

Lawyers' Rights Watch Canada

NGO in Special Consultative Status with the Economic and Social Council of the United Nations
Promoting human rights by protecting those who defend them

www.lrwc.org – lrwc@portal.ca – Tel: +1 604 736 1175 – Fax: +1 604 736 1170
3220 West 13th Avenue, Vancouver, B.C. CANADA V6K 2V5

TURKEY

International Law Duties to Provide Remedies for Violations of the Right to Life

As a member of the United Nations, Turkey has agreed to respect the rights to life guaranteed by the *Universal Declaration of Human Rights* (UDHR). As a party to the UN *International Covenant on Civil and Political Rights* (ICCPR) and to the European Convention on Human Rights (ECHR),¹ Turkey has accepted the twin legal obligations to protect the right to life of all persons within its territory and to prevent, punish and remedy violations. The duty to conduct effective investigations that result in the identification and punishment of those responsible for violations is a key component of the State duty to protect the right to life. These twin duties are affirmed by the United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Declaration on Human Rights Defenders),² the Basic Principles on the Role of Lawyers,³ the Convention for the Protection of Human Rights and Fundamental Freedoms,⁴ and the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions.⁵

The ICCPR imposes on Turkey and other State Parties the duty to investigate violations of the right to life as an integral part of the duty to protect the right to life guaranteed by Article 6.1.

The UN Human Rights Committee (HR Committee) has affirmed that Article 2.1 creates binding obligations on States to exercise due diligence to prevent, punish, investigate and redress violations of protected rights committed by State and/or private actors. Failure to take such measures can constitute violations by the State of the ICCPR. The HR Committee stated in General Comment 31:

There may be circumstances in which a failure to ensure Covenant rights as required by Article 2 would give rise to violations by States Parties of those rights, as a result of States

¹ European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, entered into force 3 September 1953.

² Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms. Adopted at the 85th plenary meeting 9 December 1998 and adopted by the U.N. General Assembly 8 March 1999 A/RES/53/144. Article 9.5 specifically requires States to “conduct a prompt and impartial investigation or ensure that an inquiry takes place whenever there is reasonable ground to believe that a violation of human rights and fundamental freedoms has occurred...”

³ Adopted by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana 27 August to 7 September 1990. U.N. Doc. A/CONF. 144/28/Rev. 1 at 188. (1990).

⁴ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5.

⁵ Adopted on 24 May 1989 by the Economic and Social Council Resolution 1989/65.

Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.⁶

The HR Committee has noted that impunity may be “an important contributing element in the recurrence of ... violations,” and has emphasized that the State obligation to provide an effective remedy pursuant to Article 2(3) of the ICCPR may in appropriate cases require guarantees of non-repetition and changes in relevant laws and practices.⁷

When the involvement of state agents is suspected, the State must ensure an investigation independent of the state agents subject to suspicion. The HR Committee has ruled that the State must take effective measures to bring the perpetrators of summary executions “to justice, to punish them and to compensate victims,” and,

[i]f allegations of such crimes have been made against members of the security forces, whether military or civilian, the investigations should be carried out by an impartial body that does not belong to the organization of the security forces themselves.⁸

The UN has developed detailed standards for investigation of unlawful killing, including:

- *UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* (“UN Investigation Principles”);⁹ and
- *UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary* (“Minnesota Protocol”).¹⁰

The UN Investigation Principles, adopted by UN ECOSOC and welcomed by the UN General Assembly in 1989, reflect a global consensus on the standards for investigations:

- thorough, prompt, and impartial investigation of all suspected cases of extra-legal, arbitrary, and summary executions;
- an independent commission of inquiry for those cases in which the established investigative

⁶ HR Committee, General Comment No. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/74/CRP.4/Rev.6, 21 April 2004, para. 8.

⁷ HR Committee, General Comment No. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/74/CRP.4/Rev.6, 21 April 2004, paras 16, 18, available at: <http://www.refworld.org/docid/478b26ae2.html>.

⁸ Judgment of 21 August 2011, *Case of Torres Millacura and others v. Argentina*, Series C No. 229, para. 121.

⁹ Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989, welcomed by the General Assembly in Resolution A/RES/44/159, 15 December 1989, see <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ArbitraryAndSummaryExecutions.aspx>.

¹⁰ UN Department of Political Affairs, *United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, U.N. DOC. E/ST/CSDHA/.12 (1991) (Minnesota Protocol). A revision of the Minnesota Protocol is currently underway in consultation with States, academia, civil society, and other interested parties. See UN Office of the High Commissioner for Human Rights, Revision of the Minnesota Protocol at:

<http://www.ohchr.org/EN/Issues/Executions/Pages/RevisionoftheUNManualPreventionExtraLegalArbitrary.aspx>.

