a regional inspector of the penitentiary service was convicted and sentenced to six years in prison for failing to report the commission of the crime of torture.<sup>122</sup>

In July 2017, prosecutors from GAESP, which was a specialized department under the prosecutor’s office in Rio de Janeiro, indicted Major Leonardo Gomes Zuma, the commander of a police unit, for trespassing into homes and restricting property rights. On several occasions between January and April 2017, military police under Major Zuma’s command invaded the homes of residents of the Nova Brasília community and, against the residents’ express will, occupied the properties. Residents were forced to accept the presence of police officers, which in one case lasted two months.<sup>123</sup> Major Zuma was convicted for abuses committed during his command of the unit.

## Military

Civilian oversight of military action raises basic questions of the ultimate responsibility for a country’s military. While most countries accept the proposition that strategic military decision-making remains in the hands of the civilian political leadership, rather than professional military officers, the military often has powers to investigate, prosecute, and adjudicate alleged transgressions through its own systems of investigations and courts-martial. But international human rights standards are clear that a jurisdiction’s military justice system, if it exists, should not extend to human rights violations.<sup>124</sup> For example, Article IX of the Inter-American Convention on Forced Disappearance of Persons states: “Persons alleged to be responsible for the acts constituting the offense of forced disappearance of persons may be tried only in the competent jurisdictions of ordinary law in each state, to the exclusion of all other special jurisdictions, particularly military jurisdictions. The acts constituting forced disappearance shall

not be deemed to have been committed in the course of military duties.”<sup>125</sup> Further, the UN Special Rapporteur on the Independence of Judges and Lawyers highlighted that, “The jurisdiction of ordinary courts should prevail over that of military courts to conduct inquiries into alleged offences involving serious human rights violations and to prosecute and try persons accused of such crimes, in all circumstances, including when the alleged acts were committed by military personnel.”<sup>126</sup>

Governments use their military against their own citizens. This intensified in 2020 during the enforcement of COVID-19 lockdowns, but it was noticeable earlier in government operations against drug-related crimes (often referred as “drug wars”). The use of the military by many countries to enforce COVID-19 related restrictions highlights the need for civilian oversight and effective investigations. In Jamaica, 12 civilians were killed by the army in 2020,<sup>127</sup> compared to typically one per year.<sup>128</sup> The case of Collins Khosa, who died after allegedly being assaulted by members of the South Africa National Defense Force enforcing the lockdown, provides an important insight: while the army absolved its members of any responsibility, the Independent Police Investigative Directorate conducted its own investigation and recommended disciplinary action against five metro police officers who stood by when Khosa was assaulted.<sup>129</sup>

IAs are necessary to facilitate public confidence that state agents will be held accountable when a civilian suffers death or serious harm at their hands. For the same reason, the military should also be subject to IIA jurisdiction when they exercise police functions, alone or jointly with the police.

INDECOM in Jamaica has the competence to investigate violations within its mandate committed by the members of Jamaican Defense Force (JDF) when they are acting jointly with the police. The JDF filed a claim challenging INDECOM’s actions after INDECOM sought to investigate the army’s firing of mortars during a 2010 joint police/military operation in the Tivoli Gardens neighborhood of Kingston. In July 2018, the court ruled in favor of INDECOM with one small exception, which granted the army immunity from having to produce its operational orders.<sup>130</sup>

Obviously, governments should not use their military against their own citizens. But where and when members of the military are used for policing functions, they should be subject to IIA jurisdiction.

## D. TEMPORAL CONSIDERATIONS

Most IIA investigations examine incidents that occurred after the establishment of the agency. However, some consideration must be given to the jurisdiction of an IIA over allegations that predate its establishment. This issue is particularly germane to allegations of detainees who disappeared while in custody, incidents of historical police use of lethal force, and sexual assault allegations, all of which may have occurred years ago.

Some IAs include units specifically designed to investigate historical events. The Police Ombudsman for Northern Ireland, for example, continues

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to maintain a Historical Investigations Directorate to investigate allegations related to The Troubles going back as far as 1968.<sup>131</sup> But most IIAs lack the mandate and the resources for such historical work. For example, the State Inspector's Service in Georgia does not have the mandate to investigate crimes committed prior to its establishment<sup>132</sup> and according to the staff, the service would not be able to take on such a significant workload without additional resources.<sup>133</sup>

Because multiple historical allegations could overwhelm a newly established IIA, it should have the ability to screen and triage them. Unresolved historical incidents can be a festering sore on current relations with law enforcement officials and need to be addressed before the objective of public confidence in oversight can be attained. Accordingly, this paper recommends that the IIA mandate include historical allegations, along with the authority to decline to conduct an investigation.

## **E. NO OVER-REACHING STATUTORY DEFENSES FOR STATE AGENTS OR STATUTES OF LIMITATIONS FOR GROSS HUMAN RIGHTS VIOLATIONS**

State agents enjoy a monopoly on the legitimate use of force. Most jurisdictions have statutory provisions granting state agents protection from criminal liability for their use of force, including lethal force, if acting within their mandate, and if the force was proportionate to the threat and necessary in the circumstances. Many criminal investigations of state agents focus on the line between reasonable and excessive force—the former being justified in law and the latter not.

However, some jurisdictions provide state agents with overly broad statutory protections which would justify virtually any use of force. For example, in 1978, Colombia amended its *Penal Code* to permit members of its police force to plead that if an otherwise punishable act was committed, “in the course of operations planned with the object of preventing and curbing the offences of extortion and kidnapping and the production and processing of and the trafficking in narcotic drugs,” lethal force was justifiable. This special defense led to the acquittal of police officers accused in the shooting death of seven individuals who, according to the forensic evidence, were unarmed and shot in the back or head.<sup>134</sup> A 1979 decision by the United Nations Human Rights Committee in response to a petition by the family of a woman who was among the seven killed, found her death to be a breach of Article 6(1)—the right against arbitrary deprivation of life—of the International Covenant on Civil and Political Rights because it “was disproportionate to the requirements of law enforcement in the circumstances of the case.”<sup>135</sup>

Torture, extra-judicial executions, and enforced disappearances are crimes under international law and must not be subject to a statute of limitations. The Inter-American Court of Human Rights has stated that “it is unacceptable to use amnesty provisions, statutes of limitations or measures designed to remove criminal liability as a means of preventing the investigation and punishment of those responsible for gross violations of human rights such as torture, summary, extra-legal or arbitrary executions and disappearances, all of which are prohibited as breaches of non-derogable rights recognized under international human rights law.”<sup>136</sup> The European Court of Human Rights has issued a similar decision: “[W]here a State agent has been charged with crimes involving torture or ill treatment, it is of the utmost importance for the purposes of an ‘effective remedy’ that criminal proceedings and sentencing are not time-barred and that the granting of an amnesty or pardon should not be permissible.”<sup>137</sup> These judicial findings should be clearly reflected in domestic legislation.

Such statutory forms of protection from criminal liability are antithetical to the concept of the rule of law. There is no point in mandating independent investigations if these immunities are in effect. Statutory protections for state agents must be mandated for the sole purpose of being proportionate to the threat and necessary in the circumstances. The UN Committee against Torture stated that “...granting immunity, in violation of international law, to any State or its agents or to non-State actors for torture or ill-treatment, is in direct conflict with the obligation of providing redress to victims. When impunity is allowed by law or exists *de facto*, it bars victims from seeking full redress as it allows the violators to go unpunished and denies victims full assurance of their rights.”<sup>138</sup>

Any use of force by law enforcement officials must comply with the principles of legality, precaution, necessity, proportionality, non-discrimination, and accountability.<sup>139</sup> In assessing whether the use of firearms was unavoidable in order to protect life, or the use of force was necessary and proportionate, the state should rely on the authoritative guidance found in international codes and principles such as the Code of Conduct for Law Enforcement Officials,<sup>140</sup> Basic Principles on the Use of Force and Firearms by Law Enforcement Officials,<sup>141</sup> and the United Nations Human Rights Guidance on the Use of Less-Lethal Weapons.<sup>142</sup>

Overly broad statutory protections from criminal responsibility are meant to protect police officers from accountability for serious crimes; they make the job of IIA investigators nearly impossible. The next chapter looks more closely at those investigators, and their competence and training.

Any use of force by law enforcement officials must comply with the principles of legality, precaution, necessity, proportionality, non-discrimination, and accountability.

# INDEPENDENCE, COMPETENCE, AND TRAINING OF IIA INVESTIGATORS

**Criminal investigations of state agents are often complex.** They can be subject to formal and informal pressure from police unions and other agencies representing police on one hand, and public outcry over police actions on the other. Investigating crimes such as homicide and assault requires specific technical skills, but also more than that. The “Careers” page of the Independent Office for Police Conduct in England and Wales provides a glimpse into demands on investigators: “[O]ur need to be independent means we need people from all sectors of society, who have a wide range of skills. The analytical ability to sift through evidence and find the vital piece of information. The humanity to deal sensitively with people from all walks of life when they’re grieving or at their most vulnerable. And the resilience to pursue a line of enquiry that may have awkward and even headline-grabbing consequences.”<sup>143</sup>

Who can work as an IIA investigator, and the skills and resources they need to do so effectively, are the subject of this chapter.

## A. SECONDED AND FORMER STATE AGENTS, OR INVESTIGATORS WITH NO POLICE EXPERIENCE

In an ideal world, independent investigators would come from a variety of backgrounds and be skilled at criminal investigations but have no prior employment as a state agent. They would be competent in all major investigations up to and including complex homicides but have no conflicts of interest or potential bias for or against state agents. However, it is very difficult to develop the skills to conduct a criminal investigation without having worked as a state agent. The practicalities of staffing an agency mandated to conduct major criminal investigations means the only readily accessible pool of qualified candidates will be those who have worked for state agencies like the police.

IAs generally need to draw from this pool of former state agents, and that need is even more urgent at the beginning stages of an IIA’s existence. Former British Columbia Independent Investigations Unit Director Richard Rosenthal, in an article reviewing Canadian independent critical investigation agencies, concluded that “the practical problems of staffing

# 5

It is very difficult to develop the skills to conduct a criminal investigation without having worked as a state agent.

[such an agency] solely with civilian investigators with no police experience has proven itself to be a formidable barrier, with the result that there are no agencies in existence that currently refuse to use former police as investigators and only one with a long-term, but as-of-yet unachieved goal of doing so."<sup>144</sup>

Similarly, in Trinidad and Tobago, the director of the Police Complaints Authority (PCA) would like to hire more investigators who do not have a policing background but notes the challenges of doing so and the time required for training them. The PCA conducts in-house training and also sends its investigators to courses in the US.<sup>145</sup> But despite such efforts, the challenge remains: in an ideal world, IIA investigators would be free of past ties to state agencies, but as a practical matter, such ties are difficult to avoid when hiring someone with the necessary skill set.

Thus, in the balance between competence and perceptions of bias, we are of the view that an IIA should be allowed to employ former law enforcement agents as investigators. But IIAs should not rely exclusively on former officers, and if possible, former officers should not constitute the majority of the investigators.

In addition, steps must be taken to ensure there is no bias on the part of former law enforcement agents employed as IIA investigators. Credible suggestions of bias will corrode public trust, and proof of actual bias will destroy the integrity of the agency's investigations.

Issues of bias should be addressed in the hiring process, and then through ongoing anti-bias training. Further, no former state agent should be involved in any investigation that relates to the state agency of which they were an employee.

The State Inspector's Service (SIS) in Georgia uses an open application process when seeking to hire investigators, with members of academia and civil society participating in the selection process. The qualification requirements for investigators of the State Inspector's Service are defined by law.<sup>146</sup> Recently, nearly 200 people applied for the position of investigator with the SIS. The competition committee selected 16 candidates for the position of investigator of especially important cases.<sup>147</sup> The 16 newly-hired investigators had different backgrounds: two were former defense lawyers, seven had worked at the prosecutor's office, five formerly worked at the Ministry of Internal Affairs, and two worked at the Investigative Service of the Ministry of Finance.<sup>148</sup>

There is an important distinction to be drawn between hiring former state agents and using current state agents who have been temporarily lent to the IIA. The employment of seconded—as opposed to former—officers should be avoided. Their use is bound to create the appearance of bias. The use of seconded officers has been shown to subvert the effectiveness of police oversight agencies.<sup>149</sup> In Israel, for example, the attorney general acknowledged that Machash's use of investigating officers on loan from the police was compromising the IIA's independence, and has announced that it will no longer use them.<sup>150</sup>

Some agencies avoid the problem of secondment by employing former officers from other countries. One of investigators of the Norwegian Bureau for Investigating Police Affairs worked for Sweden's police service.<sup>151</sup>

At its inception, the Police Ombudsman for Northern Ireland recruited experienced investigators from locations around the world including the United States, Canada, Australia, and Hong Kong.<sup>152</sup> This approach enables a fledgling IIA to hire experienced investigators, while avoiding potential conflicts of interest or perceptions of bias.

This recommendation of permitting former state agents to be employed as investigators should not be taken to mean they are the only qualified candidates. Promising candidates with no police experience should be considered as well. They can be enrolled in relevant investigation courses offered by police colleges, and the IIA can offer in-house training, mentoring, and ongoing performance evaluations to ensure they become competent investigators. The goal should be to have a staff of highly trained investigators representing a mix of civilians and former state agents whose investigations can withstand the scrutiny of a high-profile criminal trial.

The Independent Office of Police Conduct in England and Wales hires trainee investigators who then spend 12–18 months developing skills, knowledge, and expertise through both formal and on-the-job training. This process involves supporting the delivery of high-quality investigations, including working on criminal and misconduct allegations. Trainees witness and take part in interviews, visit incident scenes, and collect, preserve, and analyze evidence. On completion, they become accredited investigators appointed to a permanent Investigator role.<sup>153</sup>

A difficult staffing area arises with the need for forensic investigators referred to in the policing world as “scenes of crime officers.” It is virtually impossible to find suitable candidates in this category who have not developed the skill set through prior policing employment. The answer may be to permit former scenes of crime officers to be employed by an IIA until investigators with no police experience can be trained to fill this role.

## **B. INVESTIGATORS' COMPENSATION, IDENTIFICATION, AND CLOTHING**

IIA investigators have full police powers and perform major investigations requiring a high level of skill. As such, they deserve to be compensated commensurate with, or better than, the pay package of those they are authorized to investigate. Additionally, investigators will be treated with a higher degree of respect if they are perceived to be of equal or higher rank than those they are investigating. In the Republic of Georgia, the salaries of investigators with the State Inspector's Service are comparable with line prosecutors' salaries.<sup>154</sup> In Jamaica, the alignment of the level of salaries is based on the criteria that all INDECOM investigators are “degree-holders” and paid at higher levels than those without an academic degree.<sup>155</sup>

IIA investigators should have an identification badge and other visible markers of their position. We recommend they have identifiers such as jackets that can be used at an incident scene to differentiate them from other state agents. Ideally, they should also have marked vehicles.

Beyond the badge, an identifying jacket, and a marked vehicle, there is no reason for IIA investigators to have the usual paraphernalia associated with policing, such as firearms and handcuffs. The likelihood that IIA investigators will need to use force is remote; they are not involved in front-line law enforcement. Additionally, it is important for public perception that IIA investigators do not look and act like police officers. Finally, no former state agents serving as IIA investigators should be permitted to wear or display any symbols linking them to their former employment.<sup>156</sup>

**An IIA should strive to employ investigators who reflect the community it is serving.**

## **C. DIVERSITY AND CULTURAL AWARENESS OF IIA INVESTIGATORS**

Whether investigators are former state agents or not, the IIA should be cognizant of—and seek to bolster—gender, racial, ethnic, and cultural diversity within the agency’s personnel. Such diversity strengthens the agency and supports its work, because investigators will likely interact with a diverse population representing different cultures and languages and possessing varying historical relationships with state agents.

An IIA should strive to employ investigators who reflect the community it is serving. Israel’s attorney general recently announced, for example, that it will be integrating members of the Ethiopian, Arab, and ultra-Orthodox communities into its Machash in order to increase public trust. In addition to seeking diversity in its hires, an IIA can undertake specific outreach to minority communities and other groups most affected by police abuse, to build their understanding of, trust in, and access to the agency.

Equally important, hiring committees must be alert to potential biases among candidates regarding issues of race, ethnicity, gender, or religious affiliation. After hiring, it is equally important that investigators receive ongoing education on anti-racism, diversity, inclusion, gender-based violence, and mental health. The training must include sensitivities to families who have lost a loved one and to survivors, particularly in the area of alleged sexual assaults.

The agency’s investigators represent its public face and need the cooperation of all involved citizens to conduct effective investigations—and they should be selected and trained with these requirements in mind. The role of IIA investigator is a complex one, and their duties are many. The next chapter looks at those duties in greater detail.

# IIA POWERS IN PRACTICE

**An independent investigative agency** is only as effective as the powers it wields. While the general nature of those powers—especially the importance of independence—was discussed earlier, it is important to focus particular attention on how IIA powers govern interactions between agency investigators and the state agents they are meant to hold accountable. This chapter examines the powers of IIA investigators, how and when they are brought to bear, and the duty of state agents to cooperate.

## 6

### A. POWERS OF IIA INVESTIGATORS

Investigators must have the same powers as police officers within their jurisdiction. This typically includes the powers of arrest over citizens, and the authority to apply for production orders, search warrants, and intercepted communications authorizations. Of particular importance, IIA investigators should have the authority to enter any law enforcement establishment and seize materials relevant to the investigation without prior authorization.

### B. MANDATORY IMMEDIATE NOTIFICATION AND DUTY TO COOPERATE

IAs often face serious opposition and attempts to undermine their effectiveness and reputation from powerful police organizations, and from some political forces. In addition to a well-defined mandate, the IIA needs clear obligations requiring state agents to notify it about incidents falling within that mandate, as well as the ability to enforce the duty to cooperate.

It is important for an IIA to be able to act in response to complaints but not to be limited to a purely reactive role. State agencies must be obligated to immediately notify the IIA in certain cases. For example, state agencies are required to notify the SIU in Ontario and INDECOM in Jamaica in cases of death or serious injury involving a police officer or that occur in custody. Similarly, the Independent Office of Police Conduct in England and Wales requires the police to report any death or serious injury involving a police officer or occurring in custody.<sup>157</sup> The IIA will usually depend on the affected state agency notifying the IIA of incidents within its mandate because state agents are inevitably the first at the incident scene. Accordingly, any state agents who have knowledge of an incident reasonably falling under the mandate of the IIA must immediately notify it either directly or through the chain of command. Failure to report an incident should lead to disciplinary sanctions.

