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Investigating Potentially Unlawful Death under International Law: The 2016 Minnesota Protocol

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I. Introduction

Across every region of the world, states are daily alleged to have committed or to have failed to prevent unlawful killings. From police shootings of members of ethnic minorities, to the use of lethal force against protestors during peacetime, to indiscriminate air strikes and targeted attacks on civilians during armed conflict, one of the most pressing concerns is ensuring that an effective investigation of the killing is conducted. Without an investigation, accountability is typically impossible, and families and communities must endure the pain of loss without knowing the truth, much less seeing justice. Investigations are an essential component of the right to life and are necessary to prevent future violations.

International treaties protect the universally binding right to life and permit killing only in narrow, strictly defined circumstances. When a life has been lost and it is uncertain whether this occurred in accordance with the law, the death must be investigated. But treaties do not set out the specific standards or processes for proper investigations of alleged violations. Instead, agreed international legal standards have developed over time. States, international human rights bodies, and practitioners have relied on supplemental international instruments to set out the agreed substantive and procedural legal elements of the right to life and to advance the best investigation practice.

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In May 2017, the Office of the United Nations High Commissioner for Human Rights (OHCHR) published the Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016), a restatement of the international standards governing the conduct of such investigations.¹ The 2016 Minnesota Protocol² is an extensive revision of the original Minnesota Protocol, officially entitled the United Nations Manual on the Effective Prevention and Investigation of Extra-legal Arbitrary and Summary Executions (the 1991 Minnesota Protocol); the original 1991 Minnesota Protocol became the point of reference for standards applicable to the investigation of potentially unlawful death.³

This article—co-authored by some of those who led the Protocol’s revision—describes the process that led to the original Protocol, explores the need for and the method of the Protocol’s revision, and discusses the reasons for decisions taken about the nature or scope of revisions. Also, this article summarizes the relevant international standards by describing how an investigation should be conducted in accordance with the new Protocol, and further analyzes the Protocol’s status. The article concludes by indicating how the Minnesota Protocol can continue to guide implementation of the duty to investigate under international law.

The 2016 Protocol was drafted over the course of two years in a process led by the U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions—Christof Heyns—in collaboration with the OHCHR.⁴ An international team of legal, human rights, investigation, and forensic experts, with support from a high-level advisory panel, reviewed and revised the text of the 1991 Protocol, taking into account legal and technical developments since the drafting of the original instrument.⁵ The revision process aimed to produce an updated document that would set out international law on investigations in a holistic manner and outline good practice in investigation in light of advances in forensic science.⁶

1. See Off. of the U.N. High Comm’r for Hum. Rts., UN Rights Office Launches Global Guidelines for Investigating Unlawful Killings (May 24, 2017), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21661&LangID=E>.

2. See OFF. OF THE U.N. HIGH COMM’R FOR HUM. RTS., MINNESOTA PROTOCOL ON THE INVESTIGATION OF POTENTIALLY UNLAWFUL DEATH (2016): THE REVISED UNITED NATIONS MANUAL ON THE EFFECTIVE PREVENTION AND INVESTIGATION OF EXTRA-LEGAL, ARBITRARY AND SUMMARY EXECUTIONS, U.N. Doc. HR/PUB/17/4, U.N. Sales No. E.17.XIV.3 (2017) [hereinafter Minnesota Protocol II].

3. U.N. OFF. AT VIENNA CTR. FOR SOCIAL DEV. AND HUMANITARIAN AFF., UNITED NATIONS MANUAL ON THE EFFECTIVE PREVENTION AND INVESTIGATION OF EXTRA-LEGAL, ARBITRARY AND SUMMARY EXECUTIONS, U.N. Doc. ST/CSDHA/12, Sales No. E.91.IV.1 (1991), <http://hrlibrary.umn.edu/instreet/executioninvestigation-91.html> [hereinafter Minnesota Protocol I].

4. Minnesota Protocol II, *supra* note 2, § VI.

5. Off. of the U.N. High Comm’r for Hum. Rts, Revision of the UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (the Minnesota Protocol), <https://www.ohchr.org/en/issues/executions/pages/revisionoftheunmanualpreventionextralegalarbitrary.aspx> (last visited Oct. 22, 2018).

6. *Id.*

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The right to life has both substantive and procedural legal elements.⁷ The substantive element pertains to the question of when deprivation of life falls within the limitations recognized under international law. For example, in the circumstances, did a particular use of force in law enforcement or in the conduct of hostilities during armed conflict comply with the applicable legal regimes?⁸ The procedural element of the right to life concerns accountability for unlawful death, in particular, when and how investigations into deaths that may have been unlawful must be conducted.⁹ Thus, a failure to conduct a proper investigation of a potentially unlawful death is regarded, in itself, as a violation of the right to life.¹⁰ The primary international instruments that set out the procedural aspect of the right to life are the United Nations Principles on the Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions of 1989 (U.N. Principles on the Investigation of Extrajudicial Executions)¹¹ and the Minnesota Protocol, first in 1991 and now in its 2016 iteration.¹² The 1991 Minnesota Protocol was largely developed to operationalize and give detailed content to the more general standards set out in the U.N. Principles on the Investigation of Extrajudicial Executions.¹³

In focusing on the procedural legal elements of the right to life, the new Protocol provides detail on the legal basis for the duty to investigate, as well as the triggers for the application of the duty, and its scope. It explains what international law demands of each investigation—that it be “(i) prompt; (ii) effective and thorough; (iii) independent and impartial; and (iv) transparent.”¹⁴ Building on the original Protocol, the revision also outlines the rights of families during an investigation.¹⁵ The revised Protocol, like its predecessor, is also intended as a practical guide to investigations as well as a training tool, and the bulk of it sets out the steps required for an effective investigation.¹⁶

The Protocol is a comprehensive restatement of the procedural component of the right to life.¹⁷ It is intended to assist a range of actors, including States, investigators, civil society organizations, and rights-holders themselves, to ensure that proper investigations of suspected unlawful killings are conducted.¹⁸ It is not a step-by-step handbook but a guide to good practice, and the 2016 Protocol reflects scientific developments over

7. See, e.g., *McCann v. United Kingdom*, 324 Eur. Ct. H.R. (ser. A) 97, 163 (1995).

8. See *id.*

9. See *id.*

10. See *id.*

11. Economic and Social Council Res. 1989/65 (May 24, 1989), <https://digitallibrary.un.org/record/75550?ln=en>.

12. See Minnesota Protocol II, *supra* note 2, § VI.

13. See *id.* at § V.

14. See *id.* at 7.

15. See *id.* at 9.

16. Compare Minnesota Protocol II, *supra* note 2, with Minnesota Protocol I, *supra* note 3.

17. See Minnesota Protocol II, *supra* note 2, § V.

18. See *id.* at 2.

the past twenty-five years and contemporary good investigation practice.¹⁹ It contains sections on topics such as investigation strategy, crime-scene management, witness interviews, human remains analysis, and professional ethics.²⁰ Prepared by the world's leading experts across many fields, the Protocol provides the leading international standard for death investigations.²¹

II. Elaboration of the U.N. Principles on the Investigation of Extrajudicial Executions and the 1991 Minnesota Protocol

The original 1991 Protocol and the U.N. Principles on the Investigation of Extrajudicial Executions developed out of the efforts of coalitions of advocates from around the world and from both law and the sciences, and from civil society and intergovernmental organizations.²² They developed in contexts of significant international concern for politically motivated State violence, the increasing use by international civil society of strategies focused on human rights norm development, the establishment of U.N. Special Procedures, and the increasing use of forensics in human rights investigations.²³

The issue of State torture and killings was one of the touchstone human rights issues of the late 1970s and early 1980s, particularly for civil society in Latin America, and seeking accountability for State perpetrators was one of the main areas of emphasis.²⁴ A global campaign against torture during the mid-1970s led by human rights Non-Governmental Organizations (NGOs), such as Amnesty International, brought the role that civil society could play in addressing serious violations of bodily integrity into global focus, and helped set the stage for international efforts to develop norms related to extrajudicial killings.²⁵ Official organs of the United Nations were also seized by the challenge of how to address political killings and the challenge of impunity for unlawful killings.²⁶ In 1982, the United Nations Commission on Human Rights appointed prominent Kenyan lawyer Amos Wako as Special Rapporteur to study the problem of extrajudicial, summary,

19. See *id.* § V.2.

20. See *id.* §§ X-XI.

21. See *id.* § VI.

22. See *id.*

23. See Minnesota Protocol I, *supra* note 3, at 4; Minnesota Protocol II, *supra* note 2, § V.

24. Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 449, 454 (1990).