See the draft revision at:

<http://www.ohchr.org/Documents/Issues/Executions/UNManual2015/A.HRC.32.39.Add.4.docx>.

procedures are ineffective because of lack of expertise or impartiality, and for cases in which there are complaints from the family of the victim about these inadequacies or other substantial reasons;

- protection from violence or intimidation for complainants, witnesses, families, and investigators;
- removal from power or control over complainants, witnesses, families or investigators of anyone potentially implicated in extra-legal, summary or arbitrary executions;
- access by families and their legal representatives to any hearing and to all relevant information, and the right to present other evidence;
- a detailed written report on the methods and findings of the investigation, made public within a reasonable time;
- government action to bring to justice persons identified by the investigation as having taken part in extra-legal, arbitrary and summary executions, through prosecutions and trials;
- responsibility of superiors, officers or other public officials for acts committed under their authority if they had a reasonable opportunity to prevent such acts; and
- fair and effective compensation for the families and dependents of victims of extra-legal, arbitrary and summary executions within a reasonable period of time.

The Minnesota Protocol confirms the basic minimum standard of an investigation in Subsection III(B) on the “Purposes of an inquiry”:

As set out in paragraph 9 of the Principles, the broad purpose of an inquiry is to discover the truth about the events leading to the suspicious death of a victim. To fulfil that purpose, those conducting the inquiry shall, at a minimum, seek:

- (a) to identify the victim;
- (b) to recover and preserve evidentiary material related to the death to aid in any potential prosecution of those responsible;
- (c) to identify possible witnesses and obtain statements from them concerning the death;
- (d) to determine the cause, manner, location and time of death, as well as any pattern or practice that may have brought about the death;
- (e) to distinguish between natural death, accidental death, suicide and homicide;
- (f) to identify and apprehend the person(s) involved in the death;
- (g) to bring the suspected perpetrator(s) before a competent court established by law.

The European Court of Human Rights (ECtHR) has ruled that a state duty to investigate exists under Articles 2 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, also known as the European Convention on Human Rights (ECHR).¹¹

In *Finucane v. The United Kingdom*, the ECtHR considered the scope of the duty to investigate under Article 2 of the Convention and identified the need for an investigation to: be independent of those suspected of involvement; lead to identification and punishment of those responsible when the killing is unlawful; be conducted promptly and competently; and be reasonably open to public scrutiny.

¹¹ See *Finucane v. the United Kingdom*, no. 29178/95, ECtHR 2003-VIII, [*Finucane*] § 67-71; See also *Kaya v. Turkey*, judgment of 19 February 1998, Reports of Judgments and Decisions 1998-I, p. 324, [*Kaya*] § 86-87, § 107.

67. The obligation to protect the right to life under Article 2 of the Convention read in conjunction with the State's general duty under Article 1 of the Convention to “secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention”, requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force. The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures.

68. For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence.

69. The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used was or was not justified in the circumstances and to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard.

70. A requirement of promptness and reasonable expedition is implicit in this context. While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts

71. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests [internal citations removed].¹²

In *Kaya v. Turkey*, the ECtHR held that the notion of an effective remedy under Article 13 imposes upon a state a stricter duty to investigate than that imposed under Article 2:

¹² *Finucane, supra* note 11.

107. The notion of an effective remedy for the purposes of Article 13 entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible, and including effective access for the relatives to the investigatory procedure. Seen in these terms the requirements of Article 13 are broader than a Contracting State's procedural obligation under Article 2 to conduct an effective investigation [internal citations omitted].¹³

Access to Information by Families: The Right to Truth

A current project to revise the Minnesota Protocol articulates the right of victims, including family members of deceased persons, to participate in the process of investigation. According to the draft revision:

The relatives of a deceased person must be sought and informed of the investigation. Family members should be granted legal standing and investigative mechanisms or authorities should communicate with family members in a timely manner during all phases of the investigation. Families should be invited by the investigating authorities to make suggestions and arguments, provide evidence, and assert their interests and rights throughout the process. They should be informed of, and have access to, any hearing relevant to the investigation, and they should be provided with information relevant to the investigation. In certain circumstances — for example, where family members are suspected perpetrators — these rights may be subject to restrictions, but only where, and to the extent, strictly necessary to ensure the integrity of the investigation [internal citations omitted].¹⁴

The right of victims and family members to participate in and be informed about the process of investigations is rooted in the right to the truth, which is included in the right to information protected by the ICCPR Article 19. The right to truth includes the right of victims and their families “to know the truth about the events that led to serious violations of human rights, and the right to know the identity of those who played a role in the violations.”¹⁵ In addition, society as a whole has the “inalienable right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed, in order to prevent recurrence of such acts in the future.”¹⁶

¹³ *Kaya*, *supra* note 11.