At the same time, it is highly unlikely that an IIA will receive notification of behaviors that *prima facie* would be criminal, such as torture. Torture

takes place away from the eyes of others, and often does not leave visible physical traces. Psychological torture can be as severe as physical torture but its effects can only be uncovered later through interviews and medico-legal examinations in line with the Istanbul Protocol.<sup>158</sup> Some serious injuries manifest themselves after a complainant is no longer detained: concussions or non-displaced rib fractures may be diagnosed days or weeks after the incident in question. And allegations of sexual assault may be disclosed by a victim after significant gaps in time. Cases of missing persons that might constitute enforced disappearances might also be reported after a significant time. It is important to have a robust system for taking complaints—both referrals of complaints by state agents and direct receipt of complaints by the IIA—that can uncover these alleged crimes.

The IOPC in England and Wales has very detailed guidance on how complaints should be handled by state agents and when and how they are referred.<sup>159</sup> INDECOM in Jamaica and the State Inspector’s Service in Georgia operate hotlines to receive complaints, including anonymous complaints. Complaints received anonymously or through third parties should trigger an investigation, just as a direct complaint from a named victim would.

The United States Department of Justice (DOJ) has noted the importance of receiving and acting on anonymous complaints. In its 2017 investigation of the Chicago Police Department (CPD), DOJ criticized “[T]he CPD and the Independent Police Review Authority’s failure to investigate anonymous complaints, pursuant to the City’s collective bargaining agreement with officers, [which] further impedes the ability to investigate and identify legitimate instances of misconduct ... [G]iven the code of silence within CPD and a potential fear of retaliation, there are valid reasons a complainant may seek to report police misconduct anonymously, particularly if the complainant is a fellow officer.”<sup>160</sup>

In some circumstances, an IIA may wish to self-initiate an investigation. This may arise if the agency learns of an incident through the media but no formal complaint is made. No IIA should be dependent on notification being filtered through another public authority, such as the police.

In Ukraine, when a new specialized department under the Office of the Prosecutor General started its operations in 2019, it uncovered approximately 200 complaints of torture that were investigated by the police themselves instead of notifying the State Bureau of Investigations, an agency independent of the police, as provided by law.<sup>161</sup> In Kenya, lack of police compliance with the law with regard to notifications remains a significant challenge for IPOA’s investigations. Notifications by the police have declined over the years. However, IPOA continues to take up cases on its own motion or as a result of complaints lodged on behalf of victims.<sup>162</sup>

For any criminal investigation, time is of the essence. But because of the nature of the IIA’s mandate, state agencies and not the IIA will be the first to know of most incidents. As stated by the European Court of Human Rights in *Kelly v UK*, “... a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential to maintaining public confidence in their adherence to the rule of law and in preventing

Complaints received anonymously or through third parties should trigger an investigation, just as a direct complaint from a named victim would.

any appearance of collusion in or tolerance of unlawful acts.”<sup>163</sup> If the state agency fails to notify the IIA promptly, the subsequent investigation may be compromised through missing witnesses or lost evidence; examples of the latter include loss of contemporaneous scene photographs and, in the case of sexual assault allegations, loss of probative DNA samples.

Accordingly, there must be a duty to *immediately* notify the IIA when the incident reasonably falls within the IIA’s jurisdiction. In circumstances of doubt, the affected state agency should contact the IIA and the IIA should make the decision whether or not to conduct an investigation. To receive notifications as quickly as possible, the Police Ombudsman for Northern Ireland operates a 24-hour, seven-days-per-week emergency response system and issues guidance for police for notification.<sup>164</sup> In the Republic of Georgia, the State Inspector’s Service launched a 24-hour hotline and SMS notifications management system to facilitate reporting without any delay from any part of the country.<sup>165</sup>

Perhaps most importantly, once the IIA’s mandate is invoked, all involved state agents and the employees of the affected state agency have an immediate duty to cooperate with IIA investigators, and the duty requires them to comply with directions from IIA investigators. Mandatory notification would mean little if it were not backed by a requirement that the involved state agents and their agencies must cooperate with the IIA investigation.

## C. SANCTIONS FOR BREACHES OF THE DUTY TO COOPERATE

Breaches of the duty to cooperate with the IIA cannot be tolerated. They create a climate of impunity, have the potential to compromise an investigation, and erode public confidence in civilian oversight. The notion of a breach of duty should extend beyond the obvious (e.g. non-notification of an incident or evidence tampering) to include provable incidents of state agents’ deceit in note-writing and statement-taking. The misguided loyalty to other agents that leads to the creation of false notes or statements significantly undermines the ability of IIA investigators to ascertain the truth.

The affected state agency cannot be expected to address this issue because the act of insubordination does not directly affect it, and in some circumstances the affected agency might benefit from lack of cooperation by one of its agents. The IIA itself must have the ability to cause a disciplinary charge to be levelled against uncooperative state agents. The disciplinary hearing related to a violation of the duty to cooperate should be adjudicated by a process outside of the policing establishment.

If state agents are allegedly involved in more serious attempts to obstruct an investigation, the director should also have the authority to charge them with a criminal offense against the administration of justice. The 2020 decision, referred to above, of the Judicial Committee of the Privy Council confirming that INDECOM has powers to lay charges for crimes related to its ability to conduct investigations sets an important standard that should be considered in other jurisdictions.<sup>166</sup>

In Kenya, the *National Police Act* makes clear that a police officer's failure to report to IPOA incidents where use of force has resulted in death, serious injury, or other grave consequences is a disciplinary offense. The Act also provides special obligations for superior officers with respect to reporting potentially unlawful use of force. In addition to securing the scene, they are to report the case to IPOA immediately, "using the means of communication that guarantee there will be the least delay, and confirm this in writing no later than within 24 hours after the incident. They should supply IPOA with all evidence and other information related to the matter, and failure to comply with any of these provisions shall be an offense for the superior officer."<sup>167</sup>

Similarly, IPID in South Africa recommends disciplinary charges against officers for non-compliance with the *IPID Act*. In the 2019-2020 fiscal year, 15 such convictions were secured across the country.<sup>168</sup>

It is critically important for an IIA to develop its own forensic capacity and have crime scene examiners who can perform this task.

## D. SECURING THE SCENE OF THE INCIDENT

Inevitably, there will be a lag between the time of the incident and the response by IIA investigators. (Sometimes the time lag can be years in historical cases.) However, in those instances where an incident scene exists, the IIA needs the scene to be secured until it can be turned over to IIA investigators. The Inter-American Commission on Human Rights has noted that "correctly safeguarding and preserving the crime scene is one of the prerequisites for an effective investigation."<sup>169</sup> The incident scene might yield forensically useful evidence such as blood, hair, fibers, bullet casings, or blood spatter. Accordingly, we recommend the affected state agency have the duty to secure the incident scene to the same standards expected of the police securing a crime scene, pending arrival of the IIA. And it is critically important for an IIA to develop its own forensic capacity and have crime scene examiners who can perform this task. INDECOM in Jamaica seeks certification for its examiners from the International Association for Identification (IAI) as Crime Scene Analysts.<sup>170</sup>

INDECOM attends all crime scenes involving any state agents, including police, army (if acting jointly with the police), or correctional officers. The *INDECOM Act* authorizes it to take charge of and preserve the scene of any incident.<sup>171</sup>

In South Africa, IPID has a responsibility to attend police-related crime scenes (where possible or practical) within 24 hours of the incident being reported, and to attend related post-mortems. According to IPID's 2019-2020 annual report, the agency attended 69% of the crime scenes and 70% of post-mortems.<sup>172</sup>

The State Inspector's Service in Georgia has own crime scene examiners<sup>173</sup> but noted that it is difficult to cover the entire country from just two offices (in Tbilisi and in Kutaisi) and it is impossible to appear at police-related crime scenes immediately.<sup>174</sup>

The IIAs that are created under a Ministry of Justice or specialized departments of prosecution services need to develop the capacity for crime scene examination. In Israel, Machash has powers of investigation but is reported to lack crime scene examiners. According to a leading anti-torture NGO, Machash is not proactive in collecting evidence such as examinations of incident scenes, searching for eyewitnesses (unless named by the victims), or collecting street camera recordings.<sup>175</sup>

## E. SEGREGATION OF INVOLVED STATE AGENTS

All involved state agents are to be segregated from their fellow officers, lawyers, and police association representatives until they have written their notes to a standard expected by police after a major incident, and are either interviewed by an IIA investigator or excused by an IIA investigator from said interview. During the segregation, they should not be permitted access to anyone until their notes are completed, to prevent any allegations of collusion.<sup>176</sup> Also, IIA investigators must have the authority to seize the state agent's weapons, clothing, and mobile phone.

Notes of involved state agents are often the first memorialization of an incident. As such, they should be written contemporaneously and independently, without any contact with others so they most accurately reflect the writer's recollection of events. Thus, we recommend that all involved officers have a duty to segregate and write independent notes. The notes should be made as soon after the event as possible, and without access to memorial aids such as video recordings.<sup>177</sup>

## F. POST-INCIDENT NOTES AND STATEMENTS

In many post-incident situations, state agents will seek to protect themselves and their fellow officers from criminal liability. This may take the form of exaggerating the threat posed by the complainant/deceased, minimizing the amount of force used by themselves or their colleagues, or choosing to either not document the incident or to mischaracterize it.<sup>178</sup>

This sense of loyalty many state agents have to one another is understandable—they rely upon each other in their day-to-day working relationships. Some agents will choose loyalty to the group over an earnest attempt to memorialize the unvarnished facts. In Kenya, a court recognized that “the ‘blue code of silence’ is a common phenomenon, spanning across different countries and police cultures in America, Europe, Asia and even Africa. It is the unwritten rule according to which police officers never provide incriminating information about their colleagues; to close ranks in silence and to cover up knowledge of a fellow officer's wrongdoing with a collective blanket of self-preservation.”<sup>179</sup>

This misguided loyalty, typically at odds with the state agent's oath of office to uphold the laws of the land, will lead to the creation of notes or statements that are false, inaccurate, or suffering from glaring omissions, and will significantly detract from the ability of IIA investigators to ascertain the truth. Agents also might worry about their own liability and try to say as little as possible. The duties outlined below are an attempt to counteract the propensity of some state agents to prefer loyalty to their colleagues over their duty to tell the truth.

## G. RIGHTS AND DUTIES OF STATE AGENTS

To understand the rights and duties of state agents after an IIA invokes its mandate, it is necessary to first review the different categories these agents fall into and how that classification affects their duties. In a post-incident situation, state agents fall into two categories: witness agents and subject agents. Witness agents are not at risk of potential criminal charges arising from the incident, while subject agents are. The rights and duties of state agents should be outlined in their employment contracts so there is no misunderstanding of them during an investigation. Care should be taken to draft these clauses of the employment contract in a manner that does not abridge any state agent's constitutional or statutory rights.

### Witness State Agents

Witness state agents have no criminal exposure arising from the incident. As a result, their duty to cooperate should include production of their post-incident notes, as well as a compelled statement to IIA investigators with a duty to answer all relevant questions. This obligation is critical to the effective outcome of the investigations. In the absence of other compelling evidence such as video recordings, the outcome of an investigation may turn on the notes and statements of witness state agents.

Because a witness state agent has no criminal jeopardy, we are of the view they do not need access to a lawyer or union representative before the IIA interview. There is a history of police union lawyers thwarting the fact-finding process by interfering in IIA interviews with state agents. A United States Department of Justice report into the Chicago Police Department concluded, "... we found that it was not uncommon for officers to change the course of the narrative or walk back statements they had made after their legal representatives whispered a few words," during their interviews with investigators from the IIA.<sup>180</sup> Accordingly, witness agents should be interviewed without legal or other representation in order to facilitate an untainted recitation of events from the witness's perspective.

INDECOM in Jamaica highlights that, "There is no requirement for legal representation when being examined as a witness under oath. The desire to have a legal representative present, however, is not grounds to delay or postpone a witness interview."<sup>181</sup>

In the absence of other compelling evidence such as video recordings, the outcome of an investigation may turn on the notes and statements of witness state agents.

In countries where legislation stipulates that any interview with investigators is voluntary, compelling a witness agent to testify is a daunting task. In the Republic of Georgia, an interviewee may not be forced to provide evidence or disclose information.<sup>182</sup> The law says that, in case of refusal, an authorized party (e.g. the State Inspector's Service) may inform the interviewee that they may be summoned before a magistrate judge to give testimony and that giving testimony is compulsory and the failure to perform this obligation shall result in criminal liability of the interviewee.<sup>183</sup> In Ontario, witness state agents have an employment-based obligation to provide testimony, and failure to do so should result in disciplinary sanctions.<sup>184</sup>

The timing and location of that interview should be the prerogative of the IIA investigator. If the state agent is in distress, the interview can be delayed to a later point. The interview should be recorded so there is no doubt about its accuracy.

## Subject State Agents

A subject state agent has the risk of criminal jeopardy. In common law jurisdictions, anyone who is a suspect in a criminal investigation has no duty to provide a statement to the authorities for the purposes of that investigation.

The European Court of Human Rights, in its *Guide on the Right to A Fair Trial*, confirmed that “[a]nyone accused of a criminal offence has the right to remain silent and not to contribute to incriminating himself.”<sup>185</sup> Although not specifically mentioned in Article 6, the right to remain silent and the privilege against self-incrimination are generally recognized international standards. But this right is not absolute. Among other criteria, “the weight of the public interest in the investigation and punishment of the particular offence in issue may be taken into consideration and weighed against the individual’s interest in having the evidence against him gathered lawfully. However, public-interest concerns cannot justify measures which extinguish the very essence of an applicant’s defence rights, including the privilege against self-incrimination.”<sup>186</sup>

The notion of a protection against self-incrimination in investigations of police officers has taken the form in the United States of what is referred to as the *Garrity* warning.<sup>187</sup> In essence, officers suspected of committing a criminal offense must answer questions at the risk of losing their job, but those answers will receive immunity in any subsequent criminal trial. As noted in that decision, the risk of losing one’s employment can satisfy the criteria of compulsion leading to an inadmissible statement.

INDECOM in Jamaica and the Police Complaints Authority of Trinidad and Tobago follow the approach of requiring the subject officer to attend the interview but respect the officer’s right to silence if they refuse to answer specific questions or provide their notes.

There is another reason why the right to silence should extend to subject state agents. If the subject state agent chooses to provide notes or a statement voluntarily, there should be no impediment to its admissibility if charges are later laid against that individual.

## H. POST-INCIDENT PHYSICAL EVIDENCE RELATED TO THE SUBJECT STATE AGENT

Incidents involving an interaction with a state agent will create an evidentiary record. Some evidence, such as autopsy results of the deceased or photographs of a victim's injuries, will be beyond the reach of the state agent being investigated. However, some items of evidentiary value will be under the more immediate control of the subject state agent. Examples include the subject state agent's clothing worn at the time of the incident, photographs of injuries, or gunshot residue (GSR).

While there may be issues of self-incrimination with respect to notes and statements created by a subject state agent after an incident, those concerns should not extend to post-incident physical evidence because, at the time of its creation, there was no risk of criminal jeopardy—the IIA had yet to be notified. IIA investigators should be able to access, seize, and preserve this kind of evidence without facing arguments of voluntariness, ownership, or concepts of self-incrimination. In all of these examples, the evidence exists separate and apart from the subject state agent, and should be considered producible to the investigators. In real terms, this means the investigators should be able to seize a state agent's clothing, photograph the person, and take GSR samples, all without the need for a judicial warrant.

This duty to provide all relevant evidence should extend to the production of bodily substances in certain circumstances. For example, if the investigators have a reasonable suspicion the subject officer had been consuming alcohol or non-prescribed drugs at the time of the incident, the investigators should have the authority to demand a blood or breath sample without obtaining a warrant. Similarly, if the investigators have a reasonable suspicion the subject officer was involved in a sexual assault, they should also have the authority to demand a saliva swab suitable for DNA testing.

IIA investigators should also have the authority to demand similar physical evidence from witness state agents. This power may be necessary to eliminate them from potential culpability and, through the process of elimination, develop a case against an alleged perpetrator.

## I. PRESERVATION OF DATA AND RECORDS

State agencies generate large amounts of data about their operations, including recordings of emergency calls and in-car communications, video recordings, and medical records in detention centers. The state agency's

Investigators should be able to seize a state agent's clothing, photograph the person, and take GSR samples, all without the need for a judicial warrant.

duty to cooperate should embrace a duty to preserve and provide these records to an IIA. The State Inspector's Service in Georgia noted that failure of a state agency to provide appropriate records to the service, and in a timely manner, negatively affects its ability to conduct effective investigations.<sup>188</sup> Georgia's law allows up to 30 days for SIS investigators to execute a search or seizure warrant but does not set time limits for the affected state agency to provide evidence such as video footage, and there have been multiple instances of refusal to provide or potential deletion of evidence.<sup>189</sup>

This duty should extend to any notes the subject state agent created *before* the triggering of the IIA mandate. The reason why these notes should be produced—and not the notes created after the involvement of the IIA—is because there was no aura of criminality surrounding the generation of those notes at the time of their creation. Therefore, the usual rules against self-incrimination do not apply.

Training records and personnel files of a subject officer should be produced upon request to the investigators. These records can be of great value in understanding a state agent's state of knowledge and training at the time of the incident under investigation.

Investigating serious crimes committed by state agents is a complicated undertaking, and one that depends on immediate notification, the duty to cooperate, securing the scene, segregation, and many other steps. As documented in this chapter, a fair investigation also requires respect for the rights of the subject state agent. The rights of other participants in an investigation—including victims and their representatives—are discussed in the next chapter.

# RIGHTS AND PARTICIPATION OF VICTIMS, THEIR REPRESENTATIVES, AND NGOS IN IIA INVESTIGATIONS AND RELATED PROSECUTIONS

## **The obligation to investigate torture and other human rights violations**

is not only the state's duty related to upholding public security—it is also part of the victims' right to obtain full and effective redress.<sup>190</sup> Effective criminal investigations are one of the measures necessary to provide victims of human rights abuses with satisfaction and the right to truth. A state's failure to investigate, criminally prosecute, or to allow civil proceedings related to allegations of acts of torture in a prompt manner may constitute a *de facto* denial of redress.<sup>191</sup>

A person shall be considered a victim regardless of whether the perpetrator of the violation is identified.<sup>192</sup> Victims of crime should be recognized and treated in a respectful, sensitive, and professional manner without discrimination of any kind.<sup>193</sup>

Individuals who report torture or sexual assault, and families of the disappeared or killed often live with devastating life-long consequences. Not knowing about the whereabouts and fate of a disappeared family member can itself amount to torture or ill-treatment.<sup>194</sup> Victims need to be offered continued support that, minimally, should include referral to medical centers, social service agencies, and support programs. Those who witnessed state agents inflicting injuries or death might also need such support.