25. See Amnesty Int'l, *Conference for the Abolition of Torture, Final Report*, at 7, AI Index ACT 40/002/1973 (Dec. 11, 1973), <https://www.amnesty.org/download/Documents/204000/act400021973en.pdf>.

26. ROXANA FERLLINI, *FORENSIC ARCHAEOLOGY AND HUMAN RIGHTS VIOLATIONS* 57 (Roxana Ferllini et al., eds., 2007).

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or arbitrary executions, specifically in response to political killings in Latin American and Africa.²⁷

During the 1980s, forensic science techniques took on an increasingly critical function in investigations of human rights violations—particularly in Argentina with the work of the Equipo Argentino de Antropología Forense (Argentine Forensic Anthropology Team) (EAAF)—and then spread across the region and the world.²⁸ As the use of forensics increased globally and increased the possibilities for truth and accountability by expanding and strengthening available scientific evidence—even long after death—it also raised questions about proper procedures and agreed best scientific practice.

The growing importance of forensic investigations for the protection of the right to life began to be clearly articulated by civil society and U.N.-appointed experts during the 1980s.²⁹ Human rights NGOs, such as the EAAF, used forensic techniques as their primary method to advance accountability and the rights of families of the murdered and the disappeared.³⁰ Groups like Amnesty International underlined the importance of governments establishing proper investigation procedures so that families could learn the cause of death and identify those responsible.³¹

One of the driving forces behind bringing a forensic component into legal standards on the investigation of suspicious deaths was David Weissbrodt, a human rights scholar based at the University of Minnesota.³² In 1983, as

27. See Economic and Social Council Res. 1982/35, ¶¶ 3–5 (May 7, 1982); S. Amos Wako (Special Rapporteur on Summary or Arbitrary Executions), *Summary or Arbitrary Executions*, at i, U.N. Doc. E/CN.4/1983/16/Add.1 (Jan. 31, 1983), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G83/113/62/PDF/G8311362.pdf?OpenElement>. In the keynote address to the Commission on Human Rights in 1982, to which the creation of the mandate is often attached, by the Director of the Division of Human Rights, Theo van Boven took the then unusual step of directly naming States, and citing numbers. He mentioned in particular Chile, El Salvador, Equatorial Guinea, Guatemala, and Uganda. He also cited the annual report of the Inter-American Commission on Human Rights. See U.N. ESCOR, 38th Session, 1st mtg. at 3, U.N. Doc. E/CN.4/1982/SR.1 (Feb. 2, 1982); see also ANN MARIE CLARK, *DIPLOMACY OF CONSCIENCE: AMNESTY INTERNATIONAL AND CHANGING HUMAN RIGHTS NORMS* 109 (Princeton Univ. Press ed., 2001).

28. See Luis Fondebrider, *Reflections on the Scientific Documentation of Human Rights Violations*, 84 INT'L REV. RED CROSS 885, 887 (2002); Robert H. Kirschner & Karl E. Hannibal, *The Application of the Forensic Sciences to Human Rights Investigations*, 13 MED. & L. 451, 455 (1994).

29. FERLLINI, *supra* note 26, at 12.

30. See Mercedes Doretti & Luis Fondebrider, *Truth, Justice, Reparation, and Reconciliation, a Long Way in Third World Countries*, in *ARCHEOLOGIES OF THE CONTEMPORARY PAST* 138, 144 (Victor Buchli & Gavin Lucas eds., 2001).

31. See Amnesty Int'l, *Extrajudicial Executions in El Salvador, Report of an Amnesty International Mission to Examine Post-Mortem and Investigative Procedures in Political Killings, 1–6 July 1983*, at 11, 45, AI Index AMR 29/14/84 (May 1984) (the report further noted that: “[c]ertification of death, like registration of births, is generally considered a fundamental responsibility of the government, through which demographic data is maintained, public health monitored and right to life protected”).

32. Cynthia Scott, *The “Minnesota Protocol” - created by faculty and alumni of the University of Minnesota Law School - holds governments accountable for their crimes against humanity*, <https://umn.alumni.org/UMAA-stories/In-the-Bones> (last visited Oct. 22, 2018).

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Amnesty International was preparing a report on El Salvador and finalizing its influential *Political Killings by Governments* report, Weissbrodt was on sabbatical leave working at Amnesty's legal office in London.³³ The latter report built upon an international meeting organized by the Dutch section of Amnesty in May 1982, which played a central role in emerging international interest in the subject.³⁴

Central to the conclusions and recommendations of that meeting had been that "[m]inimum standards should be developed for investigation and the assessment of information by non-governmental organizations in cases of extrajudicial executions" and that "[m]inimum standards should be developed to establish that a government has investigated reports of extrajudicial executions in good faith."³⁵ At a practical level, the utility of such agreed standards was made evident in the aftermath of the assassination of Senator Benigno Aquino in 1983, when advocacy organizations criticized the failure of the Marcos regime to conduct a meaningful investigation.³⁶ They could not point to an explicit international standard according to which the regime could be found wanting.³⁷

That year, at Weissbrodt's suggestion, the newly founded Minnesota Lawyers International Human Rights Committee (the Minnesota Lawyers) engaged an international group of experts in law and forensic science to develop practical guidance on the conduct of forensic investigations into suspicious deaths.³⁸ That project was divided into two parts: one medical and the other legal.³⁹ At the same time, the newly appointed U.N. Special Rapporteur, Amos Wako, highlighted the issue of investigations as central to the work of the mandate.⁴⁰ Indeed, in Wako's very first report, published in 1983, he listed among his recommendations that "[m]inimum standards of investigation need to be laid down to show whether a Government has genuinely investigated a case reported to it and that those responsible are fully accountable."⁴¹

33. See KATHRYN SIKKINK, *THE JUSTICE CASCADE, HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS* 108 (2011).

34. See Amnesty Int'l, *Political Killings by Governments*, at 100–17, 120–27, AI Index ACT 03/26/82 (Dec. 15, 1983) (Expanding on the Final Statement of the International Conference on Extrajudicial Executions, attached in Appendix II).

35. See *id.* at 111.

36. Kaoru Umino, Note, *Investigating the Assassination of Benigno S. Aquino: Lessons from the Agrava Commission*, 18 COLUM. HUM. RTS. L. REV. 169, 187 (1986).

37. See Clark, *supra* note 27, at 114.

38. See Jennifer Prestholdt, *The Minnesota Protocol: Creating Guidelines for Effective Investigations*, ADVOCATES POST (Feb. 26, 2016), https://theadvocatespost.org/2016/02/26/minnesota_protocol.

39. See *id.*

40. S. Amos Wako (Special Rapporteur on Summary or Arbitrary Executions), *Summary or Arbitrary Executions*, at 43, U.N. Doc. E/CN.4/1983/16/Add.1 (Jan. 31, 1983), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G83/113/62/PDF/G8311362.pdf>.