¹⁴ UN Office of the High Commissioner for Human Rights, *Revision of the UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* (the Minnesota Protocol), para 41, available at: <http://www.ohchr.org/Documents/Issues/Executions/UNManual2015/A.HRC.32.39.Add.4.docx>, citing UN Human Rights Council, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, 9 August 2012, A/HRC/21/46, para 54, available at: <http://www.refworld.org/docid/5051ba982.html>; IACtHR, *Villagrán-Morales v. Guatemala*, Judgment (Merits), 19 November 1999, paras 225, 227, 229, available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_63_ing.pdf; Minnesota Principles, Article 15, IACtHR, *Manuel Stalin Bolaños v. Ecuador*, Report No. 10/95, Case 10.580, 12 September 1995, para 45, available at: <https://www.cidh.oas.org/annualrep/95eng/Ecuador10580.htm>.

¹⁵ *Ibid.*, at para 14.

¹⁶ *Ibid.*, at para 15. See also para 24, citing OAS, General Assembly, Resolution AG/RES. 2175 (XXXVI -O/06) “Right to the Truth” and UN, Commission on Human Rights, Report of the Office of the United Nations High Commissioner for Human Rights, Study on the right to the truth, E/CN.4/2006/91, January 9, 2006.

Independent Commissions of Inquiry

The UN Investigation Principles require an independent commission of inquiry in certain cases where established investigative procedures are ineffective because of lack of expertise or impartiality, and for cases in which there are complaints from the family of the victim about these inadequacies or other substantial reasons. The UN *Manual on Effective Prevention and Investigation of Extra Legal, Arbitrary and Summary Executions*¹⁷ provides additional guidance.

In cases where government involvement is suspected, an objective and impartial investigation may not be possible unless a special commission of inquiry is established. A commission of inquiry may also be necessary where the expertise of the investigators is called into question.¹⁸

In *Kaya v. Turkey*, the ECtHR recognized an important reason for an independent investigation of state agents:

87. The Court observes that the procedural protection of the right to life inherent in Article 2 of the Convention secures the accountability of agents of the State for their use of lethal force by subjecting their actions to some form of independent and public scrutiny capable of leading to a determination of whether the force used was or was not justified in a particular set of circumstances.¹⁹

While States have the primary international law responsibility to exercise jurisdiction over serious crimes, in some circumstances it is recognized that “an international investigation mechanism with the expertise and capacity to conduct an independent and objective investigation may be appropriate.”²⁰ An international investigation mechanism does not replace the State’s duty to investigate, prosecute and punish.²¹ Cases where the State may consent to a commission of investigation under international auspices include situations where the mechanisms of the state are in such disrepute that there is a profound lack of public confidence in the ability of the State to conduct an independent, impartial or thorough investigation.²²

¹⁷ UN Department of Political Affairs, *United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, U.N. DOC. E/ST/CSDHA/.12 (1991) (Minnesota Protocol). A revision of the Minnesota Protocol is currently underway in consultation with States, academia, civil society, and other interested parties. See UN Office of the High Commissioner for Human Rights, Revision of the Minnesota Protocol at:

<http://www.ohchr.org/EN/Issues/Executions/Pages/RevisionoftheUNManualPreventionExtraLegalArbitrary.aspx>.

See the draft revision at:

<http://www.ohchr.org/Documents/Issues/Executions/UNManual2015/A.HRC.32.39.Add.4.docx>.

¹⁸ United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, U.N. Doc. E/St/Csdha/.12 (1991), Section D. Commissions of Inquiry.

¹⁹ *Kaya*, *supra* note 11, § 87.

²⁰ UN Office of the High Commissioner for Human Rights, *Revision of the UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* (the Minnesota Protocol), para 46, available at: <http://www.ohchr.org/Documents/Issues/Executions/UNManual2015/A.HRC.32.39.Add.4.docx>.

²¹ *Ibid.* at para 47.

²² For example, in the cases of the disappearances of 43 students from the Ayotzinapa teaching college in September 2014, Mexico consented in 2014 to the establishment of an international commission of inquiry with international experts appointed under the auspices of the IACHR. See the tripartite agreement at “IACHR Makes Official Technical Cooperation Agreement about Ayotzinapa Students in Mexico”, IACHR press release, November 18, 2014, available at: http://www.oas.org/en/iachr/media_center/PReleases/2014/136.asp. See the report (Spanish) at

Turkey is obliged by international law to respect and ensure the right to life and to prevent and punish violations. An integral part of these twin duties is to conduct investigations of unlawful killings that are capable of determining the cause and particulars of death, identifying the perpetrator(s) and enabling the prosecutions, trials and imposition of the punishment(s) required by law. These international law duties arise from membership in the United Nations, the UDHR, the ICCPR, and from customary international law. In cases where there is no public confidence in the ability of the State to conduct a thorough, independent, impartial investigation, Turkey has a duty to appoint an independent commission of inquiry that complies with the standards established by the UN Investigation Principles. Where the State is unable to appoint a domestic Commission of Inquiry that is domestically and internationally trusted, the duty to investigate is neither abrogated nor abridged. In such a situation, it may be necessary for the State to seek the assistance of the United Nations.

6 August 2016