A difficult area of support is breaking the news to a family that one of its members has died as a result of an incident involving state agents. Investigators charged with this task should receive training and may require both the assistance of a support worker and an interpreter. In cases of families of disappeared persons, to avoid re-traumatization it is important to adequately prepare the family regarding information they may be exposed to, carry out informative meetings in a setting and manner that reduces stress, and provide psychological support.<sup>195</sup>

Victims often have relevant information that can inform investigations. Additionally, families' persistence in questioning state agents' official narrative has been critical in finding the truth about crimes committed by



state agents.<sup>196</sup> It is important to interview victims and their families and take seriously their suggestions for other witnesses or leads. Interviews should always be held with informed consent, with interpretation if necessary, and by appropriately trained staff. Specific mechanisms should be established that allow individuals who might have heightened vulnerability—such as children, survivors of sexual violence, and, in many contexts, women—to report their experiences in a framework of respect and privacy. Further, when required, the IIA should provide access to psychosocial support. The State Inspector’s Service in the Republic of Georgia noted in its 2019 annual report that it is difficult to find and engage child psychologists in the investigative actions, and the service did not have a special space for interviewing children due to budgetary constraints.<sup>197</sup>

Despite all efforts, it is likely that victims will not see the results they believe are fair. Even if an IIA conducts thorough and independent investigations, only a fraction of its cases will lead to convictions. Compelling evidence of improper use of force is difficult to gather, and even when the investigation is thorough, the conclusion will often be that its use is considered justifiable in the enforcement of law, or in self-defense. Individual liability has to meet the highest burden of proof in criminal prosecutions.

Respect for the rights of victims and their participation is important for an IIA’s investigation to be effective. This chapter considers first the rights of victims, including their right to participate in criminal proceedings and their right to information, before looking at the role of non-governmental organizations in investigations and prosecutions.

## **A. RIGHTS OF VICTIMS TO PARTICIPATE IN CRIMINAL PROCEEDINGS**

The role of victims in the criminal justice system and the extent to which they can participate actively in criminal proceedings vary across jurisdictions. The role of victims depends on the national system, and is determined by one or more of the following criteria: whether the national system provides for a legal status as a party to criminal proceedings; whether the victim is under a legal requirement or is requested to participate actively in criminal proceedings, for example as a witness; and/or whether the victim has a legal entitlement under national law to participate actively in criminal proceedings and is seeking to do so, where the national system does not provide that victims have the legal status of a party to the criminal proceedings.<sup>198</sup>

Rights that allow victims some form of engagement in and influence on the proceeding differ significantly between jurisdictions, influenced by its common and civil law tradition, among other factors. In many common law jurisdictions, the understanding prevails that victim participation introduces a random element into proceedings where uniformity and equality in consideration and sentencing constitute a fundamental principle: if victims are allowed to present claims or to address the court, it is asserted that

only some victims would do so and that the defendants in these cases may be subjected to harsher punishment.<sup>199</sup>

For most cases investigated by an IIA, this issue of equality is already skewed because the person under investigation is a state agent who often is supported by powerful unions, associations, lawyers, and in many jurisdictions the presumption of telling the truth. In a case related to killings and sexual violence by police, the Inter-American Court has ordered Brazil to “adopt legislative or other measures necessary to enable victims of crime or their family members to participate, formally and effectively, in the investigation of crimes conducted by the police or by the Public Prosecutor’s Office.”<sup>200</sup>

In Argentina, at the federal level, the *Criminal Procedure Code* gives victims the right to become a *querellante* (private complainant) and participate in the process alongside the state prosecutors.<sup>201</sup> Argentina’s *Law on the Rights of Victims* (Law 27.372) establishes multiple rights of victims even if the victim does not become a *querellante*, including free representation by a public defender and the right to be heard when important decisions are taken with regard to the suspect/accused, such as pre-trial release or parole.<sup>202</sup>

The person under investigation is a state agent who often is supported by powerful unions, associations, lawyers, and in many jurisdictions the presumption of telling the truth.

## B. VICTIMS’ RIGHT TO INFORMATION

Providing victims with regular access to information (which should be as detailed as possible) about the progress of an investigation is part of the obligation to effectively investigate human rights violations and the right of access to justice and to truth. For example, the Independent Office of Police Conduct in the UK provides an update to complainants on the status of the investigation every 28 days.<sup>203</sup>

In the Republic of Georgia, according to the *Criminal Procedure Code*, a victim has the right to obtain copies of a decision and or/of a judgment on the termination of investigation and/or criminal prosecution. Although a potential victim (not recognized by a prosecutor’s decision as a victim) does not have this right, investigators of the State Inspector’s Service inform all potential victims about the termination of investigation.<sup>204</sup>

In Trinidad and Tobago, after the investigation is closed, victims can file a Freedom of Information request with the director of the Police Complaints Authority and receive access to the case file (after the PCA staff review it for confidential matters). The director’s refusal to provide access is subject to judicial review. The PCA director noted that the courts would most likely grant such a request, and the PCA strives to give access to information themselves.<sup>205</sup>

In Norway, the IIA’s director rules on all its cases.<sup>206</sup> In all cases—including cases that are terminated without further investigation—a written explanation providing the basis for the ruling is prepared. The ruling includes details of what has been reported, what enquiries and/or investigations have been carried out by the IIA, the facts of the case, and a judicial assessment of the incident. It is sent to all parties involved in the case.<sup>207</sup>

## C. REVIEW OF THE DECISIONS OF AN IIA

The Council of Europe's experts recommend that any investigation of torture or ill-treatment must be subject to checks and be motivated by a determination to root out ill-treatment. In cases of discontinuation or termination of proceedings or refusal to prosecute, the obligation extends to consideration of judicial review of the legality of the decision, or the possibility of triggering judicial proceedings by means of lodging a criminal complaint if provided for by domestic legislation.<sup>208</sup>

Approaches differ among jurisdictions regarding whether the victim has a chance to ask for a review of the decision not to charge. In Israel, the victim can ask the minister of justice to review the file. If the appeal unit of the Ministry of Justice rejects the appeal, they may petition the High Court of Justice for review. The appeal process is difficult and typically a victim would need the help of a lawyer to go through it. A pattern of prolonged reviews also raises questions about whether this process is effective.<sup>209</sup>

In the Republic of Georgia, a victim (recognized as such by the decision of a prosecutor) may appeal to a superior prosecutor the original prosecutor's decision to terminate investigation and/or criminal prosecution. A decision of the superior prosecutor is final except when a particularly serious crime or a crime falling under jurisdiction of the State Inspector's Service has been committed. In such case a victim can appeal the superior prosecutor's decision to the court.<sup>210</sup>

In the UK, a law enacted on February 1, 2020 replaced the former right of appeal with a new right of review. The review body only assesses whether the handling or the final outcome of a complaint was reasonable and proportionate.<sup>211</sup>

## D. ROLE OF NON-GOVERNMENTAL ORGANIZATIONS AND PUBLIC DEFENDER'S OFFICES

Several interlocutors interviewed for this paper<sup>212</sup> highlighted the need for IIAs to establish better connections with civil society organizations in order to receive notifications of potential crimes under the IIA's jurisdiction, establish effective communication with victims, collect evidence, and keep victims apprised of the investigation's progress and results.

In Argentina, at the federal level, the *Criminal Procedure Code* recognizes the right of civil society organizations to become plaintiffs in cases concerning crimes against humanity or grave human rights violations.<sup>213</sup> *Querellantes* are represented by their own attorneys and may intervene in proceedings to "present their own witnesses, make motions, and cross-examine any witnesses presented by the defense."<sup>214</sup>

In Argentina, as well as in some states in Brazil, Public Defender's Offices provide legal advice and accompany victims of state violence during investigations and trials. Their services are part of the legal aid provided by the state. The Public Defender's Office in Rio de Janeiro has a Human Rights Unit focused on such cases, including representing victims in criminal cases and filing civil and collective actions on their behalf. Unlike providing free legal aid to for those accused of crimes, the unit can select the cases that are either more serious, more strategic, or representative of a systematic pattern.<sup>215</sup> In Argentina, a law passed in 2017 established an innovative type of Public Defender Office for Victims, part of the Federal Public Defender's Office. As of February 2021, three of 24 planned offices are operational.<sup>216</sup>

In Kenya, some analysts pointed out that civil society groups are their first point of call for most cases involving state agents.<sup>217</sup> A non-governmental "Independent Medico-Legal Unit" (IMLU) not only refers victims to IPOA, but also submits independent autopsy reports conducted in accordance with the Minnesota Protocol, and provides victims with psycho-social support. While the evidence prepared by IMLU is used by IPOA, IMLU rarely receives updates or feedback on the cases.<sup>218</sup> After a 14-year-old girl was fatally shot by two police officers in August 2014, the first post-mortem examination was conducted unprofessionally. IMLU applied to the country's High Court seeking orders for exhumation of the body for purposes of conducting an independent post-mortem examination. The High Court granted the request and the post-mortem was conducted by a government pathologist assisted by pathologists drawn from the IMLU network of doctors. Additionally, IMLU—in a precedent-setting decision—secured an order to enable the family to actively participate in the criminal proceedings as provided for under the *Victims Protection Act 2014*. This enabled one of the IMLU network lawyers to fully represent the family throughout the proceedings, including providing a victim impact assessment report prior to sentencing. Both officers were convicted and sentenced to seven years in prison.<sup>219</sup>

Nongovernmental organizations can and should play an important role in supporting the work of IIAs, including potentially helping to collect evidence—which is the focus on the following chapter.

**Nongovernmental organizations can and should play an important role in supporting the work of IIAs.**

# EVIDENTIARY MATTERS

## A. FORENSIC EVIDENCE

Typically, investigative agencies use a state-run forensic unit for forensic analyses in areas such as toxicology, firearms discharge, blood spatter, de-encryption of computers, and DNA. The IIA also needs access to a “national, autonomous institution of forensic services with adequate infrastructure, sufficient financial and human resources, and standardized protocols.”<sup>220</sup> It is problematic when the jurisdiction’s forensic services are under the auspices of the police, such as in Rio de Janeiro where the medical experts are police officers.

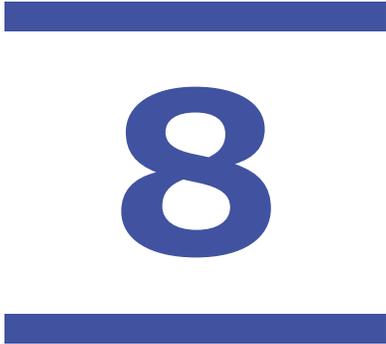
The forensic experts at these institutions are typically well-trained scientists. However, they work closely with state agencies, and perception of conflict can arise when they are asked to analyze evidence in IIA investigations. While it may not be financially feasible to establish a separate forensic unit for IIA cases, there are ways of addressing the potential conflict. One approach is to anonymize submissions by all investigative agencies to a forensic unit to ensure the reviewer is not unconsciously biased in their analysis. But this approach is hard to reconcile with the need to prioritize such cases and would not be appropriate for evaluations where the injuries are assessed together with the victim’s account of events, as dictated by the Istanbul Protocol. Another approach is to develop a protocol with an out-of-jurisdiction forensic unit that an IIA can submit its samples to. And a third way is to permit the IIA to have the evidence re-evaluated by experts of its choosing.

In the past, INDECOM in Jamaica hired a consultant, a ballistic examiner from another country, who reviewed the reports produced by police ballistics experts. This consultant checked the quality of the report and could point out gaps and inconsistencies.<sup>221</sup> The agency now has a ballistic examiner on staff and can conduct those analyses in-house.

## B. POST-MORTEM AUTOPSIES

In a fatality case, the post-mortem autopsy report is usually the most critical piece of evidence in attempting to resolve the circumstances surrounding the death. The report’s conclusions will often determine whether the death in question is considered an accident, homicide, or suicide, as well as determining how the death occurred.

Autopsies must meet the minimum standards established by the *United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* (the Minnesota Protocol) and the Inter-American Commission on Human Rights.<sup>222</sup> Those standards include maintaining a chain of custody of the body, having the autopsy performed



It is problematic when the jurisdiction’s forensic services are under the auspices of the police, such as in Rio de Janeiro where the medical experts are police officers.

by a trained forensic pathologist, and ensuring adequate photographs of the body, x-rays of the corpse, thorough documentation of all injuries, and compilation of a full report. Document-based autopsies without examination of the body will never meet these minimum standards.

Additional steps to reduce bias or the perception of bias surrounding a suspicious death might include:

- (a) a death in custody or after state agent interaction should trigger the need for immediate notice to the IIA;
- (b) all deaths of this nature should lead to a transfer of the corpse to the custody of the IIA, which will then transport it immediately to a forensic medical facility;
- (c) the only investigators in attendance should be IIA investigators;
- (d) the autopsy is video recorded;
- (e) all autopsy reports of suspicious deaths should be reviewed by an external reviewer who is an expert in the area of forensic pathology; and
- (f) the family of the deceased should be given an opportunity to have a second autopsy conducted by a pathologist of its choice.

Recognizing that reports of autopsies conducted by state institutions may lack impartiality or thoroughness, some IIAs or prosecutorial departments try to develop their own forensic expertise. For example, INDECOM in Jamaica has its own forensic unit.

## C. SUSPICION OF TORTURE

In situations where the victim is alleging torture, medico-legal evidence is critical. While the victim may be able to give evidence in a subsequent court proceeding, corroboration by expert testimony can be the key to an effective investigation. In those circumstances, adherence to the protocols set out in the *United Nations Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment* (the Istanbul Protocol) can provide this essential evidence.<sup>223</sup> The Istanbul Protocol, as well as explaining the physical nature of torture, also discusses its psychological nature. Both areas can offer an evidentiary basis for expert opinions on whether the injuries and psychological state of the victims are consistent with their account of alleged torture. It is important for IIAs to follow the Istanbul Protocol as fully as possible, including examination in private without presence of state agents.<sup>224</sup>

In the Republic of Georgia, forensic experts are independent and well trained in evaluations based on the Istanbul Protocol. Investigators with the State Inspector's Service have also received relevant training in the protocol. However, the State Inspector's Service still faces challenges when appointing and carrying out forensic examinations because some possible victims refuse to undergo forensic examination, experts are often unavailable during weekends and after working hours, and the forensic

examination reports are often delayed. The Istanbul Protocol requires the victim's consent for an examination, and some victims, especially those who are held in detention, are afraid to challenge the authorities.

## D. SEARCH FOR AND CRIMINAL INVESTIGATION OF ENFORCED DISAPPEARANCES

When an individual disappears after contact with a state agent or from custody, the investigation entails two distinct tasks: the search for the disappeared, alive or deceased, and a criminal investigation aiming to identify and prosecute those responsible for the disappearance. In countries where enforced disappearances are widespread, special *ad hoc* search commissions or specialized agencies might be established to conduct the search.<sup>225</sup> The search should be instructed by the *Guiding Principles for the Search for Disappeared Persons*<sup>226</sup> and the *Report of the Working Group on Enforced or Involuntary Disappearances on standards and public policies for an effective investigation of enforced disappearances*.<sup>227</sup> The search for a disappeared person should be conducted under the presumption that they are still alive.<sup>228</sup> It should respect the victim's dignity, as well as right to participation by the victim's family and representatives.<sup>229</sup> Under no circumstances should ending the search for a disappeared person result in the search or criminal investigation being closed.<sup>230</sup>

The IIA should have the task of ascertaining the reason why the individual in question disappeared and whether state agents are implicated in that disappearance. The search itself might be conducted by an authority other than an IIA, but the IIA should have the responsibility for any related criminal investigation. In such cases, mechanisms and procedures should be established to ensure cooperation, coordination, and an exchange of information between the authorities responsible for the search and for criminal investigation, in order to guarantee the timeliness and effectiveness of both investigations.<sup>231</sup>

States should establish databases of the disappeared, including information relevant to the search such as genetic data.<sup>232</sup> The IIA should have unimpeded access to this database, as well as the ability to audit the database to ensure its integrity.

Bodies may be discovered months or years after the disappearance. When remains are discovered, the IIA must play a monitoring role to ensure they are carefully collected in a manner allowing forensic examination, and when feasible in the presence of the next of kin.<sup>233</sup> Attempts must be made to establish the victim's identity and notify the victim's family. At that point, an autopsy by a forensic pathologist can take place in an attempt to ascertain the cause of death. The autopsy report must describe "any and all injuries to the deceased including evidence of torture."<sup>234</sup> As with any autopsy conducted in an IIA investigation, the family should be notified of the option to have a second autopsy performed by a pathologist of their choice.

The IIA should have the task of ascertaining the reason why the individual in question disappeared and whether state agents are implicated in that disappearance.

The IIA should analyze the patterns they uncover in such cases as contextual analysis is important for identifying possible units/state agencies that use the practice of enforced disappearances.

In accordance with international standards on enforced disappearances, some IIAs such as the one in Ukraine investigate and charge police officers with enforced disappearance for holding people in detention without properly registering the detention. In 2020, the State Bureau of Investigations and Department of the Prosecutor General investigated and charged two police officers with enforced disappearance for failing to register the detention of two individuals whom they allegedly beat and, in one case, sexually assaulted. In addition, the former head of the Kagarlyk Police Department in Ukraine was charged with criminal negligence because he was notified but failed to take measures to stop the alleged crimes and failed to notify the competent authorities of the crimes.<sup>235</sup>

Clearly, the thorough and proper gathering of evidence is a key component of an IIA's work. Another key component—investigating in a thorough and timely manner—is discussed next.

# THOROUGH AND TIMELY INVESTIGATION

**The state has a duty to conduct investigations** into potential criminal acts of its state agents expeditiously.<sup>236</sup> Undue delays lead to the denial of effective remedy under the International Covenant on Civil and Political Rights, the UN Convention Against Torture, and other international human rights norms.<sup>237</sup> In all IIA investigations, unacceptable delays suggest the agency is either under-resourced, not effectively screening out cases, or its mandate is too broad.

However, the need for a thorough investigation should not be sacrificed to the need for an expeditious investigation. In fact, the rush to close a case can indicate larger problems. A February 2020 report of the African Policing Civilian Oversight Forum concluded that the rapid closure of cases by South African's Independent Police Investigative Directorate in order to meet performance targets amounted to an obstruction of justice for the victims of alleged crimes committed by law enforcement.<sup>238</sup>

Some delays are unavoidable. Some investigations require expert reports, the production of which is outside the control of the IIA, and investigations involving missing persons can take years.