41. *Id.*

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In September 1984, an interregional preparatory meeting convened in Varenna, Italy, ahead of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders (now known as the U.N. Congress on Crime Prevention and Criminal Justice).⁴² The preparatory meeting was dedicated to the “formulation and application of United Nations standards and norms in criminal justice,” with an agenda item addressing extra-legal, arbitrary, and summary executions, building on the Special Rapporteur’s 1983 report.⁴³

The meeting made a set of “recommendations for consideration and further action by the . . . Congress, [including,] in the national context: [s]tandards for the genuine investigation of all violent deaths and all deaths in custody should be established;” that independent monitoring should be protected; that those entrusted with inquiries should possess acknowledged “impartiality and competence” and be empowered with necessary investigatory powers; and that “[t]here should be procedures to guarantee that deaths in any official kind of custody or custody known to, or permitted by, the authorities were reported to appropriate independent authorities, whose task should be to conduct a genuine and reliable investigation of such deaths.”⁴⁴ The following year, drawing particular attention to these detailed recommendations from the preparatory meeting, the Congress requested a report from the U.N. Secretary-General that would review all documents on the effective prevention, investigation, and elimination of extra-legal, arbitrary, and summary executions for review by the Committee on Crime Prevention and Control.⁴⁵

In his 1986 report, Special Rapporteur Wako highlighted “a need to develop international standards designed to ensure that investigations are conducted into all cases of suspicious death and in particular those at the hands of the law enforcement agencies in all situations.”⁴⁶ Such standards, he noted, should include adequate autopsies, and the results should be made public.⁴⁷ Although this was far from generally accepted at the time, he also highlighted that “[a] death in any type of custody should be regarded as

42. See Seventh U.N. Cong. on the Prevention of Crime and the Treatment of Offenders, *Report of the Interregional Preparatory Meeting for the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders on Topic V: “Formulation and Application of the United Nations Standards and Norms in Criminal Justice”*, at i, UN Doc. A/CONF.121/IPM/3 (Oct. 10, 1984), https://www.unodc.org/documents/congress//Previous_Congresses/7th_Congress_1985/042_ACONF.121.IPM.3_Topic_V_-_Formulation_and_Application_of_UN_Standards_and_Norms_in_Criminal_Justice.pdf.

43. See *id.* §§ i–ii (internal quotations omitted).

44. See *id.* at 16–17.

45. See UN DEP’T OF INT’L ECON. AND SOC. AFFAIRS, SEVENTH UNITED NATIONS CONGRESS ON THE PREVENTION OF CRIME AND THE TREATMENT OF OFFENDERS, at 78, U.N. Doc. A/CONF.121/22/Rev.1, U.N. Sales No. E.86.IV.1 (1985), <https://digitallibrary.un.org/record/114498/files/a-conf-121-22-rev-1-e.pdf>.

46. S. Amos Wako (Special Rapporteur on Summary or Arbitrary Executions), *Summary or Arbitrary Executions*, § 209, U.N. Doc. E/CN.4/1986/21 (Feb. 7, 1986).

47. *Id.*

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prima facie a summary or arbitrary execution and appropriate investigations should immediately be made to confirm or rebut the presumption.”⁴⁸ In the same year, the Economic and Social Council (ECOSOC) passed a resolution requesting that the U.N. Committee on Crime Prevention and Control consider arbitrary executions during its 1988 session “with a view to elaborating principles on the effective prevention and investigation of such practices.”⁴⁹

The following year, in the resolution concerning the Special Rapporteur’s mandate, the Commission on Human Rights and ECOSOC underlined his recommendation that States should “[r]eview the machinery for investigation of deaths under suspicious circumstances in order to secure an impartial, independent investigation on such deaths, including an adequate autopsy.”⁵⁰ They specifically recommended that international organizations “[m]ake a concerted effort to draft international standards designed to ensure proper investigation by appropriate authorities into all cases of suspicious death, including provisions for adequate autopsy.”⁵¹

In explaining the significance of such standards, David Weissbrodt noted that, in addition to the practical benefits of knowledge sharing in improving the quality of investigations:

the existence of internationally accepted standards [would] enable the international community of forensic scientists, police officers, prosecuting lawyers and judges to provide support, some protection and autonomy for physicians and investigators who might otherwise be intimidated by their governments or other groups into performing inadequate investigations or reaching unjustified conclusions.⁵²

At this point, the civil society processes and the official U.N. processes began to overlap. At their own initiative, and building upon their earlier research, the Minnesota Lawyers drafted a document that also partly spoke to the ECOSOC and Commission recommendation, entitled “Standards for the Investigation of Arbitrary Killings.”⁵³ Meanwhile, the U.N. Secretariat in Vienna prepared a set of draft principles on the effective prevention and investigation of extra-legal, arbitrary, and summary executions.⁵⁴ Both draft documents were presented at an October 1987 conference, hosted by the Minnesota Lawyers, on the subject of “Promoting Human Rights Through

48. *Id.*

49. Economic and Social Council Res. 1986/10, § VI(2) (May 21, 1986).

50. See Comm. on Hum. Rts., Rep. on Its Forty-Third Session, at 3, U.N. Doc. E/CN.4/1987/60 (Feb. 2–Mar. 13, 1987) (commission on Human Rights Resolution 1987/57 was adopted without a vote on March 11, 1987).

51. *Id.* at 3–4.

52. David Weissbrodt, *The Three “Theme” Special Rapporteurs of the UN Commission on Human Rights*, 80 A.J.I.L. 685, 692 (1986).

53. See, e.g., David Weissbrodt and Terri Rosen, *Principles against Executions*, 13 HAMLINE L. REV. 579, 584 (1990) (internal quotations omitted).

54. See Minnesota Protocol I, *supra* note 3, at 10.

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Adequate Inquiry Procedures,” which was attended by all the relevant U.N. agencies and a range of human rights NGOs.⁵⁵

In June 1988, another preparatory meeting was held in Vienna to develop the documents emanating from Minnesota into a set of principles that was presented to and adopted by the Committee on Crime Prevention and Control in August 1988.⁵⁶ In May 1989, ECOSOC adopted the U.N. Principles on the Investigation of Executions, under the title United Nations Principles on the Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions.⁵⁷ The Principles were endorsed by the General Assembly later that year.⁵⁸

In his 1990 report, the Special Rapporteur commended the collaboration that had led to the adoption of the U.N. Principles on the Investigation of Extrajudicial Executions, including the role played by the Minnesota Lawyers, describing the Principles as “a milestone for his mandate” that would strongly support its implementation.⁵⁹ He emphasized that:

[Because] the principles adopted by the Economic and Social Council reflect the Special Rapporteur’s ideas and views in sufficient detail, he [would] be able to refer, without any reservation, to these principles in his examination of alleged incidents of summary or arbitrary executions. Any Government’s practice that fails to reach the standards set out in the principles may be regarded as an indication of the Government’s responsibility, even if no Government officials are found to be directly involved in the acts of summary or arbitrary execution.⁶⁰

He also drew the Commission’s attention to the fact that work was continuing on a manual to supplement these principles and stated that he looked forward to it becoming widely available.⁶¹

The process of elaborating the more practice-oriented Manual had been continuing alongside the development of the U.N. Principles on the Investigation of Extrajudicial Executions. Weissbrodt, on behalf of the Minnesota Lawyers, had been liaising with the Danish Permanent Mission to the United Nations, which, at the Commission for Human Rights and then the General Assembly, presented language for resolutions that referenced the draft manual.⁶² One such resolution was the General Assembly’s resolution on the Special Rapporteur’s mandate in 1988, which

55. David Weissbrodt, *supra* note 53.

56. *Id.* at 585.

57. Economic and Social Council Res. 1989/65, ¶ 12 (May 24, 1989).

58. G.A. Res. 44/162, ¶¶ 11–12 (Dec. 15, 1989) (adopted without a vote).

59. S. Amos Wako (Special Rapporteur on Summary or Arbitrary Executions), *Summary or Arbitrary Executions*, § 461, U.N. Doc. E/CN.4/1990/22 (Jan. 23, 1990).

60. *Id.* § 463.

61. *See id.* § 464.

62. See Comm’n on Human Rights Res. 1998/36, U.N. Doc. E/CN.4/RES/1998/36 (Apr. 17, 1998); Comm’n on Human Rights Res. 2005/26, U.N. Doc. E/CN.4/2005/26, § 3 (Apr. 19, 2005).

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had called on Member States, international organizations, and NGOs “to support the efforts made in the United Nations forums towards the adoption of an international instrument that would incorporate international standards for proper investigation of all cases of death in suspicious circumstances, including provision for adequate autopsy” and had endorsed the Special Rapporteur’s proposals concerning the elements to be included.⁶³

A 1990 meeting of the Committee on Crime Prevention and Control, held in Vienna, adopted a draft resolution, “Implementation of United Nations Standards and Norms in Crime Prevention and Criminal Justice,” that highlighted, among other documents, the adoption of the Principles by ECOSOC and called on Member States to implement such standards at the national level and to devise means of enhancing their observance (including through channels such as university curricula, training seminars, professional groups and the mass media).⁶⁴

Many drafts of the Manual were exchanged between U.N. officials and staff working with the Minnesota Lawyers, Amnesty International, and others. Eventually, in May 1991, the then Crime Prevention and Criminal Justice Branch of the Centre for Social Development and Humanitarian Affairs (the forerunner of the U.N. Office on Drugs and Crime, UNODC) concluded and published the document, now titled the United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.⁶⁵ Unlike the U.N. Principles on the Investigation of Extrajudicial Executions, which were “endorsed” by the General Assembly, the Manual did not receive official, high-level approval within the United Nations.⁶⁶ It was thus an expert document, with its importance deriving from the expertise of the multidisciplinary group that drafted it.⁶⁷

While the new document was officially called the “United Nations Manual,” it soon became known as the Minnesota Protocol, which was the subtitle of the Model Protocol for a Legal Investigation of Extralegal, Arbitrary and Summary Executions.⁶⁸ The text of the new document affirms that the adoption of standards on investigations:

[The 2016 Minnesota Protocol] will also provide international observers with guidelines to evaluate investigations of suspicious deaths. Non-compliance with the standards can be publicized and pressure brought against non-complying Governments, especially where extra-legal, arbitrary and summary executions are believed to have occurred. If a Government refuses to establish impartial inquest procedures in

63. G.A. Res. 43/151, ¶¶ 10–11 (Dec. 8, 1988).

64. Comm. on Crime Prevention and Control Rep. on Its Eleventh Session U.N. Doc. E/AC.57/1990/80, at 8, 10 (Feb. 5, 1990).

65. See Minnesota Protocol I, *supra* note 3, at 10.

66. See Minnesota Protocol II, *supra* note 2, § V.

67. See *id.*

68. *Id.*

such cases, it might be inferred that the Government is hiding such executions. The fear of condemnation by the international community may encourage government compliance with the inquest standards, which, in turn, should reduce extra-legal, arbitrary and summary executions.⁶⁹

In his report the following year, Special Rapporteur Wako noted that it was “a document of major importance for guaranteeing the right to life” and urged all governments to incorporate these procedures into national legislation and practice, as well as in training programs for law enforcement officials.⁷⁰

III. The Revision of the Minnesota Protocol

A. MOTIVATION FOR REVISION

“A number of considerations prompted [the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof] Heyns, to consider” revising the 1991 Minnesota Protocol during his term as mandate holder (2010–2016).⁷¹

He encountered the application of the Minnesota Protocol in the field during country visits, the first of which took place during his mission to India in 2012. In mortuaries, medical personnel involved in autopsies emphasized to the Special Rapporteur the importance of the Protocol, but at the same time pointed out that it had become outdated. The Special Rapporteur consulted forensic experts working for U.N. bodies, the International Committee of the Red Cross (ICRC), and NGOs, who expressed the same concerns while adding that the Protocol lacked a section on the identification of the dead in cases of suspicious death, an aspect of an investigation that had evolved since the Protocol’s original elaboration to become a critical issue.⁷²

While the revision was prompted by concerns expressed by medical and forensic experts, an examination of the Protocol also revealed that the section on “legal standards” (Section D)—setting out the main instruments and mechanisms for the protection of human rights of relevance to arbitrary executions—had become wholly outdated.⁷³ At the same time, the Protocol said little about the right to life itself or the role of investigations in the

69. *Id.* at 14.

70. S. Amos Wako (Special Rapporteur on Summary or Arbitrary Executions), *Summary or Arbitrary Executions*, § 22, U.N. Doc. E/CN.4/1992/30 (Jan. 31, 1992).

71. *The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)*, INST. FOR INT’L AND COMP. L. IN AFR., <http://www.icla.up.ac.za/engagement-with-international-organisations/un/special-projects/revision-of-the-un-manual> (last visited Oct. 11, 2018) [hereinafter *Minnesota Protocol Comp. Law*].

72. *Id.*

73. See Minnesota Protocol I, *supra* note 3, at 4–12.

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realization of this right.⁷⁴ The section justifying the elaboration of international standards on the investigation of arbitrary killings (Section II) made sense when the enterprise was first embarked upon, but no longer seemed necessary.⁷⁵ The section on Commissions of Inquiry (Section III(D)) was also outdated and had been little used in practice.⁷⁶

It was clear that the Minnesota Protocol was largely used by medical and forensic practitioners, but the fact that it contained some legal provisions, however fragmented and outdated, provided an opportunity to develop the legal part of the Protocol further and to ensure the coherence between the medical and legal components.⁷⁷

It had also become clear that the process of ensuring accountability had to be conceptualized as a chain, which was only as strong as its weakest link. If anyone involved in that process—the police, other investigators, forensic specialists, prosecutors, or judges—did not do a proper job, the efforts of the others would come to naught, thereby reducing accountability.

“In a number of reports, the Special Rapporteur emphasized that proper investigations were part and parcel of respecting, protecting, and ensuring the right to life and a lack of accountability constituted a violation of the right to life in itself.”⁷⁸ Research for a report by the Rapporteur on the safety of journalists revealed the direct correlation between the vulnerability of such groups and the lack of proper accountability mechanisms.⁷⁹ The increased focus of the mandate on the right to life in the context of armed conflict and counterterrorism measures, including through the use of armed drones, also brought to the fore the question of the triggers and standards for investigations in such situations.⁸⁰

Overall, and building upon the work of his predecessors, it became a central contention of Heyns’ work in the mandate that a focus on the substantive aspects of the right to life was incomplete, and had to be supplemented with an emphasis on the procedural aspects. In many cases examined by the Rapporteur, Member States would not dispute the

74. *See generally id.*

75. *See id.* at 13–14.

76. *See id.* at 18–23.

77. *Id.*

78. *Id.*; *see* Christof Heyns (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, ¶ 44, U.N. Doc. A/66/330 (Aug. 30, 2011) (this point was first explicitly made by the Rapporteur in his report on use of force by law enforcement).

79. Christof Heyns (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions*, ¶ 43, U.N. Doc. A/HRC/20/22 (Apr. 10, 2012).

80. Christof Heyns (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions*, ¶¶ 1, 108, U.N. Doc. A/68/382 (Sept. 13, 2013) (discussing armed drones).

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applicable substantive legal standards, but instead would deny the facts.⁸¹ In other words, the full realization of the right to life would often depend on proper investigations.⁸² The revision of the Protocol can thus be seen as an effort to guide the work of the mandate, as well as an effort to assist others who play a role in the accountability chain.

With this in mind, the Special Rapporteur commissioned Toby Fisher, a barrister specializing in human rights law, to conduct

[a] scoping exercise to determine the extent to which stakeholders around the globe supported a proposal to revise and update the Protocol. The responses were consistent: the Protocol was useful and important, but in need of thorough revision: from both the forensic science advances and with regard to the international legal developments.⁸³

DNA testing and digital photography, among other technologies, have revolutionized forensic science and needed to be appropriately reflected in any revised Protocol.

Moreover, as part of the scoping exercise, the Rapporteur “identified a series of resolutions from 1998 to 2005 from the then U.N. Commission on Human Rights that called on the OHCHR and UNODC’s Crime Prevention and Criminal Justice Division to consider revising the Manual” and requested the U.N. Secretary-General to provide the necessary funding.⁸⁴

Notwithstanding those resolutions, no work had been done to revise the document by 2013, though they provided further support to the

81. Christof Heyns (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions) & Maina Kiai (Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association), *Joint Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association and the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions on the Proper Management of Assemblies*, U.N. Doc. A/HRC/31/66 (Feb. 4, 2016).