In the balance between thoroughness and timeliness, we believe that the former should play the dominant role. To balance these two competing principles, we recommend that investigations be completed in a timely manner, and the public be notified of that fact and provided with reasons for any delays. INDECOM in Jamaica has internal targets of 30 and 60 days to complete investigations.<sup>239</sup> Machash in Israel uses guidelines of the attorney general that apply to all cases—six months for minor offenses, and up to 18 months for more serious ones.<sup>240</sup> The State Inspector's Service in Georgia does not specify a target length for investigations but strives to meet the Council of Europe's criteria for "reasonable time," and ensures that the investigation's duration should not exceed the statute of limitations provided by the *Criminal Code of Georgia*.<sup>241</sup> The SIU in Ontario recently adopted a promising practice to publish information about investigations if they last more than 120 days.<sup>242</sup> This recommendation would serve as a reminder to the director to monitor these longer investigations, as well as keeping the public informed of progress.

## 9

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# PROTECTION OF WITNESSES AND WHISTLEBLOWERS

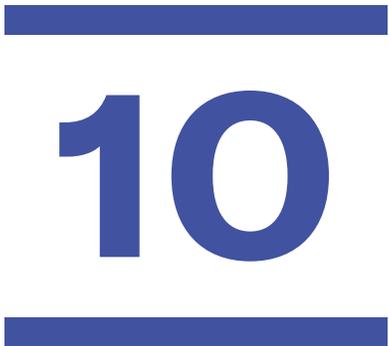
**Witnesses and whistleblowers play essential roles** in the investigation of alleged crimes by state agents. Yet those roles come with significant risks, including the threat of reprisals from members of the state agency being investigated. IIAs need a clear and thorough plan for providing protection to witnesses and whistleblowers, including access to a witness protection program and the ability to offer immunity from potential criminal prosecution.

## A. PROTECTION FROM REPRISALS

The threat of reprisals against complainants and witnesses can undermine effective investigations. This problem is especially acute when witnesses are detainees who remain in the custody of the state agents now under investigation. It is a state duty under the UN Convention Against Torture<sup>243</sup> and other international norms and most domestic laws to protect witnesses. The Istanbul Protocol also highlights the need to protect victims and witnesses from reprisals and states that those potentially implicated in torture or ill-treatment should be removed from any position of control or power, whether direct or indirect, over complainants, witnesses, their families, and those conducting the investigation.<sup>244</sup> However, the risks of retaliation, including possible physical harm to victims, witnesses, their families, or lawyers working with them, are great. In response, we recommend that the IIA director have the authority to suspend a state agent from employment pending the outcome of the investigation or pending the outcome of the prosecution if criminal charges are laid.

Any attempt by a state agent to interfere with a witness should be the subject of severe sanctions, and the IIA should have the authority to investigate allegations of this nature.

In Argentina, in 2011, the Federal Prosecutor's Office established an Action Protocol for the investigation of ill-treatment and torture and specified that the norms of the Istanbul Protocol are an inherent part of such investigations. The Action Protocol requires that prosecutors in such cases provide a series of protections to victims and witnesses. These include being able to testify without the presence of state agents from any security forces; having all rights explained, including the right to protection of personal integrity; arranging the urgent transfer of a detained person to the prosecutor's office with guarantees of security; video recording testimonies with proper notifications to the parties; transferring a detainee to another detention facility; and promptly investigating allegations in cases where the victim is free.<sup>245</sup> In 2012, the Federal Prosecutor's Office also adopted resolution PGN 4-12, establishing that in cases of investigations of injuries



Any attempt by a state agent to interfere with a witness should be the subject of severe sanctions, and the IIA should have the authority to investigate allegations of this nature.

and homicides by on-duty members of security forces, the implicated agents should be removed from the investigation and another agency should become responsible for the investigation.<sup>246</sup>

Despite these norms and commitments, research on PROCUVIN and other specialized prosecutorial departments shows how difficult it is to protect witnesses and victims who are deprived of liberty. In practice, the only protection measure available is to transfer the victim to the so-called Physical Integrity Safeguard System, a form of isolation similar to that used by the penitentiary service to punish detainees for bad behavior. These isolation units are so small they are known as “mailboxes.” Another option is to transfer the victim to another unit within the prison system, but that risks identifying the victim as a complainant. Nor does it eliminate the risk of reprisals, because guards tend to rotate frequently among detention facilities. The possibility of considering conditional release or other less-restrictive measures for detainees who are complainants or witnesses has not been sufficiently explored.<sup>247</sup>

In some cases, it is important to offer witnesses, including complaints, shelter in a witness protection program to prevent intimidation or harassment. An IIA needs to be able to use witness protection programs and for such programs to be independent of the police.

In Rio de Janeiro, Brazil, the witness protection program is run by a board, with participation from civil society, the state's Public Defender's Office, the Federal Public Defender's Office, state and federal courts, and others.<sup>248</sup> According to a public defender who serves on the board, with the exception of one tragic killing of a witness placed under protection in the state of Ceara, there were no incidents of physical harm to anyone placed under witness protection in Brazil.<sup>249</sup> At the same time, a prosecutor noted that for the majority of witnesses who need protection, it is not possible to leave their current living situation.<sup>250</sup>

## **B. STATE AGENTS AS WHISTLEBLOWERS**

A significant source of probative evidence can be state agents who are prepared to give evidence of wrongdoing against other state agents, known as whistleblowers. Sources of this nature are invaluable because they offer rarely disclosed inside information, but they need to be assured of protection if they are going to come forward. While their legal protections from any employment related or defamation proceedings might depend on the gist of the information they provide being true, they should always be protected from possible retaliation, including potential threats to inflict harm to them or their families, or through the filing of unjustified charges.

These agents present difficult problems because their own agencies may not be motivated to provide them with protection. Thus, any attempt to interfere with another state agent who is cooperating with an IIA should be the subject of severe sanctions. The protections available to whistleblowers

should include a guarantee that the cooperating state agent will not be subject to intimidation, retaliatory employment measures, or other negative consequences. In circumstances where a state agent is prepared to disclose information implicating other state agents in exchange for either immunity from prosecution, discussed below, or a reduced sentence, discussions need to take place between the director and the prosecution service, similar to those that take place in more common investigations. Extreme cases may require placing the cooperating state agent in a witness protection program or, if incarcerated, in protective custody.

In the Republic of Ireland, the *Protected Disclosures Act 2014* provides protections to police and those providing information that might compromise state security.<sup>251</sup> It was one of the first provisions in Europe to extend whistleblower protections to whistleblowers in the security sector.<sup>252</sup> There are conditions placed on whistleblowers sharing information related to state security, defense, international relations intelligence, and a government-appointed disclosures recipient is responsible for receiving disclosures in such cases.<sup>253</sup> Transparency International (TI) Ireland provides access to practical and legal advice for whistleblowers, including police whistleblowers, through its Speak Up Helpline as well as guidance and training to police management through its Integrity at Work program.<sup>254</sup>

A recent whistleblower case in the Republic of Ireland generated significant controversy, but also significant reforms. Systemic malpractice in the police service of Ireland (*A Garda Síochána*) was exposed by whistleblowers Sergeant Maurice McCabe and Garda John Wilson. Both men were clients of the TI Ireland Speak Up Helpline. A smear campaign against McCabe including false allegations of child abuse ensued. The resulting public outcry compelled the government to establish a statutory Tribunal of Inquiry into protected disclosures made by McCabe and others, and was chaired by a Supreme Court Justice who concluded that McCabe was a genuine person who at all times had the interests of the people of Ireland uppermost in his mind.<sup>255</sup> The events contributed to reforming how the police service is held accountable, in particular strengthening the powers of the A Garda Síochána Ombudsman Commission, while also leading to the departure of senior political figures and a Garda Commissioner.<sup>256</sup>

Extreme cases may require placing the cooperating state agent in a witness protection program.

## C. IMMUNITY FROM PROSECUTION

Some civilian witnesses who are victims of or witnesses to state agent abuse will not give a statement without receiving immunity for their own involvement in alleged criminal wrongdoing. They may, for example, be charged with assaulting a police officer arising from the same incident in which a state agent is now under investigation for excessive use of force. And some state agents will not become whistleblowers without a grant of immunity due to their involvement in the matter now under investigation by the IIA.

In many jurisdictions, prosecutors have the discretion to grant witnesses immunity from prosecution in exchange for their testimony against others. This evidentiary tool can be useful when a witness has relevant and

compelling evidence to give against others that, in the assessment of the prosecutor, outweighs the need to bring that witness to trial for their own alleged transgressions.

This immunity will require the approval of the prosecution service, and typically takes the form of a written agreement related to very specific events, referred to as granting transactional immunity. While these grants are controversial because some will say its beneficiary should be brought to justice, they may be the only available method of bringing a more culpable individual to court. For example, one of the police officers involved in the 2015 death of Freddie Gray in Baltimore, Maryland, was granted immunity from prosecution in exchange for his evidence, leading in part to the charging of six Baltimore officers for crimes including murder.<sup>257</sup>

It is essential that IIAs provide protection to witnesses and whistleblowers who are part of their investigations. Yet even as they provide such protection, IIAs must also provide transparency in how they operate, as explored in the next chapter.

# TRANSPARENCY

**While the starting point of successful investigations** will always be their thoroughness and effectiveness, this section takes into consideration the importance of accountability to the public. An effective investigation which the public never learns about does not meet the goal of promoting public confidence in civilian oversight of these public institutions.

## A. PUBLIC STATEMENTS DURING AN INVESTIGATION

In the immediate aftermath of an incident, particularly one in which images of a state agent's actions have been posted on social media, the public demand for more information will be intense. In these circumstances, the affected state agency will want to issue press releases or other public statements in an attempt to quell public disquiet over the incident, and often these releases turn out to be inaccurate.<sup>258</sup> The inaccurate information can have the deleterious consequence of tainting civilian witnesses' recollection of the material events. Thus, we recommend prohibiting state agencies from making any public statements during an IIA investigation, beyond stating the IIA is now responsible for the investigation.

The IIA, however, may want to issue press releases during the investigation to, for example, satisfy the public that the investigation is ongoing, or to request the cooperation of witnesses from the public.

An example of statutory wording granting an IIA director the authority to issue public statements may be found in Ontario's Special Investigations Act. The SIU director may issue public statements regarding an ongoing investigation or preliminary inquiries if:

- (a) the statement is aimed at preserving public confidence; and
- (b) the benefit of preserving public confidence clearly outweighs any detriment to the integrity of the investigation.

## B. PUBLIC STATEMENTS AT THE CLOSE OF AN INVESTIGATION

At the close of an investigation, if the legislation endows the director with the power to lay charges as recommended in this paper, the IIA director will make the decision on the critical issue of whether there are reasonable grounds to do so. The decision is a binary one: either a charge is laid or not. In either scenario, the IIA should keep the family members informed of the imminent decision.

# 11

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If a charge is laid, the question of transparency of the investigation is arguably addressed by the court process, either by a trial leading to a verdict of guilty or not guilty, or the withdrawal of charges by the prosecutor.

From the perspective of the director attempting to provide accountability to the family and the public, the more challenging task arises in providing reasons for not laying criminal charges. Interested parties will demand to know what steps were taken in the investigation and the director's reasoning process for not laying charges in the face of a state agent being involved in serious harm or death. In the *Kelly* case, the public prosecutor's failure to provide reasons for not bringing charges against any of the soldiers involved in the shooting deaths of nine people led the European Court of Human Rights to find a breach of Article 2(1)—the right to life.<sup>259</sup>

The *Kelly* ruling supports the position that for any investigation not proceeding to prosecution, the IIA director must provide a public summary of the investigation along with their reasoning. Doing so enables interested parties to understand the ambit of the investigation and the legal reasons why the director is of the opinion no reasonable grounds exist to conclude a criminal offense took place. The public may fundamentally disagree with the director's conclusion in controversial cases, but a decision containing the results of a full investigation with accompanying reasons will at least permit the public to understand the agency's fact-finding process and the director's reasoning.

INDECOM in Jamaica provides short descriptions of each case where it decides not to recommend charges in its reports.<sup>260</sup>

In Norway, decisions and rulings reached by the Norwegian Bureau for the Investigation of Police Affairs—including the decision to decline to bring charges—can be appealed to the Director of Public Prosecutions.<sup>261</sup>

In those jurisdictions where the charging decision is made by the prosecution service based upon an IIA report, that service should report back to the IIA director with written reasons in cases where the prosecutor decides not to lay charges. The director should then have the discretion to make those reasons public in an attempt to facilitate public confidence in the thoroughness of the IIA's investigation.

There will be occasions where the IIA director and the prosecution service disagree. This typically occurs when the director believes charges should be laid and the prosecution service has a different view and is not prepared to prosecute. In these circumstances, the IIA director should have the discretion to state publicly the reasons they believe charges should be laid, facilitating greater public awareness and debate.

For any investigation not proceeding to prosecution, the IIA director must provide a public summary of the investigation along with their reasoning.

## C. REPORT IF CHARGES ARE WITHDRAWN

The IIA director and the prosecution service may be at odds over whether a charge should go to trial. In those jurisdictions where the director makes a charging decision independently from the prosecution service, this can lead to a charge being laid and then withdrawn. There may be acceptable reasons for a difference of opinion. Charging standards may be lower than the prosecution test to take a case to trial. Alternatively, circumstances may change between the time the charge was laid and the time of trial. For example, a witness may recant an earlier statement, or a new forensic report may change the analysis of the culpability of the accused. There are many legitimate reasons why a prosecution may be terminated after the laying of a charge. In those circumstances, the public needs to understand why the evidence supporting a potentially serious criminal charge against a state agent was not presented in a public courtroom and resolved by way of a verdict.

One of problems facing IPID in South Africa is that the National Prosecution Authority has no obligation to inform the agency about their decisions and the outcome of cases, and the information that IPID receives is sporadic.<sup>262</sup> This risks undermining public confidence, and in response we recommend the prosecution service should be obligated to inform the IIA director of its decisions. Further, upon the withdrawal of any charge laid by an IIA, the director should have the discretion to report to the public why they thought there were grounds to lay the criminal charge in the first place.

## D. ANNUAL REPORT

Regular reporting to the public is an important method to ensure transparency and satisfy public concerns over issues of independence.<sup>263</sup> Most established IIAs publish an annual report that recaps the year's activities and includes budget data, statistics on the number of cases and their outcomes, and legal updates. Such reporting provides a vehicle to explain the functioning of the agency and is an accountability mechanism to the public, as well as to the agency's overseers.

Lack of data on state use of force can be the cause of suspicion. For example, Israel's Police Internal Investigations Department has refused over the years to release data relating to complaints of police violence, on the curious grounds that its computerized system is not sufficiently sophisticated. Following a petition to the High Court last year by the Association for Civil Rights in Israel, the agency announced that it was upgrading its computer system and would start publishing figures from January 2020.<sup>264</sup>

Annual reports allow interested readers to track trends in state agents' use of force, and the IIA's response to that use of force. In order to maintain the independence of the IIA, its annual report should be prepared and disseminated in-house without outside input, and be the product exclusively of that agency.

The IPID in South Africa publishes annual reports with detailed statistics, performance indicators, administrative and budgetary matters. The IOPC in England and Wales also publishes regular Impact Reports. Although its governing legislation only requires annual reports, INDECOM in Jamaica submits quarterly reports to ensure regular dialogue with the parliament and the public. The State Inspector's Service in the Republic of Georgia, in its first annual report since it started acting as an IIA, has a chapter on its cooperation with the ombudsman's office (called the Public Defender's Office in Georgia) and with non-governmental organizations, in addition to statistics on its investigations.

It is only by collecting demographic data that the issue of state violence and racial profiling can be measured.

## E. PATTERN ANALYSIS

Some IIAs also choose to issue thematic reports on patterns of abuse they see in their work. For example, INDECOM in 2014 reported on patterns of fatalities during planned police operations.<sup>265</sup> This led to the introduction of a post-event questionnaire/evaluation for use by police commanders to examine and assess the level of planning for such operations. An assessment of the 2014-2019 period shows a continuing decline in fatal shootings arising from planned police operations (PPO). Through 2015, such fatal shootings accounted annually for between 33%-37% of all fatalities, but 2016 saw the first marked reduction to 25% and 2019 has seen the number of deaths occurring during PPOs fall to less than 12%. In absolute numbers, fatal police shootings have declined from a high in 2013 of 258 to 86 in 2019.<sup>266</sup>

## F. DEMOGRAPHIC DATA COLLECTION

IIAs should collect demographic data because doing so supports evidence-based public policy. It is only by collecting demographic data that the issue of state violence and racial profiling can be measured. The American Sociological Association strongly supports the collection of this data because it "provides scientific evidence in the current scientific and civic debate over the social consequences of the existing categorizations and perceptions of race; allows scholars to document how race shapes social ranking, access to resources, and life experiences; and advances understanding of this important dimension of social life, which, in turn, advances social justice."<sup>267</sup> The European Commission against Racism and Intolerance (ECRI) has consistently called for the collection of ethnic data in order to monitor policing practices, while flagging the importance of anonymizing all statistics and full compliance with personal data protection standards.<sup>268</sup>

Current research into race and police officer-involved fatalities strongly supports a positive correlation between these two factors. An August 2020 report by the Ontario Human Rights Commission concluded that a Black person in Toronto, Canada is nearly 20 times more likely to be fatally shot by a police officer than a White person.<sup>269</sup> And, according to a report by the National Campaign Against Torture, an Indian rights group based in Delhi, at least 1,731 people were killed in Indian custody in 2019 with the

majority being, in their words, “the usual victims of abuse: Muslims and lower-caste Hindus.”<sup>270</sup> In 2018, the *Washington Post*, which collects police shooting data in the United States, recorded 982 police shooting fatalities for the year. Twenty-three percent of these shootings involved Black victims, although Black people represent only 13% of the American population.<sup>271</sup>

This data collection is useful to shape social policy in the difficult area of race relations and state use of force. For this reason, we recommend that IIAs collect data on race and ethnicity, anonymize and aggregate it, and publish these statistics in its annual report. In addition, anonymized raw data should be made available to social science researchers to analyze and extrapolate inferences from this data.

# PROSECUTIONS AND TRIALS

**The main theme that emerged in all interviews conducted** for this paper was the need for a coherent system to investigate and prosecute alleged serious crimes by state agents. As this paper has explored, such investigations are by their nature complex because they require state employees (in the form of IIA staff) to hold accountable other state employees (in the form of police and other security officers). Prosecutions of state agents are similarly complex, and in fact have an additional complicating factor: with exception of the Norwegian Bureau of Investigations of Police Affairs and Israel's Machash, the IIAs studied here do not have the authority to prosecute their cases.