82. *See id.*

83. *Minnesota Protocol Comp. Law*, *supra* note 71. The members of the Legal and Forensics Working Groups are listed on page vii of the 2016 Minnesota Protocol. They included experts from organizations and institutions such as the International Criminal Court, the Special Tribunal for Lebanon, the ICRC, Human Rights Watch, the International Commission of Jurists, and Physicians for Human Rights. Several experts had served as co-authors of the 1991 Minnesota Protocol. *Id.*

84. *Id.*; *see also* Comm’n on Human Rights Res. 2005/26, U.N. Doc. E/CN.4/RES/2005/26, § 9 (Apr. 20, 2005); Comm’n on Human Rights Res. 2003/33, U.N. Doc. E/CN.4/RES/2003/33, § 9 (Apr. 23, 2003); Comm’n on Human Rights Res. 2000/32, U.N. Doc. E/CN.4/RES/2000/32, § 4 (Apr. 20, 2000); Comm’n on Human Rights Res. 1998/36, U.N. Doc. E/CN.4/1998/36, § 3 (Apr. 17, 1998). Two Human Rights Council Resolutions refer to the Commission on Human Rights resolutions cited above and call on the High Commissioner to submit a report on the possibility of drafting a manual that may serve a guide for the most effective application of forensic genetics. *See* Human Rights Council Res. 15/5, U.N. Doc. A/HRC/RES/15/5, § 7 (Oct. 6, 2010); Human Rights Council Res. 10/26, U.N. Doc. A/HRC/RES/10/26, § 6 (Mar. 27, 2009).

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mandate initiating the process and for close collaboration with the OHCHR. Such a formal collaboration between the mandate and the OHCHR was established, with the Office's expertise proving invaluable throughout the revision process.⁸⁵

The scoping exercise also sought to elicit views as to whether the Special Rapporteur should initiate a wider process to update the U.N. Principles on the Investigation of Extrajudicial Executions at the same time. The general assessment was that the U.N. Principles continued broadly to reflect the international law standards required for an effective investigation and provided a framework—endorsed by the U.N. General Assembly—upon which a revised Minnesota Protocol could be based.

B. THE PROCESS OF REVISION

Having examined the status and content of the original document to determine that a revision would be beneficial, the next step was to determine the process through which such a revision should take place.

Recognizing the diverse expertise involved in conducting investigations and in drafting and using the 1991 Protocol, it was decided to create drafting teams of world-renowned scholars and practitioners, with OHCHR and UNODC both contributing their own expertise and providing an anchor for the process. A high-level advisory panel was set up to offer broader guidance. A procedure was fashioned for government and public consultation and input at multiple phases of the revision process. Just as with the original version, the mandate of the U.N. Special Rapporteur was to play a critical role in orienting the effort.⁸⁶

There was general agreement about the need to retain within the Protocol the voice of experts—those charged on a daily basis with forensic or other investigative practice. In light of political realities and the technical complexity of the subject matter, this would make formal adoption by a United Nations body, such as the Human Rights Council, challenging. The decision was made to repeat the approach of the original Protocol, which was to present it essentially as an expert document, developed in collaboration with and published by a U.N. body, in this case the OHCHR.

Between January and May 2015, invitations were sent to a diverse range of experts to become part of two working groups to draft the revised document, as well as to join the advisory panel. Working group and advisory panel members were selected based on their internationally recognized expertise as well as to ensure a broad range of types of disciplinary knowledge and global representation.⁸⁷

⁸⁵. *Minnesota Protocol Comp. Law*, *supra* note 71.

⁸⁶. *Id.*

⁸⁷. *Id.*

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A legal working group was appointed to draft the international legal aspects of the Protocol.⁸⁸ Chaired by Professor Sarah Knuckey of Columbia Law School, it included experts in international human rights law, international criminal law, and international humanitarian law.⁸⁹ A forensics and investigations working group was also appointed to draft the investigation process aspects of the Protocol.⁹⁰ It was chaired by Dr Morris Tidball-Binz, then the Head of Forensic Services at the ICRC, and included experts in criminal investigation, fact-finding missions, and forensic medicine and anthropology.⁹¹

Research was coordinated by Stuart Casey-Maslen with Thomas Probert and Toby Fisher. The advisory panel of legal, forensics, and investigative experts, which included members drawn from Africa, the Americas, Asia, the Middle East, Western and Central Europe, and Oceania, were asked to review the text at critical junctures and provide suggestions.⁹²

“In May 2015, an initial government and public consultation was opened” via a *note verbale* to diplomatic missions in Geneva and via the OHCHR website.⁹³ This consultation introduced the initial results of the scoping exercise and a preliminary draft table of contents and presented various key questions and consultation points.⁹⁴ These issues ranged from establishing the scope of the revised Protocol to the choice between providing minimum

88. *Id.*

89. *Id.*

90. *Id.*

91. *Minnesota Protocol Comp. Law*, *supra* note 71. The members of the Legal and Forensics Working Groups are listed on page vii of the 2016 Minnesota Protocol. They included experts from organizations and institutions such as the International Criminal Court, the Special Tribunal for Lebanon, the ICRC, Human Rights Watch, the International Commission of Jurists, and Physicians for Human Rights. Several experts had served as co-authors of the 1991 Minnesota Protocol.

92. *Id.* Among many others, the Panel included former and current UN Special Rapporteurs; the Chairs of the UN Human Rights Committee and the UN Working Group on Enforced or Involuntary Disappearances; a former UN High Commissioner for Human Rights; experts from the African Commission on Human and Peoples’ Rights (ACHPR), the Association of Southeast Asian Nations (ASEAN) Intergovernmental Commission on Human Rights, and the Inter-American Commission on Human Rights; the Head of Investigations from the International Criminal Court; the President of the International Association of Forensic Scientists; and the Director of Forensic Sciences at the International Commission for Missing Persons. Importantly, a senior official from UNODC, under whose auspices the original Minnesota Protocol was adopted, also agreed to serve on the Advisory Panel.

93. *Id.*; see also Off. of the U.N. High Comm’r for Hum. Rts., Revision of the UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (the Minnesota Protocol), <https://www.ohchr.org/en/issues/executions/pages/revisionoftheunmanualpreventionextralegalarbitrary.aspx> (last visited Oct. 8, 2018).

94. See Christof Heyns (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *The UN Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions: Consultation Document*, (May 11, 2015), https://www.ohchr.org/Documents/Issues/Executions/UNManual2015/Annex2_Consultation_document.pdf.

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standards or good practice. Advisory Panel members were also asked to provide advice on these issues.⁹⁵

At the end of July 2015, the two working groups convened in Geneva to consider the results of the initial consultation and to break down the initial work of revision. Drafts were prepared, internally reviewed, and collated during the second half of 2015, ready for consideration of the working groups, who would meet together again in Geneva the following year. Meanwhile, [to make sure the process was as transparent as possible,] the Special Rapporteur dedicated half of his thematic report to the General Assembly to the question of the use of forensics in investigations.⁹⁶

He again underlined the importance of investigations and agreed standards for their conduct to the universal protection of the right to life, and he stated that he had initiated the process to revise the Protocol.⁹⁷

When presenting that report in New York, he and the chairs of the two working groups presented on the revision process to a side-event organized for [Member] States and other stakeholders.

The working groups met again in February 2016 in Geneva to review the initial drafts of many of the different components of the revised text. During the course of these meetings, the OHCHR convened an open briefing for all [Member] States and other interested stakeholders; these enabled the Rapporteur and the chairs of the two working groups to respond to questions about both the process and the substance of the revision. Several State delegations raised pertinent questions, making clear their intention to engage fully with the upcoming second written consultation.

By April 2016, a full draft text was distributed to the Advisory Panel for comment and, upon further revision, published for a second stakeholder consultation which ran until early June. Again, responses from a range of different stakeholders, including [Member] States, civil society organizations, and practitioners, were considered in detail by the working groups and amendments made to the draft text following extensive working group discussion and Advisory Panel input. The Special Rapporteur informed the Human Rights Council of the completion of the revision in June 2016. The text of the revised Protocol was presented to the U.N. High Commissioner on the last day of the Special Rapporteur's mandate: 31 July 2016.⁹⁸

"After going through internal review and approval processes, OHCHR published the Minnesota Protocol" (in advance e-version) in May 2017, and

95. See *id.* ¶¶ 4–5.

96. *Minnesota Protocol Comp. Law*, *supra* note 71.