## A. PROSECUTIONS

Typically, local prosecutors work closely with the police and other state agents and thus may have a conflict of interest when it comes to prosecuting crimes by state agents. IIAs exist to provide independent *investigations* of alleged serious crimes by state agents, but as noted, most of the IIAs examined here do not have the power to prosecute. It is essential to have a system in which not just investigations, but also *prosecutions* are as independent as possible.

The ways to organize such a system vary, depending on the legal system and the political and security context, among other factors. But regardless of the specific structure, it is clear that both dedicated investigators and prosecutors are needed to pursue accountability for serious crimes committed by state agents.

Prosecutions of charges initiated by an IIA should be conducted by a specialized department of the prosecution service, working closely with the IIA. (Alternatively, in common law systems, the IIA director should have the authority to retain the professional services of counsel in the private bar.) Having a dedicated prosecutor for IIA related charges—who is separate from the regular prosecution service—would facilitate public confidence, because specialized prosecutors would not be closely linked with the police. Specialized prosecutorial departments would also have a more comprehensive overview of the problem of serious crime committed by state agents. In addition, having such a department would allow prosecutors to receive additional training in the Istanbul and Minnesota Protocols and other investigative standards relevant to cases within the IIA's mandate.

There are several specialized units within some prosecutor's offices that either perform some of the investigative functions that an IIA is typically in charge of, and/or that have responsibility for the prosecution of



12

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crimes by state agents. While they tend to be established by the internal resolutions of prosecutors<sup>272</sup> and can be easily disbanded (as happened to GAESP in Rio de Janeiro in March 2021), they usually have a degree of practical independence or are at least perceived as independent. PROCUVIN in Argentina was originally established by a resolution of the Federal Prosecutor's Office but then in 2018 was included in the new *Organic Law of the Public Prosecutor's Office of the Nation*.<sup>273</sup> In the US, the Department of Justice Civil Rights Division's Criminal Section is established by law.<sup>274</sup>

PROCUVIN operates in a complex legal system: Argentina is a federal state, and all crimes are regulated within a federal criminal code. However, each province has its own provincial criminal procedural code.<sup>275</sup> The federal prosecutor only investigates "federal" crimes established in specific laws (drug trafficking or crimes committed by federal police, for example). Cases related to allegations of crimes by federal state agents are referred to federal line prosecutors (*fiscal natural*), who then need to refer cases to PROCUVIN. In general, PROCUVIN does not take over the cases and instead works with prosecutors or suggests the initiation of some cases *ex-officio* based on media or NGO reports. PROCUVIN does not prosecute crimes by the military, although such cases would be investigated and prosecuted in the regular justice system if they are related to interactions with civilians or human rights violations.<sup>276</sup> According to one of key human rights NGOs in Argentina, Centro de Estudios Legales y Sociales (CELS), that has acted as *querellante* in some cases prosecuted by PROCUVIN, the agency's establishment sent an important message that institutional violence is a priority for the Federal Prosecutor's Office. But it is also true that PROCUVIN could be given stronger functional independence, rather than being dependent on the prosecutor general's policies.<sup>277</sup> It could also develop a stronger investigative capacity and train its own forensic investigators to attend the scenes of incidents.<sup>278</sup>

In Ukraine, a specialized department within the Prosecutor General's Office that can provide procedural guidance to the State Bureau of Investigations (SBI) in cases of allegations of torture and other human rights violations by state agents was established in 2019.<sup>279</sup> This Specialized Department under the Prosecutor General's Office has a head of the department, 19 prosecutors, and five other staff. The Specialized Department's prosecutors provide guidance to the SBI in investigations and can also conduct several investigative actions themselves. The Specialized Department tries to take under its direct control the most difficult and widely known cases. In addition, a group of the department's prosecutors focuses on establishing close interactions with regional prosecutor's offices, collecting information about all complaints, investigations, and prosecutions in order to conduct pattern analyses related to torture and illegal detention. They can require prosecutors from the regions to send the relevant casefile and the department can either keep the case or return it with detailed instructions. Currently, the department does not provide guidance in or prosecute crimes by the military, but its mandate could be expanded through a resolution of the Prosecutor General's Office if there are sufficient resources and the will to do so.<sup>280</sup>

Before it was disbanded, GAESP in Rio de Janeiro had a group of prosecutors investigating cases of alleged crimes by civil police, military police, and prison officers related to the right to life or personal integrity. They also developed “conduct enforcement agreements” with the police in order to improve systemic issues and filed civil collective actions. However, when GAESP prosecutors laid criminal charges, the cases were presented in court by regular prosecutors who work much more closely with the police and are not specialized in cases related to the prosecution of state agents.<sup>281</sup>

In the United States, the Criminal Section of Civil Rights Division of the Department of Justice (DOJ) can bring criminal prosecutions for police misconduct.<sup>282</sup> DOJ’s Special Litigation Section is responsible for pattern and practice investigations and works on pursuing civil cases and “consent decrees” with police departments.<sup>283</sup> In situations where both a criminal offense is alleged that warrants DOJ’s Criminal Section’s involvement and the offense may be part of a pattern of abusive practice, the criminal prosecution would take precedence. Underlying fact finding and evidence gathering for the Criminal Section are performed by the Federal Bureau of Investigations, which is formally part of DOJ but works independently. Attorneys from the Criminal Section can receive complaints (or requests for a criminal investigation) directly or through another agency, initiate investigations *ex-officio*, and receive requests from state attorneys general. State attorneys general are required to report, among others, cases of fatalities with participation of state agents. The United States also has a *Death in Custody Reporting Act* (providing data about deaths in custody that could be used as part of determining whether an investigation is warranted) but its implementation has been uneven.<sup>284</sup>

The state should also not impede other procedures that victims and their families may initiate, such as civil actions and private prosecutions.

## B. DELEGATED OR PRIVATE PROSECUTIONS

The Set of Principles to Combat Impunity, a 2005 report of independent experts to the UN Commission on Human Rights, recognized that while the decision to prosecute lies primarily with the state, the state should also not impede other procedures that victims and their families may initiate, such as civil actions and private prosecutions. Moreover, states should afford “broad legal standing” to any individual, collective, or non-governmental organization that has a legitimate interest in such a matter.<sup>285</sup>

The acute need to find other ways to support prosecutions was noted in South Africa, where the National Prosecuting Authority (NPA) suffered years of mismanagement and, despite the efforts of the current director to reform the institution, still does not prioritize cases of abuse by police and other state agents.<sup>286</sup> The NPA has a policy directive that to prosecute a government official, a prosecutor needs the permission of a more senior prosecutor.<sup>287</sup> The NPA does not have a clear obligation or timeline to report back to IPID on its decision to prosecute. In its 2019-2020 annual report, IPID noted that in 1,594 of referrals to the NPA, IPID is still waiting for a response. Prosecution was declined for 785 cases; the NPA decided to prosecute 55 cases and nine cases were withdrawn.<sup>288</sup> In recent years, the

NPA started holding regular meetings with IPID to clarify the statistics and align electronic docket management systems.

The NPA could delegate its authority to prosecute to another agency, as it has done in relation to traffic offenses. There is no legal impediment preventing the NPA from delegating prosecution of certain cases to IPID if the two organizations agreed. In the case of delegated prosecutions, the state can pay a private attorney to prosecute on its behalf. Also, in South Africa, private prosecutions are possible if the NPA would issue a *nolle prosequi* certificate for a specific case stating that it declines its authority to prosecute this case.<sup>289</sup>

In Jamaica and Trinidad and Tobago, the Departments of Public Prosecutions can issue a *fiat*, which allows a private person to actively associate themselves with the prosecution. Human rights groups such as Jamaicans for Justice have made use of this to prosecute police officers.<sup>290</sup>

## C. TRIALS

An investigation that produces *prima facie* evidence implicating a state agent, leading to a prosecution carried out in a manner consistent with prosecutions of others accused of grave crimes, raises the question of who will adjudicate the guilt or innocence of the accused. This discussion recalls the United Nations definition of the rule of law, which includes the requirement that the state itself is held accountable to laws that are, among other things, “equally enforced and independently adjudicated.”<sup>291</sup>

Independent adjudication is a critically important component of accountability. Its criteria includes a hearing in a publicly accessible court room in which the media is allowed unfettered access, a tenured judge who is independent of the state, free of conflicts, and who provides reasons for their rulings, or a jury whose members are screened for bias and protected from reprisals. There should also be access to an appeals mechanism to correct any errors of law made during the hearing. Such adjudication should include trials for human rights violations committed by the members of the military, who should be tried in ordinary courts.<sup>292</sup>

Only a small percentage of cases against state agents reaches the trial stage and even fewer result in a conviction. In South Africa, IPID reported a caseload in 2019-2020 of 5,640 cases.<sup>293</sup> But during that period, only 136 cases investigated by IPID went to trial, with approximately half of them ending with a conviction registered against the accused state agent.<sup>294</sup> A total of 701 cases were on a court roll where the National Prosecuting Authority accepted IPID’s recommendation for criminal prosecution.<sup>295</sup>

In Ukraine, the newly created Special Department under the Prosecutor General’s Office tries to transfer cases away from the jurisdiction where the crime was allegedly committed. In a recent case of alleged sexual assault, torture, and holding individuals in unacknowledged detention amounting to enforced disappearance, where the head of the local police station is facing trial, the judges of the local court recused themselves due to the real

and perceived conflict if one of them were to sit in judgement of him. The appeal court considered the recusal and assigned the case to a court in a nearby town.<sup>296</sup> Although such steps are not ideal, they may be necessary to protect judicial independence and to protect judges and other court workers from fears of reprisals.

There is a need to protect those involved in trials against state agents, including before and after the trial. For witnesses and victims, this is critical, especially if state agents are convicted and if the victim is incarcerated. An important case from Argentina was investigated and prosecuted by the federal judiciary, including PROCUVIN.<sup>297</sup> After four guards who tortured 20-year-old Brian Nuñez were convicted, the victim was returned to prison. In 2015, four years later, Nuñez said during an interview that the abuse continues but is “silent”—prison guards do not give him medication, do not let him go out to the yard, and give him cold food. A judge ordered that Nuñez be placed under 24-hour surveillance, and prison authorities made a hole in his cell wall and installed a camera. This safeguard measure became a double-edged sword: he cannot leave the camera’s view.<sup>298</sup>

Judges and lawyers can also be targeted. In 2011, Judge Patricia Acioli was killed in her car, close to her home in the state of Rio de Janeiro. Acioli was known as an uncompromising judge who sentenced approximately 60 police officers involved in death squads and militia groups.<sup>299</sup> The Brazilian Association of Judges reported that the number of judicial workers requesting government protection increased 400 percent since Acioli’s killing.<sup>300</sup> A local police chief and seven officers were arrested and charged with Acioli’s murder.<sup>301</sup> During trial in 2013, one officer testified that Acioli’s assassination was carried out in retaliation after she ordered the arrest of three officers accused of an extrajudicial killing.<sup>302</sup>

It should be noted that a fair adjudication is more than a search for the truth—it is a search for justice, and justice in a criminal context includes concepts sometimes at odds with a search for the truth. For example, a fair trial typically includes adequate representation of an accused person, compliance with exclusionary rules of evidence, and proof beyond a reasonable doubt. These safeguards against wrongful convictions will sometimes lead to acquittals the public will find difficult to accept. However, if citizens are satisfied these trials are vigorously prosecuted and fairly adjudicated, they will be more accepting of an outcome with which they disagree. Whether or not a trial leads to a conviction or an acquittal, the first building block of accountability is an independent investigation producing credible evidence of criminal wrongdoing.

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# CONCLUSION

**The question of who polices state agents is an age-old one.** That question has come into sharp relief recently as societies focus on the proper role of state agents, and in particular on the role of the police, and how to respond to allegations of their wrongdoing. The use of state agents to enforce lockdowns and other restrictions due to COVID-19 provides a fresh and stark reminder of the need to control the use of force by state agents and ensure accountability for abuses. At the same time, in the last decade there were also advances in seeking accountability for abuses by state agents, including the establishment of new IIAs and prosecutorial departments and the strengthening of some existing ones.

The goal of independent investigative agencies is to bring to justice those state agents who allegedly commit serious offenses against members of the public, a goal that may only be achieved through independent, effective, thorough, and transparent investigations. By following the recommendations laid out in this paper, it is possible for citizens, governments, and law enforcement organizations to reform bad practices, engage in good ones, and have better policing as a result. 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 and, ultimately, renewed faith in the state apparatus used to enforce the law. This paper is intended as a small contribution to those efforts.

Although this paper reviews important lessons from the work of IIAs and seeks to distill key recommendations—enumerated in the next section—based on their experiences, it is not intended to be the final word on this topic. Rather, it is hoped this paper will spur increased interest in and research into IIAs, which is why a list of resources to support additional inquiry is included in the Annex.



13

# FULL RECOMMENDATIONS

## 1 Independence of the Independent Investigative Agency (IIA)

- **Legislation.** A dedicated law separate from other policing legislation should define an independent investigative agency, to ensure its actual as well as perceived independence.
- **Reporting.** If the legal system allows, the IIA should report to the governing legislature. The agency should be as removed from the influence of the executive branch as possible.
- **Budget.** The state budget should have a dedicated line to ensure adequate funding for the IIA to fulfill all activities within its mandate.
- **Location.** The IIA should be housed in a facility separate from other state agencies' buildings, with access restricted to authorized personnel.

## 2 Independence and Responsibility of Leadership

- **Appointment.** Legislation should provide the IIA's director with the highest guarantees of independence allowed, preferably similar to an ombudsperson. A selection process including a public commission with participants from different branches of government, political parties, and civil society—followed by ratification by legislature—would be ideal.
- **Length of service.** The director should be appointed to a fixed term.
- **Dismissal.** Dismissal of a director before the end of their term should only be allowed for just cause, pursuant to a procedure that provides sufficient protections (e.g., a legislative supermajority).
- **Responsibility.** Ideally, the director should be ultimately responsible for charging decisions. In jurisdictions where charging decisions are made exclusively by the prosecution service, that service should provide written reasons to the IIA director in cases where the decision is made not to prosecute. The director should have the discretion to make those reasons public.

## 3 Investigative Authority and Jurisdiction

- **Lead investigative agency.** The IIA must have full investigative authority and its investigations must take priority over all others.
- **Exclusive jurisdiction.** Legislation should clearly define the IIA's exclusive jurisdiction over any incidents of death, serious injury, allegations of sexual assault, torture, or enforced disappearances by state agents. Any further areas of exclusive jurisdiction need to be clearly defined in legislation.
- **Temporal jurisdiction.** Jurisdiction should extend to incidents that predate the IIA's establishment.
- **Public interest.** The IIA should be empowered to take control over other investigations, if doing so would be in the public interest.

- **Screening and prioritization.** The IIA should have the ability to screen cases for prioritization based on the gravity of the allegation.
- **Liability.** The IIA should be able to investigate all state agents—defined as law enforcement personnel and their superiors, including police, security, correctional staff, military (if acting as police), and others with detention powers. The IIA should be able to investigate direct perpetrators as well as those who attempt to aid, abet, or conspire, 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 participate in police operations or use force against civilians.
- **Immunity.** The statutory immunity of state agents must be proportionate to the threat and necessary in the circumstances. In accordance with international human rights law, no statutory immunities or temporal statutes of limitations can be invoked in cases of allegations for torture, enforced disappearance, or other gross human rights violations.

## 4 Investigators and Investigations

- **Investigators and former stage agents.** The majority of IIA investigators should not have served as police or security officers. While some former state agents can be employed, the IIA should strive to limit their number. Seconded officers should not be relied upon. A robust training program must be developed for all investigative staff.
- **Diversity, cultural competence, and accessibility.** The composition of investigators should seek to reflect the communities the IIA serves. IIA investigators should receive training in anti-racism, diversity and inclusion, gender-based violence, human rights, mental health, and community history with state agents and policing, and should take steps to ensure that the office or its representatives are accessible to all individuals and groups, particularly those most affected by police abuse.
- **Compensation.** Investigators' compensation should not be lower than the pay package of those they are overseeing.
- **Length of investigations.** IIA investigations should be thorough and conducted in a timely manner. If an investigation takes longer than provided by the legislation or internal rules (e.g., 120 days), the IIA should issue a public notification with reasons for the delay.

## 5 Duties to Cooperate and Mandatory Notification

- **Powers.** Investigators should have the same statutory and common law powers as police officers within the IIA's jurisdiction (including the power to arrest). IIA investigators should have the authority to enter any law enforcement establishment and seize potentially relevant evidence without prior authorization.
- **Mandatory immediate notification.** Any state agent who has knowledge of an incident reasonably falling under the IIA's mandate must immediately notify the agency. The IIA may also accept complaints and notifications from third parties, and may self-initiate investigations falling within its mandate. The IIA has sole authority to decide whether to conduct an investigation and has the authority to decline to investigate incidents.

- **Secure scene.** The affected state agency must secure the incident scene to the same standards as required of a crime scene pending the arrival of the IIA.
- **Segregation of state agents.** Where state agents are involved in an incident, they should be immediately segregated until excused by IIA investigators. Agents must write their notes of the incident independently, without external influences. Witness agents should have an employment-based duty to provide a recorded interview to the IIA, preferably without the assistance of legal or union representation and answer all relevant questions. Subject state agents (who can become suspects) have no such duty but may voluntarily provide notes and/or submit to an interview.
- **Preservation of evidence.** Any relevant post-incident physical evidence relating to a subject state agent shall be producible to IIA investigators. All relevant data and records must be preserved by the state agency and provided to the IIA upon request. This duty extends to pre-incident notes created by the subject state agent.
- **Duty to cooperate.** State agencies and their employees have a duty to cooperate with the IIA; these duties should be included in a state agent's employment contract. Breaches of this duty are subject to disciplinary and potentially criminal sanctions.

## 6 Rights of Victims, Cooperation with NGOs and Public Defender's Offices

- **Support.** IIA staff should be trained in working with victims of violence. The IIA should also refer victims and affected persons to social service agencies and organizations or community-run support programs.
- **Participation.** The IIA should inform victims of their right to participate in judicial proceedings to the maximum extent permitted by legislation. The IIA should always interview alleged victims and pursue their suggestions regarding potential evidence or other individuals to interview.
- **Information.** Alleged victims and/or relatives should be kept informed about the progress of an investigation, without disclosing confidential data. At the end of an investigation, the IIA staff should first inform the victim as well as subject officer(s) whether charges will be brought and provide reasons for the decision.
- **Participation of NGOs and Public Defender's Offices.** The IIA should establish effective cooperation with NGOs, community-based organizations, and Public Defender's Offices that often serve as the first point of contact and support for victims.