97. See Christof Heyns, *Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions*, § 65, U.N. Doc. A/70/304, (Aug. 7, 2015).

98. *Minnesota Protocol Comp. Law*, *supra* note 71.

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published the final electronic and hard-copy English versions in October 2017.⁹⁹ As of writing, translations were underway into the other five official U.N. languages: Arabic, Chinese, French, Russian, and Spanish.¹⁰⁰

C. ISSUES DURING THE REVISION

The revision process required the Special Rapporteur and the expert drafting teams to resolve numerous issues about the content, scope, and purposes of the Protocol. Among the cross-cutting issues requiring deliberation were: the naming of the document (and its implications); whether the practical guidance in the document should be at the level of best practice, good practice, or minimum standards (or something else); whether and how the document should cover deaths during armed conflict; and how the original Protocol's sections on commissions of inquiry should be treated.

1. The Name of the Protocol

A preliminary issue that arose during drafting was what to call the document. The original title had formally been the United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, but it was most often referred to and known by the informal title: the Minnesota Protocol. The drafters decided to make the popular name "Minnesota Protocol" official, both because of the value of retaining and elevating the internationally recognized name and to recognize the ground-breaking work of the original drafters and their base in Minnesota.

There was some discussion about whether the term "protocol" should be used. Under international law, this term normally refers to a treaty, which is binding international law.¹⁰¹ This raised the question as to whether the use of the term in the context of the Minnesota Protocol could be misleading. But the history of the document and its dominant original use in forensic circles indicates that the use of the term may primarily be traced to its sense in medicine and other sciences, where "protocol" refers to an explicit, "detailed plan of a scientific or medical experiment, treatment, or procedure."¹⁰² The Istanbul Protocol, which addresses the investigation of alleged torture, has used the word "protocol" in the same sense as the Minnesota Protocol, and was similarly used by lawyers and those in other disciplines.¹⁰³ By the time of the Minnesota Protocol's revision, the combination of "Minnesota" and "protocol" had been long established.

^{99.} *See id.*

^{100.} *See id.*

^{101.} PARRY AND GRANT ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW 404–05 (John P. Grant & J. Craig Barker eds., 2004).

^{102.} *Medical Definition of Protocol*, MERIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/protocol#medical> (last visited Oct. 8, 2018).

^{103.} The formal title is the UN Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. *See generally* OFF.

Finally, the name of the original Minnesota Protocol referred to the investigation of “Extra-legal, Arbitrary, and Summary Executions.”¹⁰⁴ The revision working groups assessed that such language could be seen as prejudging the issue of whether the deaths being investigated were indeed unlawful, hence the preference for using the term “potentially unlawful death” in the new document. The wording of “unlawful death” was also chosen because of its simplicity, its ability to be readily understood without technical knowledge, and the understanding that any type of unlawful death was covered whether it resulted from an act or from an omission.

2. Best Practice, Good Practice, or Minimum Standards?

A second preliminary issue was to decide the level at which the guidance in the revised Protocol should be set. Should it aim for minimum standards, good practice, best practice, or something else? After extensive discussion among the contributing experts, it was decided that the Protocol should be framed as setting out good practice, setting a high standard of achievement for effective investigations. Nonetheless, the new Protocol (in paragraph six) notes that, “[a]lthough some [Member] States may not yet be in a position to follow all of the guidance set out within it, nothing in the Protocol should be interpreted . . . as reliev[ing] or excus[ing] any State from full compliance with its obligations under international human rights law.”¹⁰⁵

At the same time, in a number of cases, the Protocol offers guidance on minimum measures if the recommended practice is not feasible in the circumstances.¹⁰⁶ Paragraph sixty, for example, stipulates that when entering a possible crime scene “suitable protective clothing should be worn wherever it is available” and notes that this should “includ[e], at a minimum, gloves and masks.”¹⁰⁷ Consonant with practice in the International Organization for Standardization (ISO) standard-setting, the word *shall* is used to denote a requirement from which no deviation is acceptable whereas *should* identifies recommended action.¹⁰⁸

The good practice set out in the Protocol can also be relevant to the investigation work of civil society. “[W]here the rule of law has broken down, such as during armed conflict” or repressive rule, state actors may fail to conduct the required investigations, and international legal bodies may not be able to exercise jurisdiction until long after any crimes have occurred, if ever.¹⁰⁹ Under such circumstances, civil society actors without forensic expertise, “such as medical workers, journalists, or human rights activists,

OF THE U.N. HIGH COMM’R FOR HUM. RTS., ISTABUL PROTOCOL, U.N. Doc. HR/P/PT/8/Rev.1, U.N. Sales No. E.04.XIV.3 (2004).

104. Minnesota Protocol I, *supra* note 3.

105. See Minnesota Protocol II, *supra* note 2, ¶ 6.

106. *Id.* ¶¶ 25, 32, 60, 155.

107. *Id.* ¶ 60.

108. INT’L ORG. FOR STANDARDIZATION, HOW TO WRITE STANDARDS 4 (2016), <https://www.iso.org/files/live/sites/isoorg/files/archive/pdf/en/how-to-write-standards.pdf>.

109. See Minnesota Protocol II, *supra* note 2, ¶ 169.

may be the first to come upon the scene.”¹¹⁰ What they document will often “be important to future investigations as well as to the proper management of the dead and the identification of victims, even though they have no [State criminal investigation and prosecution] mandate to identify, document, or collect evidence.”¹¹¹

Nonetheless, documentation through methodical photographing and/or video recording, interviewing, accurate measuring, and thorough note-taking is a means for civil society members to contribute to truth-seeking and/or future judicial inquiries. The Protocol observes that “[t]he credibility of such documentation is increased when [any evidence obtained respects] chain-of-custody standards, allowing for independent verification of the identity of the author, the origin of the information and how [any evidence was] subsequently stored or managed.”¹¹²

3. *Applicability in Armed Conflict*

Another issue was whether to explicitly include within the scope of the Protocol those deaths occurring during armed conflict and particularly during the conduct of hostilities (i.e. combat). The original Protocol was not clear on this point. The dilemma surrounds the differing legal standards for what amounts to arbitrary deprivation of life during the conduct of hostilities. In general, the rules of international humanitarian law are less restrictive than those applicable to law enforcement.¹¹³ The decision was taken that the new Protocol should clearly cover all situations of arbitrary deprivation of life for reasons of law, principle, and pragmatism. The right to life clearly continues to apply during armed conflict, as does the legal duty to investigate.¹¹⁴ Given the large number of alleged unlawful killings during armed conflicts, the Protocol’s inapplicability to such cases would create a significant protection gap and reduce its utility in some of the most significant contemporary crises.¹¹⁵

The 2016 Protocol is thus explicit about its applicability at all times—whether peacetime, internal disturbance, or armed conflict.¹¹⁶ But the revision notes that the duty to investigate principles “must . . . be considered in light of both the circumstances and the underlying principles governing international humanitarian law,” and that an armed conflict “may pose

110. *See id.*

111. *Id.*

112. *Id.* ¶ 170.

113. Louise Doswald-Beck, *The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?*, 88 INT. REV. OF THE RED CROSS 881, 891 (2006).

114. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 95, § 25 (July 8).

115. Agnes Callamard (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on Armed Non-State Actors), *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on Armed Non-State Actors: The Protection of the Right to Life*, U.N. Doc. A/HRC/RES 38/44 (Jun. 5, 2018).

116. *See* Minnesota Protocol II, *supra* note 2, ¶¶ 16, 20.

practical challenges” for an investigation.¹¹⁷ The Protocol describes the specific investigation obligations during the conduct of hostilities in an armed conflict, providing for post-operation assessment, an inquiry, or a full investigation, depending on whether a violation of international humanitarian law or a war crime (i.e. a serious violation of international humanitarian law for which individual criminal responsibility is envisaged) is suspected to have occurred.¹¹⁸

4. *Commissions of Inquiry*

The fourth decision made was to reframe the treatment of commissions of inquiry during the revised Protocol. These were treated in a dedicated section of the original Minnesota Protocol, which is not the case in the 2016 version.¹¹⁹ Commissions of inquiry may be a mechanism to implement the duty to investigate, but they are not the only (or even the primary) means by which this can occur.¹²⁰ The 2016 Protocol focuses on setting the standards for investigations rather than prescribing the particular form that they should take—whether it is courts, commissions of inquiry, or another body or mechanism.¹²¹

5. *Structural Changes in the Protocol*

The original Protocol had five sections and three annexes.¹²² The first section addressed international human rights standards while the second described the elaboration of the 1989 U.N. Principles and the 1991 Protocol itself.¹²³ Three model protocols addressed, respectively, the legal investigation of extra-legal, arbitrary, and summary executions (focusing on commissions of inquiry); autopsy; and the disinterment and analysis of skeletal remains.¹²⁴ Annexes included a copy of the U.N. Principles on the Investigation of Extrajudicial Executions, offered guidance on the post-mortem detection of torture, and attached drawings of parts of the human body for use in autopsies to identify torture.¹²⁵

117. *See id.* ¶ 20.

118. *See id.*

119. Minnesota Protocol I, *supra* note 3, § III(D)(13).

120. Minnesota Protocol II, *supra* note 2, ¶ 39.

121. Minnesota Protocol II, *supra* note 2, ¶ 38 (“The duty to investigate does not necessarily call for one particular investigative mechanism in preference to another. States may use a wide range of mechanisms consistent with domestic law and practice, provided those mechanisms meet the international law requirements of the duty to investigate. . . . Whichever mechanisms are used, however, they must, as a whole, meet the minimum requirements set out in these Guidelines.”).

122. *See* Minnesota Protocol I, *supra* note 3.

123. *Id.* art. I.

124. *Id.* §§ III-V.

125. *Id.* at Annex §§ I-III.

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The 2016 Minnesota Protocol has seven sections.¹²⁶ Section I sets out its aim and scope.¹²⁷ Section II outlines the relevant international legal framework, describing the right to life under international law, the duties of accountability and remedy, and the triggering and scope of the duty to investigate.¹²⁸ This section also describes the requisite character of any investigation: that it be prompt, effective, independent, impartial, and transparent.¹²⁹ It also emphasizes the importance of the participation and protection of family members during an investigation. Section III defines professional ethics that govern the conduct of all those involved in any investigation of potentially unlawful death.¹³⁰

Section IV describes how an investigation of potentially unlawful death should be conducted.¹³¹ It summarizes the general principles that apply to investigations and then details the investigation process, including how to collect and manage data, materials, and important physical locations, including the death/crime scene; family liaison; understanding the victim; finding, interviewing, and protecting witnesses; international technical assistance; telecommunications and other digital evidence; and financial issues.¹³² Also addressed in Section IV are the recovery of human remains, the analysis of skeletal remains, the identification of dead bodies, types of evidence and sampling, and autopsy.¹³³

Section V sets out detailed guidelines on crime-scene investigation, the conduct of interviews, the excavation of graves, autopsy, and the analysis of skeletal remains.¹³⁴ Section VI is a glossary of key forensic and medical terms.¹³⁵ Finally, the five annexes in Section VII contain, respectively, anatomical sketches, a case details form, a firearm wound chart, a stab wound chart, and an adult dental chart.¹³⁶

IV. The Duty to Investigate under International Law

The 2016 Minnesota Protocol clarifies the international legal obligation of Member States to investigate potentially unlawful deaths and the legally required elements of such investigations.¹³⁷ The 1991 Protocol contained only minimal articulation of Member States' legal duties.¹³⁸ The drafters of the 2016 text incorporated the significant international legal developments

126. See Minnesota Protocol II, *supra* note 2.

127. *Id.* ¶¶ 1-6.

128. *Id.* ¶¶ 7-40.

129. See *id.* ¶ 20.

130. *Id.* ¶¶ 41-45.

131. *Id.* ¶¶ 46-166.

132. *Id.*

133. See Minnesota Protocol II, *supra* note 2, ¶¶ 46-166.

134. *Id.* ¶¶ 167-292.

135. *Id.*

136. *Id.* ¶¶ 52-55.

137. *Id.* ¶¶ 57-87.

138. *Id.* ¶¶ 7-40.

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in the intervening decades, and the updated Protocol includes detailed expression of the source of the duty to investigate, the triggers for and scope of the duty, its key elements, and an explanation of the legal rules related to the participation and protection of family members during investigations into potentially unlawful death.¹³⁹

The 1991 Protocol did not provide detailed guidance on relevant international law. It restated the right to life and its expression in treaties and other international documents, and, importantly, it described actions taken by international and regional human rights mechanisms to protect the right, including the history of calls for elaboration of international standards for investigations.¹⁴⁰ The 1991 Protocol included detail on reporting by the U.N. Special Rapporteur and a key 1988 report laying out elements that should form part of such standards.¹⁴¹ It also included a short paragraph summarizing the “fundamental principles of any viable investigation into the causes of death,” drawing on the U.N. Principles on the Investigation of Extrajudicial Executions, as discussed above.¹⁴² The 1991 Protocol also briefly outlined landmark Inter-American human rights decisions setting out the duty to investigate and described the extent of relevant African and European regional jurisprudence, which was then minimal.¹⁴³

In contrast, the 2016 Protocol provides detailed legal guidance both on the triggers for and scope of an investigation into a potentially unlawful death and on the duty’s key elements.¹⁴⁴ Since the drafting of the original Protocol, there have been significant international legal developments, including numerous cases in the Inter-American, African, and European regional human rights systems; decisions by the U.N. Human Rights Committee; international and regional resolutions; General Comments interpreting the right to life and related issues; national judicial decisions; and new international principles and guidelines.¹⁴⁵ As scientific and investigation developments enabled the forensic experts involved in revising the Protocol to update those aspects of the document, legal developments over the preceding two decades enabled the legal team involved in the revision to substantially expand and deepen the legal sections of the Protocol. In clarifying the nature of the Member State’s duty to investigate and setting out accepted international law, the new Protocol builds upon the 1991 original, provides a reference point that can assist Member States in fulfilling their obligations, and supports the efforts of civil society in assessing the adequacy of government investigations.

139. Minnesota Protocol I, *supra* note 3, § I.

140. Minnesota Protocol II, *supra* note 2, ¶¶ 7–40.

141. See Minnesota Protocol I, *supra* note 3, § I(A)(3).

142. See *id.* § III.

143. See *id.* § I(C).

144. See Minnesota Protocol II, *supra* note 2, ¶¶ 7–40.

145. *Selected Uses of the Minnesota Protocol Since its Revision in 2016*, INST. FOR INT’L AND COMP. L. IN AFR., <http://www.icla.up.ac.za/special-projects/revision-of-the-un-manual/uses-of-the-minnesota-protocol> (last visited Oct. 10, 2018).