## 7 Forensic Matters

- **Priority in forensic examinations.** An IIA should receive priority for forensic examinations in state forensic institutions. The IIA should be allowed to employ its own forensic experts or to contract with independent experts.
- **Post-mortem autopsies.** Autopsies must meet international standards set out in the Minnesota Protocol, including possible second autopsies performed by a forensic pathologist of the family's choosing.

- **Allegations of torture or assault.** In case of serious injuries or allegations of torture or sexual assault, a full medico-legal examination consistent with the Istanbul Protocol should be conducted by qualified medical professionals independent of state agencies.
- **Indications of enforced disappearance.** IIAs and authorities in charge of the search for disappeared should develop clear procedures for coordination and exchange of information to allow joint access to evidence and development of contextual analysis.

## 8

### Protection of Witnesses and Whistleblowers

- **Witness tampering.** A state agent who attempts to interfere with a witness should be subject to sanctions, and the IIA should have the authority to investigate such allegations.
- **Witness protection.** The IIA should have the resources to use secure witness protection programs.
- **Whistleblowers.** Any attempt by a state agent to interfere with another cooperating agent should be the subject to sanctions. Extreme cases may require placing the cooperating state agent in a witness protection program.
- **Immunity from prosecution.** The relevant prosecution service, in conjunction with its IIA, should have the authority to grant immunity from prosecution for the objective of gathering evidence of wrongdoing by state agents.

## 9

### Transparency

- **Press releases.** The IIA should have the authority to issue press releases during an investigation.
- **Informing the public.** If no charges are brought, the IIA director must inform the public by means of a summary of the investigation and provide reasons for the decision. If charges are withdrawn, the director should have the discretion to report why the IIA thought there were grounds to bring the criminal charge in the first place.
- **Annual report.** The IIA should publish an annual report containing its budget, statistics on the number and outcome of cases, and other relevant legal updates, including analysis of patterns of abuse and relevant systemic issues. The report should be prepared and disseminated by the IIA.
- **Demographic data.** The IIA should collect demographic data (race, ethnicity, caste, and other protected classes) of those involved in incidents falling under its mandate.

## 10

### Prosecutions and Trials

- **Specialized prosecutors.** The IIA should be afforded powers to support the prosecution, retain professional services of counsel in private bar, or ensure that there are specialized prosecutors or departments within that jurisdiction's prosecution service.
- **Fair trial.** Trials involving state agents as accused must be independently adjudicated in criminal courts in a publicly accessible courtroom. Trials involving violations of rights by the military should be conducted by ordinary courts.

# ANNEX: LIST OF RESOURCES

## A. SELECT BOOKS, ARTICLES, REPORTS

- Africa Criminal Justice Reform, *Fact Sheet 15: Democratic Policing: A Conceptual Framework*, March 2019. Available at <https://acjr.org.za/acjr-publications/acjr-factsheet-15-democratic-policing.pdf/view>.
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## C. SELECT INTERNATIONAL STANDARDS

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# ENDNOTES

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- 2 See Tian Shan Policy Center, American University of Central Asia, *Final Report on Research Findings, Program to Enhance the Capacity of NGO's and Institutions to Advocate for Implementation of Human Rights Decisions and Standards to Prevent Torture For the Kyrgyz Republic*, 2014 <https://auca.kg/uploads/Tian%20Shan%20Policy%20Center/EU%20TSPC/FINAL%20REPORT%202014/Final%20report-TSPC.pdf>.
- 3 The list of interviewers and reviewers is included in the Acknowledgments section.
- 4 See <https://www.siu.on.ca/en/index.php>.
- 5 See <https://stateinspector.ge/en/>.
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- 7 See <https://www.justice.gov.il/En/Units/PoliceInternalInvestigationsDepartment/Pages/default.aspx>.
- 8 See <https://www.indecom.gov.jm/>.
- 9 See <https://www.ipoa.go.ke/>.
- 10 See <https://www.spesialenheten.no/>.
- 11 See <http://www.ipid.gov.za/>.
- 12 See <https://www.pca.org.tt/>.
- 13 See <https://www.policeconduct.gov.uk/>.
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- 15 See <https://www.mpf.gob.ar/procuvin/>.
- 16 Established on October 2019 by the decree of Prosecutor General. See [https://old.gp.gov.ua/ua/news.html?\\_m=publications&t=rec&id=259760&fp=310](https://old.gp.gov.ua/ua/news.html?_m=publications&t=rec&id=259760&fp=310). The Regulation on the competences and rules applied to the Department signed by the Prosecutor General on February 27, 2020 is on file at the Justice Initiative (in Ukrainian).
- 17 See <https://www.justice.gov/crt/criminal-section>.
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- 20 For example, the Norwegian Bureau for Investigation of Police Affairs can investigate prosecutors.
- 21 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, para 1.
- 22 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, para 2.
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- 30 *Bleier v. Uruguay*, UNHRC, Views of 29 March 1982, UN Doc. A/37/40 (Sup. No. 40), para. 13.3.
- 31 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.
- 32 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).
- 33 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.
- 34 See <https://www.siu.on.ca/en/index.php>.
- 35 See <https://www.indecom.gov.jm/>.
- 36 See <https://stateinspector.ge/en/>.
- 37 See <http://www.ipid.gov.za/>.
- 38 Office of the Prosecutor General, Department of Procedural Guidance in Criminal Proceedings on Torture and Other Serious Human Rights Violations by Law Enforcement.
- 39 Argentina, Procuraduría de Violencia Institucional (PROCUVIN). See <https://www.mpf.gob.ar/procuvin/>.
- 40 United States, Department of Justice Civil Rights Division, Criminal Section. See <https://www.justice.gov/crt/criminal-section>.
- 41 Brazil, Rio de Janeiro, Grupo de Atuação Especializada em Segurança Pública (GAESP).
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- 44 Nowak, Manfred and McArthur, Elizabeth, *The United Nations Convention Against Torture. A Commentary*, New York City : Oxford University Press, 2008, at 414.
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- 49 Commissions of Inquiry CIPEV report (Waki Report), Truth, Justice, and Reconciliation Commission, Kenya, 2008 <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1004&context=tjrc-gov>.
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- 51 *Sunil Ranjan Singh et al v the Office of the Council of Minster et al*, 067-WO-1043 (6 January 2020).
- 52 For example, police leadership in South Africa reportedly uses the existence of independent investigative agencies as a justification for neglecting its responsibility to monitor and control the use of force by its members. David Bruce, "How to reduce police brutality in South Africa," Institute for Security Studies, at p. 2 <https://issafrica.org/research/southern-africa-report/how-to-reduce-police-brutality-in-south-africa>.
- 53 For example, Police Ombudsman for Northern Ireland, Independent Police Investigative Directorate of South Africa.
- 54 For examples of strategic litigation, see Open Society Justice Initiative, *Strategic Litigation Impacts: Torture in Custody*, November 2017, <https://www.justiceinitiative.org/publications/strategic-litigation-impacts-torture-custody>.
- 55 For example, the New York Attorney General's Office filed a civil lawsuit on January 14, 2021 against the New York City Police Department and its leadership to end its pattern of using excessive force and making false arrests against New Yorkers during peaceful protests. See <https://ag.ny.gov/press-release/2021/attorney-general-james-files-lawsuit-against-nypd-excessive-use-force>.

- 56 For example, the federal government of Nigeria in October 2020 directed the establishment of independent judicial panels of inquiry to investigate complaints of police brutality or related extrajudicial killings perpetrated by the defunct Special Anti-Robbery Squad (SARS) and other police units. For more information see <https://cleen.org/2020/12/29/cso-police-reform-observatory-calls-on-the-judicial-panels-of-inquiry-on-extra-judicial-killings-by-security-agents-to-dispense-justice-not-technicalities-to-families-of-victims-and-survivors/>.
- 57 Report of the Working Group on Enforced or Involuntary Disappearances on standards and public policies for an effective investigation of enforced disappearances, August 7, 2020, A/HRC/45/13/Add.3 at para 38 and footnote 32 <https://undocs.org/A/HRC/45/13/Add.3>. The Working Group noted a good practice in Mexico where an interdisciplinary group of independent experts (GIEI) was established to conduct the investigation of enforced disappearance of 43 students of Ayotzinapa School in Iguala, Mexico. The GIEI opened new lines of investigation that had been ignored by the prosecution and unveiled serious irregularities, such as the covering up of evidence and a false depiction of the facts, including facts in relation to the alleged torture of several defendants.
- 58 For example, the Human Rights Unit of the Public Defender's Office of Rio de Janeiro, Brazil, adopted a protocol to be used by all 800+ public defenders during the custody hearings to identify allegations of torture. The report presented in August 2018 analyzes 931 allegations of torture and ill-treatment received by public defenders during a 10-month period. See <https://defensoria.rj.def.br/noticia/detalhes/9265-Denuncias-apontam-que-tres-presos-sofrem-tortura-a-cada-dia-no-Rio> (in Portuguese).
- 59 For more information, see *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Mendez*, September 23, 2014, A/69/387 <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15195&LangID=E>.
- 60 Ss. 206(6) of the Constitution of the Republic of South Africa, December 10, 1996.
- 61 See <https://www.npsc.go.ke/index.php/2014-03-25-12-08-21/downloads?download=3:independent-police-oversight-authority-act>.
- 62 See [https://jparliament.gov.jm/attachments/341\\_The%20Independent%20Commission%20of%20Investigation%20Act,%202010,.pdf](https://jparliament.gov.jm/attachments/341_The%20Independent%20Commission%20of%20Investigation%20Act,%202010,.pdf).
- 63 See [https://rgd.legalaffairs.gov.tt/laws2/Alphabetical\\_List/lawspdfs/15.05.pdf](https://rgd.legalaffairs.gov.tt/laws2/Alphabetical_List/lawspdfs/15.05.pdf).
- 64 IOPC previously was the Independent Police Complaints Commission (IPCC) established in 2004 by the *Police Reform Act 2002*. In 2017, the *Policing and Crime Act 2017* introduced some structural changes to the expanded organization and renamed it to Independent Office for Police Conduct.
- 65 See <https://www.ontario.ca/laws/statute/19s01>.
- 66 See at p. 21-22 <https://www.policeombudsman.org/PONI/files/4a/4a6df267-71c3-431b-a85a-a5ac8ed7956d.pdf>.
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- 68 Article 22, see [https://www.mpf.gob.ar/wp-content/uploads/2018/08/Ley\\_organica\\_2018.pdf](https://www.mpf.gob.ar/wp-content/uploads/2018/08/Ley_organica_2018.pdf).
- 69 Centro de Estudios Legales y Sociales (CELS) et al., *Fiscalías especializadas en violencia institucional. Diseño, implementación y estrategias jurídicas*, November 9, 2020 at p. 7 <https://www.cels.org.ar/web/publicaciones/fiscalias-especializadas-en-violencia-institucional-diseno-implementacion-y-estrategias-juridicas/>.
- 70 Savage, Stephen, "Thinking Independence: Calling the Police to Account through the Independent Investigations of Police Complaints" (2013) 53 *Brit. J. Criminology* 94, at p. 109.
- 71 Interview with Peter Kiama, IMLU, February 9, 2021.
- 72 Interview with Lukas Muntingh, Africa Criminal Justice Reform, January 7, 2021.
- 73 An important caveat: Machash does not investigate alleged offenses by the army. Additionally, in very rare circumstances allegations of crimes by security agents would reach Machash after initial investigation by another agency. In most cases, the reports of alleged offenses in the Occupied Palestinian Territories (OPT) would not be investigated by Machash, and it does not have offices in OPT.
- 74 In Northern Ireland, for example, the Police Ombudsman is accountable to the Northern Ireland Assembly, through the Ministry of Justice.
- 75 Mowbray, Alistair, "Duties of Investigation under the European Convention on Human Rights," *The International and Comparative Law Quarterly*, Vol 51, No.2, (Apr. 2002), 437, at p. 439.
- 76 *McBride v Minister of Police and Another* (CCT255/15) [2016] SACC 30; 2016 (2) SACR 585 (CC); 2016 (11) BCLR 1398 (CC) (6 September 2016) and APCOF Policy Paper *Strengthening the Independence of the Independent Police Investigative Directorate* (February 2017).
- 77 Independent Police Investigative Directorate Amendment Act 27 of 2019, came into force on May 27, 2020.
- 78 Independent Police Investigative Directorate Amendment Bill (B25-2018) <https://pmg.org.za/bill/818/>.
- 79 S. 5 and s. 3 of the First Schedule of the *Independent Commission of Investigations Act*, 2010, Act 12 of 2010.
- 80 Interview with David Nderitu, Director of Complaints and Legal Services, IPOA, Kenya, February 26, 2021.
- 81 Interview with Peter Kiama, Director, Independent Medico-Legal Unit, Kenya, February 9, 2021.

- 82 At p. 22 <https://www.policeombudsman.org/PONI/files/4a/4a6df267-71c3-431b-a85a-a5ac8ed7956d.pdf>.
- 83 Law of Georgia on the state inspector service, Article 6.1.
- 84 Principles on the Protection and Promotion of the Ombudsman Institution (“the Venice Principles”), Adopted by the European Commission for Democracy Through Law (Venice Commission) at its 118th Plenary Session, March 2019, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)005-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)005-e).
- 85 Venice Principles, Principle 7.
- 86 Law of Georgia on the State Inspector Service, Article 6.2.
- 87 Venice Principles, Principle 10.
- 88 Venice Principles, Principle 11.
- 89 Interview with Paulo Roberto, prosecutor from Rio de Janeiro, February 11, 2021.
- 90 S. 32, *Special Investigations Unit Act*, S.O. 2019, c. 1, Sch. 5.
- 91 Interview with David West, director, Police Complaints Authority, Trinidad and Tobago, February 9, 2021.
- 92 See [https://www.indecom.gov.jm/press\\_release/privy-council-delivers-judgment-in-indecom-cases](https://www.indecom.gov.jm/press_release/privy-council-delivers-judgment-in-indecom-cases).
- 93 Interview with Hamish Campbell, INDECOM, Jamaica, December 23, 2020.
- 94 See [https://www.indecom.gov.jm/press\\_release/privy-council-delivers-judgment-in-indecom-cases](https://www.indecom.gov.jm/press_release/privy-council-delivers-judgment-in-indecom-cases).
- 95 The Norwegian Bureau for Investigations of Police Affairs, Annual Report 2018, at p. 32.
- 96 Interview with a lawyer in Norway on a condition of confidentiality, February 17, 2021.
- 97 If the Department has decided that there is a basis for the filing of an indictment against the police officer, the case is processed further in the following way: Machash cases come under the jurisdiction of the Magistrates Courts in the Jerusalem, Tel Aviv, Central and Southern Districts. Indictments are filed by the Machash Attorneys and they appear in the courts. In the other cases the file is forwarded to the appropriate District Attorney’s Office where it is examined in order to decide whether to bring an indictment. See <https://www.justice.gov.il/En/Units/PoliceInternalInvestigationsDepartment/Pages/default.aspx>.
- 98 Interview with George Kegoro, Open Society Foundations East Africa, Director, former director of Kenya Human Rights Commission and member of Commission of Inquiry into the Post Election Violence, January 21, 2021.
- 99 Interview with David Nderitu, Director of Complaints and Legal Services, IPOA, Kenya, February 26, 2021.
- 100 Interview with Paulo Roberto, a prosecutor from Rio de Janeiro, February 11, 2021.
- 101 ECHR Application 30054/96, 2001, at para 114.
- 102 S. 18 of the *Special Investigations Unit Act*, S.O. 2019, ch. 1, Sch 5.
- 103 David Nderitu, IPOA, Kenya, *The dichotomy and duplicity in the investigative jurisdiction and mandate of the national police service and the independent policing oversight authority - a legislative design or accident*, August 2020, at p.3. On file with the authors.
- 104 The State Inspector’s Service, Republic of Georgia, Annual Report 2019, at p. 125.
- 105 ‘What We Investigate’ [https://www.siu.on.ca/en/investigate\\_what.php](https://www.siu.on.ca/en/investigate_what.php).
- 106 For example, ss. 273.1(2)(c) of the *Criminal Code of Canada*.
- 107 For example, torture is criminalized in Colombia, Penal Code, Law 599 of 2000, article 178. For more examples, see Association for the Prevention of Torture and Convention against Torture Initiative, Guide on Anti-Torture Legislation, 2016, at p. 15.
- 108 For example, in Colombia, enforced disappearance of persons is prohibited by Article 12 of the Political Constitution of Colombia and is a criminal offense prohibited by article 165 of the *Colombia Penal Code*, Law 589 of 2000. In Argentina, it is a criminal offense under article 142 ter. of the *Argentinian Penal Code*.
- 109 Jamaica’s INDECOM, for example, is required by law to investigate all use of force cases which involve allegations against members of the security forces and agents of the state: <https://www.indecom.gov.jm/about-us/commission>. Also, Canada’s Nova Scotia’s Serious Incident Response Team investigates allegations of domestic violence by its police officers: <https://sirt.novascotia.ca/about>.
- 110 For example, in the Republic of Georgia, its *Criminal Code* has separate articles for Torture (Article 144.1) and Inhuman or Degrading Treatment (Article 144.3) and both crimes are investigated by the State Inspector’s Service.
- 111 For example, although the Police Ombudsman for Northern Ireland has not received complaints about the use of the spit hood/bite guards, the Ombudsman investigators identified issues of concern and the Ombudsman has commenced an “own motion” investigation under section 55(6) of the *Police (Northern Ireland) Act 1998*. Police Ombudsman for Northern Ireland, *A report on the use of spit hood & bite guard incidents notified to the Police Ombudsman’s office*, December 1, 2020 <https://www.policeombudsman.org/PONI/files/26/2609a097-2900-4cf2-b357-fd99113d27ea.pdf>.

- 112 Bruce, David, "Are South Africa's Cops Accountable? Results of Independent Police Investigative Directorate Investigations," *APCOF Research Series 2020*, <https://www.documentcloud.org/documents/6780260-APCOF-RESEARCH-25.html#document/p14/a551413>.
- 113 Machash in Israel also handles complaints about the Border Police (Mishmar Havul) which is a semi-military force that operates on the border of the Occupied Palestinian Territories.
- 114 *R. v. Nixon* (1990), 57 C.C.C. (3d) 97, leave to appeal to the Supreme Court of Canada refused [1991] 1 S.C.R. xii.
- 115 The Supreme Court of Appeal of South Africa, *Mkhize v S* (390/18) [2019] ZASCA 56, Judgement, April 1, 2019, at para 11 and 12 stated, "The high court reasoned further that the appellants' silence was maintained out of the misguided belief that the failure to identify the correct perpetrator would exonerate him and, ultimately, all of them. To allow them to do so would be to grant a license to police officers to assault accused persons at will. As long as there was more than one of them present when a suspect was assaulted they would be safe in the knowledge that if the suspect was killed and they stuck together in their version that the suspect has died for some other reason than being assaulted, they would escape conviction. Relying on the judgment of this court in *S v Govender* 2004 (2) SACR 381 (SCA), the high court held that there was a duty in law on those policemen who were present and who witnessed, but did not participate in the attack on the deceased, to put a stop to it." For a British case upholding a conviction for misconduct in public office against a police officer for failing to act because he had a duty of care to all society, please refer to *R. v. Dytham*, [1979] Q.B. 722.
- 116 Gould, Chandre and Newham, Gareth, Institute for Security Studies, "The South African Constitutional Court Extends Police Accountability," *ISS Today*, February 6, 2012, available at <https://issafrica.org/amp/iss-today/the-south-african-constitutional-court-extends-police-accountability#:~:text=In%20an%20important%20unanimous%20judgement,officers%20who%20break%20the%20law.>
- 117 See <https://www.ohchr.org/en/professionalinterest/pages/useofforceandfirearms.aspx>.
- 118 See <https://osgf.ge/en/independent-investigative-function-of-the-state-inspectors-service/>.
- 119 Council of Europe (2019) *Report to the Georgian Government on the visit to Georgia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 10 to 21 September 2018*, available at: <https://rm.coe.int/1680945eca>. Specific public officials are excluded: General Prosecutor, Prosecutors overseeing investigation at the State Inspectors Service, Minister of Interior, and the Head of the State Security Service of Georgia, as provided for in Article 3 of the *Law of Georgia On State Inspector's Service*.
- 120 See [https://www.indecom.gov.jm/press\\_release/privy-council-delivers-judgment-in-indecom-cases](https://www.indecom.gov.jm/press_release/privy-council-delivers-judgment-in-indecom-cases). Also Dave Lewin (Director of Complaints of the Independent Commission of Investigations) (Appellant) v Diah and others (Respondents) (Jamaica), Case ID: JCPC 2019/0099, 4 May 2020, <https://www.jcpc.uk/cases/jcpc-2019-0099.html>.
- 121 See <https://www.mpf.gob.ar/procuvin/files/2019/09/Vergara-S-imposici%C3%B3n-de-tortura-agravada-pelozo-iturri-TOF-NEUQUEN-copia.pdf>.
- 122 Centro de Estudios Legales y Sociales (CELS) et al., *Fiscalías especializadas en violencia institucional. Diseño, implementación y estrategias jurídicas*, November 9, 2020 at pp. 28-29 <https://www.cels.org.ar/web/publicaciones/fiscalias-especializadas-en-violencia-institucional-diseno-implementacion-y-estrategias-juridicas/>.
- 123 See <http://www.mprj.mp.br/home/-/detalhe-noticia/visualizar/53605>.
- 124 "As a specialized jurisdiction aimed at serving the particular disciplinary needs of the military, the *ratione materiae* jurisdiction of military tribunals should be limited to criminal offenses of a strictly military nature, in other words to offenses that by their own nature relate exclusively to legally protected interests of military order, such as desertion, insubordination or abandonment of post or command," UN Special Rapporteur on the Independence of Judges and Lawyers, the report to General Assembly, August 2013, A/68/285.
- 125 For more information see Juan Carlos Gutiérrez and Silvano Cantú, "The restriction of military jurisdiction in international human rights protection systems," *SUR Journal*, Issue 13, December 2010 <https://sur.conectas.org/en/the-restriction-of-military-jurisdiction-in-international-human-rights-protection-systems/>.
- 126 UN Special Rapporteur on the Independence of Judges and Lawyers, the report to General Assembly, August 2013, A/68/285.
- 127 See <http://jamaica-gleaner.com/article/lead-stories/20201009/indecom-reports-25-rise-killings-security-forces-susan-bogle-probe>.
- 128 Interview with Hamish Campbell, Assistant Commissioner, INDECOM Jamaica, December 23, 2020.
- 129 See <https://www.news24.com/news24/southafrica/news/collins-khosa-new-details-of-alleged-sandf-assault-on-witnesses-family-come-to-light-in-apid-report-20200610>.
- 130 See [https://www.indecom.gov.jm/press\\_release/judges-rule-on-indecoms-investigation-into-the-use-of-mortars-by-jdf](https://www.indecom.gov.jm/press_release/judges-rule-on-indecoms-investigation-into-the-use-of-mortars-by-jdf).
- 131 See <https://www.policeombudsman.org/About-Us/Historical-Investigations>.
- 132 The State Inspector's Service has been mandated to investigate crimes committed by a representative of a law enforcement body, an official or a person equal to an official as of November 1, 2019. Report on the Activities of State Inspector's Service, 2019 at p. 91.
- 133 Interview with Tamar Zubashvili, State Inspector's Service, Republic of Georgia, February 3, 2021.

- 134 Human Rights Committee, *Suarez de Guerrero v. Colombia*, 45/1979.
- 135 Human Rights Committee *Suarez de Guerrero v. Colombia*, 45/1979, at para 13.3.
- 136 Case of Barrios Altos (*Chumbipuma Aguirre and others v Peru*), Inter-Am Ct.H.R., Judgment 14 March 2001, para 41. For additional discussion see Conor Foley, *Combating Torture. A Manual for Judges and Prosecutors*, Human Rights Centre, University of Essex, 2003.
- 137 *Abdülsamet Yaman v. Turkey*, Judgment of 2 November 2004, application no. 32446/96, para. 55 as discussed in Eric Svanidze, Expert Opinion on Definition of torture and ill-treatment and Statute of Limitation, Council of Europe, December 2018 <https://rm.coe.int/2019-comparative-analysis-on-macedonian-criminal-code-eng/168091f5ce> at p. 13.
- 138 CAT General Comment 3, at para 42.
- 139 United Nations Human Rights Guidance on the Use of Less-Lethal Weapons, 2020, para 2.4.
- 140 Code of Conduct for Law Enforcement Officials, Adopted by United Nations General Assembly resolution 34/169 of December 17, 1979 <https://www.ohchr.org/en/professionalinterest/pages/lawenforcementofficials.aspx>.
- 141 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27 to September 7, 1990 <https://www.ohchr.org/en/professionalinterest/pages/useofforceandfirearms.aspx>.
- 142 United Nations Human Rights Guidance on the Use of Less-Lethal Weapons, 2020 [https://www.ohchr.org/Documents/HRBodies/CCPR/LLW\\_Guidance.pdf](https://www.ohchr.org/Documents/HRBodies/CCPR/LLW_Guidance.pdf).
- 143 See <https://www.policeconduct.gov.uk/who-we-are/working-us>.
- 144 Rosenthal, Richard, "Independent Critical Incident Investigations Agencies: A Unique Form of Police Oversight," (2020) 83 *Alb. L. Rev.* 855, at pp. 924-925.
- 145 Interview with David West, PCA Director, Trinidad and Tobago, February 9, 2021.
- 146 A citizen of Georgia with no previous record of criminal conviction, who has a higher legal education, has at least one-year experience of working as a judge, a prosecutor, an investigator or a lawyer, has appropriate business qualities and high moral reputation, a command of the language of proceedings and has passed the unified qualification examination at the Training Centre of Justice of Georgia in the following disciplines: Constitutional Law, International Human Rights Law, Criminal Law, Law of Criminal Procedure, Law on Corrections, and Principles of Operative-Technical Activities in Criminal Procedure, shall be appointed as the investigator of the State Inspector's Service. The candidates having passed judicial, prosecutorial or bar qualification examinations in general specialization or in the field of criminal law – are exempt of the duty to pass a unified qualification examination.
- 147 Operative officers are in charge of: carrying out measures envisaged by the Law of Georgia on Operative-Investigative Activities such as obtaining and processing operational information; examination of crime scene and its surrounding area; identifying persons who may have possessed information relevant to the investigation; determining location of witnesses; participating in conducting covert investigative actions within the scope of their competence.
- 148 State Inspector's Service, Republic of Georgia, *Annual Report 2019*, at pp. 97-98.
- 149 Prenzler, Tim, "Civilian Oversight of the Police: A Test of Capture Theory," 40 *Brit. J. Criminology* 659, at pp. 664-665.
- 150 "Close Ties Cloud Work Between Israel Police and Internal Affairs Unit," <https://www.haaretz.com/premium-close-ties-cloud-work-between-israel-police-and-internal-affairs-unit-1.5374156>.
- 151 Interview with a lawyer and a police investigator from Norway, February 17, 2021.
- 152 Police Ombudsman for Northern Ireland, *20 years of dealing with complaints about the conduct of police officers in Northern Ireland*, at p.5 <https://www.policeombudsman.org/PONI/files/2a/2a731513-24da-42f5-a996-c475d28ba751.pdf>.
- 153 See <https://www.policeconduct.gov.uk/who-we-are/working-us/investigative-roles>.
- 154 Interview with Tamar Zubashvili, State Inspector's Service, Republic of Georgia, February 3, 2021.
- 155 Interview with Hamish Campbell, INDECOM, Jamaica, December 23, 2020.
- 156 Recommendation 10 from the 2008 Ontario Ombudsman Report entitled, *Oversight Unseen*: "The Special Investigations Unit should ensure that none of its investigative staff wear or otherwise display symbols suggesting that they identify with police or demonstrate their former police membership or status"; <https://www.ombudsman.on.ca/resources/reports-and-case-summaries/reports-on-investigations/2008/oversight-unseen>.
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- 158 See Sales, Pau Perez, *Psychological Torture: Definition, Evaluation and Measurement*, Nov 2016
- 159 [https://www.policeconduct.gov.uk/sites/default/files/Documents/statutoryguidance/2020\\_statutory\\_guidance\\_english.pdf](https://www.policeconduct.gov.uk/sites/default/files/Documents/statutoryguidance/2020_statutory_guidance_english.pdf).

- 160 United States Department of Justice Civil Rights Division and United States Attorney's Office Northern District of Illinois *Investigation of the Chicago Police Department*, January 13, 2017, at p. 51; <https://www.justice.gov/opa/file/925846/download>.
- 161 Interview with Yevhen Krapivin, Centre of Policy and Legal Reform, Ukraine, January 25, 2021.
- 162 Thomas Probert, Brian Kimari, Mutuma Ruteere, Strengthening policing oversight and investigations in Kenya study of IPOA investigations into deaths resulting from police action, Centre for Human Rights and Policy Studies, October 2020, at p.8 <https://apcof.org/wp-content/uploads/apcof-study-of-ipoa-deaths-from-police-action-kenya-eng-041-3.pdf>.
- 163 ECHR Application 30054/96, 2001, at para 97.
- 164 See <https://www.policeombudsman.org/Information-for-Police-Officers/When-you-must-contact-the-Police-Ombudsman-s-Office>.
- 165 State Inspector's Service, Republic of Georgia, Annual Report 2019, at pp. 99-100.
- 166 See [https://www.indecom.gov.jm/press\\_release/privy-council-delivers-judgment-in-indecom-cases](https://www.indecom.gov.jm/press_release/privy-council-delivers-judgment-in-indecom-cases).
- 167 Thomas Probert, Brian Kimari, Mutuma Ruteere, *Strengthening policing oversight and investigations in Kenya study of IPOA investigations into deaths resulting from police action*, Centre for Human Rights and Policy Studies, October 2020, at p.17: <https://apcof.org/wp-content/uploads/apcof-study-of-ipoa-deaths-from-police-action-kenya-eng-041-3.pdf>.
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- 169 Inter-American Commission on Human Rights, *Gross Human Rights Violations in the Context of Social Protests in Nicaragua*, OEA/Ser.L/VII (2018), at p. 77.
- 170 See [https://www.indecom.gov.jm/press\\_release/four-more-indecom-crime-scene-examiners-now-iai-certified](https://www.indecom.gov.jm/press_release/four-more-indecom-crime-scene-examiners-now-iai-certified).
- 171 See <https://www.indecom.gov.jm/frequently-asked-questions/faq-security-forces>.
- 172 IPID, *Annual Report 2019-2020*, at p. 69 [http://www.ipid.gov.za/sites/default/files/documents/IPID%202019\\_20%20Annual%20Report.pdf](http://www.ipid.gov.za/sites/default/files/documents/IPID%202019_20%20Annual%20Report.pdf).
- 173 Interview with Tamar Zubashvili, State Inspector's Service, Republic of Georgia, February 3, 2021.
- 174 State Inspector's Service, Republic of Georgia, Annual Report 2019, at p. 126.
- 175 Interview with Efrat Bergman-Sapir, Public Committee against Torture, Israel, February 2, 2021.
- 176 "... police officers do have a duty to prepare accurate, detailed, and comprehensive notes as soon as practicable after an investigation. Permitting officers to consult with counsel before preparing their notes runs the risk that the focus of the notes will shift away from the officer's public duty toward his or her private interest in justifying what has taken place.": *Wood v. Schaeffer* 2013 Supreme Court of Canada 71.
- 177 "Union contracts in police forces in most of America's 100 largest cities have provisions reducing police accountability. In Chicago, for example, officers have 24 hours after a shooting to make a statement which they can amend after watching footage of a disputed incident." *The Economist*, July 11, 2020, at p. 19.
- 178 A classic example of this behavior by the police is their response to the March 2020 death by suffocation of Daniel Prude in Rochester, New York after officers placed his head in a hood and pinned him to the ground. The police generated documents exaggerating Mr. Prude's propensity for violence, and minimizing the tactics of the involved officers, a narrative that flew in the face of police video cam recordings, recordings the police attempted to suppress: <https://www.nytimes.com/2020/09/15/nyregion/rochester-police-daniel-prude.html?action=click&module=Top%20Stories&pgtype=Homepage>.
- 179 *Titus Ngamau Musila Katitu v Republic* -In the Court of Appeal at Nairobi -Criminal appeal No. 124 of 2018 cited in in David Nderitu, IPOA, Kenya, *The dichotomy and duplicity in the investigative jurisdiction and mandate of the national police service and the independent policing oversight authority - a legislative design or accident*, August 2020, at p.21, on file with the authors.
- 180 United States Department of Justice Civil Rights Division and United States Attorney's Office Northern District of Illinois *Investigation of the Chicago Police Department*, January 13, 2017, at p. 62.
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- 182 Victims are mainly persons detained either through administrative or criminal procedure. The persons directly or indirectly involved in imposing criminal or administrative sanctions against them are alleged offenders. Due to this, victims often refrain from testifying against those who committed acts of violence against them. Ten possible victims did not cooperate with the investigation. In the cases investigated by the State Inspector's Service, eyewitnesses are mainly the representatives of the law enforcement bodies. From 114 persons interviewed, none of them confirm unlawful actions by him/her or by his or her colleague/co-worker. As a rule, they appeal to completely different circumstances. The criminal cases processed by the State Inspector's Service rarely have neutral witnesses (bypassing citizens). In case there is one, he/she usually states that despite their presence, they saw or heard nothing. State Inspector's Service, Republic of Georgia. *Annual Report 2019*, at. p. 114.
- 183 Interview and email correspondence with Tamar Zubashvili, State Inspector's Service, Republic of Georgia, February 3, 2021.

- 184 Ss. 2(1)(c)(ii) of the Code of Conduct to the *Police Services Act*, R.S.O, 1990, c. P-15, as amended.
- 185 Guide on Article 6 of the European Convention on Human Rights, Right to A Fair Trial (criminal limb), European Court of Human Rights, updated on 31 August 2020 citing *Saunders v. the United Kingdom* [GC] § 60; *O'Halloran and Francis v. the United Kingdom* [GC, § 45; *Funke v. France*, § 44).
- 186 Guide on Article 6 of the European Convention on Human Rights, Right to A Fair Trial (criminal limb), European Court of Human Rights, updated on 31 August 2020 at p. 40 citing *Jalloh v. Germany* [GC], § 97.
- 187 385 U.S. 492 (1967) and *Gardiner v. Broderick*, 392 U.S. 273 (1968). See also Scott, Ian, 'Taking Statements from Police Officers Suspected of Criminal Misconduct' [2004], 49 *Crim. Law Quarterly* 166. For more information on the Garrity warning, see <https://www.officer.com/home/article/10250117/garrityhow-it-works>.
- 188 State Inspector's Service, Republic of Georgia, *Annual Report 2019*, at p.126.
- 189 Interview with Tamar Zubashvili, State Inspector's Service, Republic of Georgia, February 3, 2021.
- 190 For a detailed discussion on the right to redress, see UN Committee against Torture, General comment no. 3, 2012: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: implementation of article 14 by States parties.
- 191 UN Committee against Torture, General comment no. 3, 2012: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: implementation of article 14 by States parties, at para 17.
- 192 Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization. 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, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, Principle V.9 and V.8.
- 193 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JH, para 9 A <https://eurlex.europa.eu/legalcontent/EN/TXT/?qid=1421925131614&uri=CELEX:32012L0029>.
- 194 Report of the Working Group on Enforced or Involuntary Disappearances, A/HRC/16/48, January 26, 2011, at para. 39 (general comment on the right to the truth in relation to enforced disappearance, para. 4).
- 195 Report of the Working Group on Enforced or Involuntary Disappearances on standards and public policies for an effective investigation of enforced disappearances, August 7, 2020, A/HRC/45/13/Add.3 para 69 <https://undocs.org/A/HRC/45/13/Add.3>.
- 196 For example, the 2006 the Police Ombudsman for Northern Ireland investigation into a complaint from Jean McConville's family concluded that police did not conduct an investigation into her disappearance for more than 20 years. The investigation also revealed police received information from military sources which suggested the abduction was a hoax and that Mrs. McConville was known to be safe and well. The family have consistently said that Jean McConville was abducted and beaten and released, the night before she was abducted and murdered. See <https://www.policeombudsman.org/Investigation-Reports/Historical-Reports/Army-thought-McConville-disappearance-a-hoax>. See also: Patrick Radden Keefe, *Say Nothing - A True Story of Murder and Memory in Northern Ireland*, Penguin Random House LLC, (2019).
- 197 State Inspector's Service, Republic of Georgia, *Annual Report 2019*, at pp. 123-124.
- 198 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JH, at para 20.
- 199 UNODC, *Handbook on Justice for Victims*, at p 36.
- 200 Corte Interamericana De Derechos Humanos, *Caso Favela Nova Brasilia Vs. Brasil*, Judgement, February 16, 2017 (Excepciones Preliminares, Fondo, Reparaciones Y Costas) [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_333\\_esp.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_333_esp.pdf) Section IX, para. 9-24.
- 201 *Criminal Procedure Code* (Codigo Procesal Penal) of Argentina, Article 82, translation from Spanish: "Any person with civil capacity particularly offended by a publicly actionable offense shall have the right to become a plaintiff and as such to promote the process, provide elements of conviction, argue about them and appeal with the scope established in this Code... In the case of a crime resulting in the death or disappearance of a person, the spouse, cohabitant, parents, children and siblings of the dead or missing person may exercise this right; in the case of a minor, his guardians or guardians, and in the case of an incapacitated person, his legal representative." <http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/383/texact.htm#5>.
- 202 Email correspondence with Nicolás Laino, Public Defender's Office, Argentina, February 18, 2021.
- 203 See <https://policeconduct.gov.uk/research-and-learning/our-youth-panel/police-complaints-quick-guide-young-people>.
- 204 Interview and email correspondence with Tamar Zubashvili, State Inspector Service, Republic of Georgia, February 3, 2021.
- 205 Interview with David West, Director of Police Complaints Authority, Trinidad and Tobago, February 9, 2021.
- 206 With the exception of cases where the question of prosecution is ruled on by the King in Council or the Director of Public Prosecutions.

- 207 See <https://www.spesialenheten.no/english/about-us/case-processing/>.
- 208 Jim Murdoch, Václav Jiříka, *Combating Ill-Treatment in Prison*, Council of Europe, 2016, at p.83, available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806ab9a7>. See also, Svanidze, Eric, *Guidelines on International Standards on the Effective Investigation of Ill-treatment*, 2010.
- 209 For example, Public Committee against Torture in Israel (PCATI) lawyers won such appeal when in February 2017, the High Court of Justice in Israel ordered Machash to indict a policeman in the abuse of a Palestinian man nine years prior. The High Court cancelled the Attorney General's decision to reject the appeal against the closing of the file. According to PCATI, this is the first time that the HCJ intervened in the authorities' decision not to charge due to lack of evidence. Interview with Efrat Bergman-Sapir, Public Committee against Torture in Israel, February 2, 2021.
- 210 Interview and email correspondence with Tamar Zubashvili, State Inspector's Service, Republic of Georgia, February 3, 2021.
- 211 See <https://www.policeconduct.gov.uk/complaints-reviews-and-appeals/reviews-and-appeals>.
- 212 Including Graham Smith, Manchester University, UK; Peter Kiama, Independent Medico-Legal Unit, Kenya; Paulo Roberto, a prosecutor from Rio de Janeiro.
- 213 *Criminal Procedure Code of Argentina (Codigo Procesal Penal)*, Article 82 bis, unofficial translation from Spanish <http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/383/texact.htm#5>.
- 214 This was made possible following a complaint lodged by Grandmothers of Plaza de Mayo at the Inter-American Commission of Human Rights arguing a violation of their right to access justice. Argentina accepted a friendly settlement in the case and committed to introduce new legislation to enable more effective participation in proceedings by victims and organizations supporting them. See Presidential Decree No. 1800, November 19, 2009. For more information see Open Society Justice Initiative, *Options for Justice*, Annex 2, Mechanisms in the Americas, at pp. 356 and 416.
- 215 Interview with Fabio Amado, Public Defender's Office of Rio de Janeiro, January 14, 2021.
- 216 Email correspondence with Nicolás Laino, Federal Public Defender's Office, Argentina, February 18, 2021. The law created 24 Public Defenders of the Victims, 23 for the 23 provinces of the country, and another one for the Autonomous City of Buenos Aires.
- 217 Thomas Probert, Brian Kimari, Mutuma Ruteere, *Strengthening policing oversight and investigations in Kenya study of IPOA investigations into deaths resulting from police action*, Centre for Human Rights and Policy Studies, October 2020, at p.21.
- 218 Interview with Peter Kiama, Independent Medico-Legal Unit, Kenya, February 9, 2021.
- 219 See <https://www.imlu.org/index.php/14-sample-data-article/portfolio/apps/83-justice-for-kwekwe>.
- 220 Inter-American Commission on Human Rights, *The Human Rights Situation in Mexico*, OEA/Ser.L/V/II (2018), at p. 224.
- 221 Interview with Hamish Campbell, INDECOM, Jamaica, December 23, 2020.
- 222 *The Minnesota Protocol on the Investigation of Potentially Unlawful Death* (2016); <https://www.ohchr.org/Documents/Publications/MinnesotaProtocol.pdf>; accessed September 16, 2020 and Inter-American Commission on Human Rights, *Gross Human Rights Violations in the Context of Social Protests in Nicaragua*, OEA/Ser.L/VII (2018), at p. 76.
- 223 *United Nations Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment* (2004) Office of the United Nations High Commissioner for Human Rights (Geneva 2004) (the Istanbul Protocol).
- 224 Istanbul protocol, at para 123.
- 225 Colombia, Unit for the Search of Disappeared Persons (UBPD) started operating in August 2017 with a 20-year mandate. See <https://colombiapace.org/colombias-unit-for-the-search-of-disappeared-persons/>.
- 226 Committee on Enforced Disappearances, *Guiding principles for the search for disappeared persons*, May 8, 2019.
- 227 Report of the Working Group on Enforced or Involuntary Disappearances on standards and public policies for an effective investigation of enforced disappearances, August 7, 2020, A/HRC/45/13/Add.3 <https://undocs.org/A/HRC/45/13/Add.3>.
- 228 Committee on Enforced Disappearances, *Guiding principles for the search for disappeared persons*, 8 May 2019, Principle 1.
- 229 Victims, their legal representatives, counsel, or any person authorized by them, and any person, association or organization with a legitimate interest have the right to take part in the search. This right should be protected and guaranteed at all stages of the search process, without prejudice to the measures taken to preserve the integrity and effectiveness of the criminal investigation or the search itself. [They] should have access to information on the action taken and on the progress and results of the search and the investigation. Their input, experiences, alternative suggestions, questions and doubts should be taken into account at all stages of the search, as contributions to increasing the effectiveness of the search, and should not be subjected to formalities that hold them up[0]. Any decision to discontinue the search should be taken in a transparent manner and requires the prior and informed consent of the family members.[0] Committee on Enforced Disappearances, *Guiding principles for the search for disappeared persons*, May 8, 2019, Principle 5.1.

- 230 Committee on Enforced Disappearances, *Guiding principles for the search for disappeared persons*, May 8, 2019, Principle 7.5.
- 231 For more details see Committee on Enforced Disappearances, *Guiding principles for the search for disappeared persons*, May 8, 2019, Principle 13. For examples of challenges and good practices, see Swisspeace, *Coordinating the Search and Criminal Investigations concerning Disappeared Persons*, June 2020 [https://www.swisspeace.ch/assets/publications/downloads/Reports/b966e003cc/Report\\_ExpertWorkingMeeting\\_CoordinatingSearchCriminalInvestigationsConcerningDisappearedPersons.pdf](https://www.swisspeace.ch/assets/publications/downloads/Reports/b966e003cc/Report_ExpertWorkingMeeting_CoordinatingSearchCriminalInvestigationsConcerningDisappearedPersons.pdf).
- 232 Committee on Enforced Disappearances, *Guiding principles for the search for disappeared persons*, May 8, 2019, Principle 11.7.
- 233 Inter-American Court of Human Rights, *Bámaca-Velásquez v. Guatemala*, Judgment of February 22, 2002 (Reparations and Costs), para 82. “... the State must conduct the exhumations, in the presence of the next of kin, to locate the mortal remains of Efraín Bámaca Velásquez and to hand them over to them.”
- 234 *Eshonov v. Uzbekistan* HRC (1225/03), at para 6. See also *The Minnesota Protocol on the Investigation of Potentially Unlawful Death* (2016).
- 235 See [https://dbr.gov.ua/news/zevaltuvannya\\_u\\_kagarliku\\_dbr\\_povidomilo\\_pro\\_pidozru\\_kolishnomu\\_nachalniku\\_kagarlickogo\\_vp](https://dbr.gov.ua/news/zevaltuvannya_u_kagarliku_dbr_povidomilo_pro_pidozru_kolishnomu_nachalniku_kagarlickogo_vp).
- 236 Convention against Torture, art 13 “Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities.”
- 237 Open Society Justice Initiative, *Strategic Litigation Toolkit: Drafting Torture Complaints to the United Nations Human Rights Committee or Committee against Torture*, 2018, at para 223.
- 238 Bruce, David. “Are South Africa’s Cops Accountable? Results of Independent Police Investigative Directorate Investigations.” *APCOF Research Series 2020*, <https://www.documentcloud.org/documents/6780260-APCOF-RESEARCH-25.html#document/p14/a551413>.
- 239 Interview with Hamish Campbell, INDECOM, December 23, 2020.
- 240 Interview with Efrat Bergman-Sapir, Public Committee against Torture in Israel, February 2, 2021. Also see <https://www.justice.gov.il/Units/YoezMespati/HanchayotNew/Pages/fast.aspx> (in Hebrew).
- 241 Interview with Tamar Zubashvili, State Inspector’s Service, February 3, 2021.
- 242 *Special Investigations Unit Act*, S.O. 2019, ch. 1, Sch 5, s. 35.
- 243 Article 13 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) reads, in part: “Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.”
- 244 Istanbul protocol, at para 80.
- 245 Centro de Estudios Legales y Sociales (CELS) et al., *Fiscalías especializadas en violencia institucional. Diseño, implementación y estrategias jurídicas*, November 9, 2020 at p. 36 <https://www.cels.org.ar/web/publicaciones/fiscalias-especializadas-en-violencia-institucional-diseno-implementacion-y-estrategias-juridicas/>.
- 246 Centro de Estudios Legales y Sociales (CELS) et al., *Fiscalías especializadas en violencia institucional. Diseño, implementación y estrategias jurídicas*, November 9, 2020 at p. 36 <https://www.cels.org.ar/web/publicaciones/fiscalias-especializadas-en-violencia-institucional-diseno-implementacion-y-estrategias-juridicas/>.
- 247 Centro de Estudios Legales y Sociales (CELS) et al., *Fiscalías especializadas en violencia institucional. Diseño, implementación y estrategias jurídicas*, November 9, 2020 at p. 37 <https://www.cels.org.ar/web/publicaciones/fiscalias-especializadas-en-violencia-institucional-diseno-implementacion-y-estrategias-juridicas/>.
- 248 See [https://www.planalto.gov.br/ccivil\\_03/LEIS/L9807.htm](https://www.planalto.gov.br/ccivil_03/LEIS/L9807.htm).
- 249 Interview with Fabio Amado, Public Defender’s Office of Rio de Janeiro, January 14, 2021.
- 250 Interview with Paulo Roberto, a prosecutor from Rio de Janeiro, February 11, 2021.
- 251 Ireland *Protected Disclosures Act*, Part IV <https://revisedacts.lawreform.ie/eli/2014/act/14/front/revised/en/html>.
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- 255 Transparency International Ireland, *Speak Up Report 2020*, at p. 22.
- 256 Transparency International Ireland, *Speak Up Report 2020*, at p. 22.
- 257 Interview with Tammie Gregg, ACLU lawyer, February 17, 2021. All officers were eventually acquitted. For more information, see <https://www.baltimoresun.com/news/crime/bs-md-ci-goodson-motions-20160106-story.html>.

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- 259 ECHR Application 30054/96, 2001, at para 118 & 136.
- 260 See the INDECOM Quarterly, the Year in Review, 2020 at pp.20-26 <https://www.indecom.gov.jm/wp-content/uploads/2021/02/The-INDECOM-Quarterly-Q4-October-to-December-2020.pdf>
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- 262 Interview with Lukas Muntingh, Africa Criminal Justice Reform, January 7, 2021.
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- 267 American Sociological Association, *The Importance of Collecting Data and Doing Social Scientific Research on Race*, 2003: [https://www.asanet.org/sites/default/files/savvy/images/press/docs/pdf/asa\\_race\\_statement.pdf](https://www.asanet.org/sites/default/files/savvy/images/press/docs/pdf/asa_race_statement.pdf).
- 268 ECRI General Policy Recommendation N° 11 on Combatting Racism and Racial Discrimination in Policing, adopted on 29 June 2007; at paras. 41-42, <https://rm.coe.int/ecri-general-policy-recommendation-no-11-on-combating-racism-and-racia/16808b5adf>.
- 269 Ontario Human Rights Commission Final Report, *Use of Force by Police in Toronto*, August 10, 2020.
- 270 *New York Times*, "Hundreds of People Killed in India, but No Mass Protests," August 20, 2020 <http://nyti.ms/3128bdW>.
- 271 See <https://www.washingtonpost.com/graphics/2018/national/police-shootings-2018/>.
- 272 The Department of the Prosecutor General of Ukraine was established by the 2019 order of the Prosecutor General.
- 273 An additional example from Argentina is the province of Buenos Aires, where the Senate and the Chamber of Deputies passed in 2014 law 14.687 which established the creation of 21 Functional Units of Investigation and Trial specialized in institutional violence (*Unidades Funcionales de Instrucción y Juicio especializadas en violencia institucional*.) See Centro de Estudios Legales y Sociales (CELS) et al, *Fiscalías especializadas en violencia institucional. Diseño, implementación y estrategias jurídicas*, November 9, 2020 at pp. 6-7.
- 274 *Civil Rights Act of 1957*.
- 275 Accordingly, PROCUVIN does not have jurisprudence over local police, or correctional services personnel; however, it has competence over federal agents and violations in federal detention places. PROCUVIN also covers allegations against police and other state agents of the city of Buenos Aires.
- 276 Federal Prosecutor's Office has a specialized department on crimes against humanity that investigated crimes by the military.
- 277 Interview with Paula Litvachky and Mariano Lanziano, CELS, Argentina, February 10, 2021.
- 278 Interview with Paula Litvachky and Mariano Lanziano, CELS, Argentina, February 10, 2021.
- 279 Office of the Prosecutor General of Ukraine, Department of Procedural Guidance in Criminal Proceedings on Torture and Other Serious Human Rights Violations by Law Enforcement. Another department of the Prosecutor General office provides procedural guidance to the SBI in their other cases (such as military offenses or corruption). Since the 2012 legislative amendments in Ukraine, a prosecutor is responsible for the overall investigation and takes key decisions, while an investigator is responsible for the quality and timeliness of investigative actions. For more information on the practice of procedural guidance in Ukraine, see Expert Center for Human Rights, *The role of the prosecutor of the Specialized Anti-Corruption Prosecutor's office at the Pre-Trial Stage. Study Report*, May 12, 2018, available at <https://ecpl.com.ua/en/publications/the-role-of-the-prosecutor-of-the-specialized-anti-corruption-prosecutor-s-office-at-the-pre-trial-stage-study-report/>.
- 280 Interview with Yuriy Bielousov, Office of Prosecutor General of Ukraine, February 16, 2021.
- 281 Interview with Paulo Roberto, a prosecutor from Rio de Janeiro, Brazil, February 11, 2021.
- 282 18 U.S.C. § 242, Deprivation of Rights Under Color of Law, <https://www.justice.gov/crt/statutes-enforced-criminal-section>.
- 283 A consent decree is an agreement between involved parties submitted in writing to a court. Once approved by the judge, it becomes legally binding.
- 284 *Death in Custody Reporting Act of 2013*.

- 285 Principle 19. Although the decision to prosecute lies primarily within the competence of the State, victims, their families and heirs should be able to institute proceedings, on either an individual or a collective basis, particularly as *parties civiles* or as persons conducting private prosecutions in States whose law of criminal procedure recognizes these procedures. States should guarantee broad legal standing in the judicial process to any wronged party and to any person or non-governmental organization having a legitimate interest therein. See UN Commission on Human Rights, Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher, February 8, 2005, <https://undocs.org/E/CN.4/2005/102/Add.1>.
- 286 Interview with Lukas Muntingh, Africa Criminal Justice Reform, January 7, 2021.
- 287 National Prosecuting Authority (2014) Prosecution *Policy Directives - Policy Directives issued by the National Director of Public Prosecutions*.
- 288 IPID, *Annual Report 2019-2020*, at p.70 [http://www.ipid.gov.za/sites/default/files/documents/IPID%202019\\_20%20Annual%20Report.pdf](http://www.ipid.gov.za/sites/default/files/documents/IPID%202019_20%20Annual%20Report.pdf).
- 289 Interview with Lukas Muntingh, Africa Criminal Justice Reform, January 7, 2021.
- 290 See [https://dpp.gov.jm/dpp\\_powers\\_a](https://dpp.gov.jm/dpp_powers_a).
- 291 See <https://www.un.org/ruleoflaw/un-and-the-rule-of-law/>.
- 292 In all circumstances, the jurisdiction of military courts should be set aside in favor of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes. Draft Principles Governing the Administration of Justice Through Military Tribunals, U.N. Doc. E/CN.4/2006/58, January 13, 2006, Principle 9 <http://hrlibrary.umn.edu/instreet/DecauxPrinciples.html>.
- 293 IPID, *Annual Report 2019-2020*, at p. 39.
- 294 IPID, *Annual Report 2019-2020*, at p. 84 and p. 88. There were 69 criminal convictions and 67 acquittals.
- 295 IPID, *Annual Report 2019-2020*, at p. 93.
- 296 Interview with Yuriy Bielousov, Office of the Prosecutor General of Ukraine, February 16, 2021.
- 297 Centro de Estudios Legales y Sociales (CELS) et al., *Fiscalías especializadas en violencia institucional. Diseño, implementación y estrategias jurídicas*, November 9, 2020 at p. 29 <https://www.cels.org.ar/web/publicaciones/fiscalias-especializadas-en-violencia-institucional-diseno-implementacion-y-estrategias-juridicas/>.
- 298 See <https://juliamurielDominzain.wordpress.com/2014/12/01/four-years-after-brian-lives-in-prison-with-the-memory-of-torture/>.
- 299 Although Judge Acioli was named as an assassination target on a list of 12 people, her security was withdrawn by the State of Rio de Janeiro prior to her murder. Judge Acioli had requested reinstatement of protection but the state refused, claiming that it was not necessary for her to have security or even an armored car. See <https://www.lrwc.org/re-assassination-of-judge-patricia-lourival-acioli/>.
- 300 Human Rights Watch, *World Report 2012-Brazil*.
- 301 See [https://www.abajournal.com/news/article/police\\_chief\\_in\\_city\\_in\\_which\\_murdered\\_brazil\\_judge\\_worked\\_is\\_arrested\\_alon](https://www.abajournal.com/news/article/police_chief_in_city_in_which_murdered_brazil_judge_worked_is_arrested_alon).
- 302 See <https://insightcrime.org/news/brief/brazil-sentences-3-police-judges-murder/>.