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**A. THE RIGHT TO LIFE UNDER INTERNATIONAL LAW AND THE
SOURCE OF THE DUTY TO INVESTIGATE**

The duty to investigate potentially unlawful death is an integral part of the Member State's obligation to respect, protect, and fulfill the right to life, and is also grounded in the Member State's obligation to provide remedy in the event of a breach.¹⁴⁶ As the 2016 Protocol explains:

The right not to be arbitrarily deprived of life is a foundational and universally recognized right, applicable at all times and in all circumstances. . . . The right to life is a norm of *jus cogens* and is protected by international and regional treaties, customary international law and domestic legal systems.¹⁴⁷

To fulfill their international legal obligations, Member States must *respect* the right to life, meaning they must “not deprive any person of their life arbitrarily.”¹⁴⁸ They must protect and fulfill the right, “including by exercising due diligence to prevent the arbitrary deprivation of life by private actors.”¹⁴⁹ This was described earlier as the substantive part of the right. Further, Member States must investigate suspected cases of unlawful deaths, ensure accountability for wrongdoing, and provide remedies to victims. “The duty to investigate,” the procedural component of the right, “is an essential part of . . . the right to life,” and a failure to investigate is itself a legal violation.¹⁵⁰

Families have the right to a remedy in the event of a disappearance or unlawful killing. This right includes the rights to disclosure of the truth of what happened, to seek and obtain information on the cause and manner of death, and to accountability for perpetrators.¹⁵¹ The Protocol also notes that “[t]he right to know the truth [of what happened] extends to society as a whole.”¹⁵² Additionally, the revised Protocol sets out Member States' obligations under international humanitarian law, including obligations to provide families with any information on relatives reported missing and to identify the dead.¹⁵³

B. TRIGGERS FOR AN INVESTIGATION

The 2016 Protocol clarifies that “[a Member] State's duty to investigate is triggered where it knows or should have known of any potentially unlawful death.”¹⁵⁴ Where the Member State or its agents have caused the death, it

146. Minnesota Protocol II, *supra* note 2, ¶ 8.

147. *Id.* ¶ 7.

148. *Id.* ¶ 8(a).

149. *Id.* ¶ 8(b).

150. *Id.* ¶ 8(c).

151. *Id.* ¶¶ 10–11.

152. *Id.* ¶ 13.

153. Minnesota Protocol II, *supra* note 2, ¶ 14.

154. *Id.* ¶ 15.

will be deemed to have known that the death was potentially unlawful.¹⁵⁵ In any event, a formal complaint is not necessary to trigger the duty—an important rule that ensures that Member States cannot seek to evade their investigation responsibilities by pointing to the non-fulfillment of procedural formalities.¹⁵⁶ The Protocol also addresses cases where a victim’s family does not make a complaint because of fear of retaliation; rather, the Member State should know of the potentially unlawful death because of, for example, credible media reports.¹⁵⁷ Where they do make a complaint, the obligation is not on families and NGOs to show or prove an unlawful death: where “reasonable allegations” are made, the Member State must investigate.¹⁵⁸

C. SCOPE OF THE DUTY TO INVESTIGATE

The 1991 Protocol, drafted in the context of concerns about political assassinations and State-sanctioned extrajudicial killings, was primarily concerned with investigations of such cases.¹⁵⁹ The 2016 Protocol, responding to both legal developments as well as increasing international attention to other forms of killings—including those by non-State actors—describes four kinds of contexts in which the Protocol will be most relevant.¹⁶⁰ First, the State has a duty to investigate all those cases where the State or its agents caused the death, regardless of whether there is reason to suspect it amounted to arbitrary deprivation of life.¹⁶¹ Thus, all cases of killings by police, or those committed by military forces outside the conduct of hostilities, must automatically be investigated.¹⁶² Relatedly, the duty applies where a death is attributable to the State, such as killings by death squads committed with the Member State’s acquiescence.¹⁶³

Second, the Member State must investigate all deaths in custody, and, given the Member State’s control over detainees, it is widely agreed that there is a “general presumption of [Member] State responsibility in such cases.”¹⁶⁴ Third, the duty to investigate applies “where the [Member] State may have breached its obligations to protect life. This includes, for example, any situation where a [Member] State fails to exercise due diligence to protect an individual” from violence by non-State actors that was foreseeable.¹⁶⁵ Finally, even where there is no reason to suspect that the

155. *Id.* ¶ 16.

156. *Id.* ¶ 15.

157. *See id.* ¶¶ 50-83.

158. *See id.* ¶ 15.

159. Jennifer Prestholdt, *The Minnesota Protocol: Creating Guidelines for Effective Investigations*, XXVII(1) HUM. RTS. OBSERVER 4, 4 (2016).

160. Minnesota Protocol II, *supra* note 2, ¶¶ 2, 16-19.

161. *Id.*

162. *Id.*

163. *Id.* ¶ 2(a).

164. *Id.* ¶ 17.

165. *Id.* ¶ 2(c).

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Member State bears international legal responsibility, it has a duty to investigate all deaths that are potentially unlawful under domestic law.¹⁶⁶

D. ELEMENTS OF THE DUTY TO INVESTIGATE

One of the most important contributions of the 2016 Protocol is its detailed statement on the legally required elements of the duty to investigate. The core elements—that an investigation be prompt, effective, independent, impartial, and transparent—have long been acknowledged as essential.¹⁶⁷ The revised Protocol, relying on human rights law developments since the first Protocol was drafted, provides detail about what each element demands in practice.¹⁶⁸

A *prompt* investigation is carried out “as soon as possible,” and any government “[o]fficials with knowledge of a potentially unlawful death must report it . . . without delay.”¹⁶⁹ The duty to investigate continues until it is satisfied: “the duty does not cease even with the passing of significant time.”¹⁷⁰ An *effective and thorough* investigation requires the Member State to collect “all testimonial, documentary and physical evidence” so that the investigation is capable of ensuring accountability.¹⁷¹ The Protocol outlines the essential goals of an effective human rights investigation, including identification of the victim, determination of the manner and cause of death, determination of responsibility for the death, and an assessment as to whether the right to life was violated.¹⁷² It also sets out the minimum resources and powers that the investigatory authority must have, such as the power to compel witnesses.¹⁷³

An investigation “must be, and must be seen to be” both *independent* and *impartial*.¹⁷⁴ This requirement is of critical importance when the Member State is suspected of involvement in a killing: impunity often results from biased or influenced investigations. *Transparency* of investigation processes and outcomes is essential to promoting effectiveness and accountability.¹⁷⁵ The Protocol outlines the minimum transparency requirements, including the investigation procedures and findings.¹⁷⁶ Limitations on transparency are permissible only when “strictly necessary for a legitimate purpose,” and secrecy is not permitted when it would result in concealment of information about the fate of a victim or in impunity.¹⁷⁷

166. *Id.*

167. *See, e.g.*, Economic and Social Council Res. 1989/65, at ¶¶ 9, 14, 16–17 (May 24, 1989).

168. *See* Minnesota Protocol II, *supra* note 2, ¶¶ 22–33.

169. *Id.*

170. *Id.*

171. *Id.* ¶ 24.

172. *Id.* ¶¶ 25–26.

173. *Id.* ¶ 27.

174. *Id.* ¶ 28.

175. Minnesota Protocol II, *supra* note 2, ¶ 32.

176. *Id.*

177. *Id.* ¶ 33.

V. The Conduct of an Investigation into Potentially Unlawful Death

The 2016 Protocol outlines in detail the steps that an investigation into a potentially unlawful death should take.¹⁷⁸ Very little was included in the original Protocol on key issues such as investigation strategy, witness interviews, chain of custody of evidence, and professional ethics.¹⁷⁹ These lacunae are all addressed along with updated guidance reflecting technological and technical developments in forensic investigations, whether the investigation is for the purpose of criminal law or for other means of accountability.

A. INVESTIGATION STRATEGY

As the Protocol explains, “the overarching strategy of any investigation [into a potentially unlawful death] should be methodical and transparent, and all legitimate lines of inquiry should be pursued. Depending on the circumstances, both routine investigative steps and highly specialized techniques may be required.”¹⁸⁰

An investigation may gather many different types of material, not all of which will be used as evidence in a judicial proceeding. Nevertheless, all materials and observations relevant to the investigation should be secured, recorded and logged. This includes all decisions taken, information gathered, and witness statements. The source, date and time of collection of all material must also be logged.¹⁸¹

As part of the strategy,

activities should be planned and . . . resources allocated in order to manage . . . the collection, analysis and management of evidence, data and materials; [t]he forensic examination of important physical locations, including the death/crime scene; [f]amily liaison; [t]he development of a victim profile; [f]inding, interviewing and protecting witnesses; [i]nternational technical assistance; [t]elecommunications and other digital evidence; [f]inancial issues; [and the establishment of a] chronology of events.¹⁸²

B. CRIME-SCENE MANAGEMENT

In the investigation of a potentially unlawful death there may or may not be a body in a known location, which in turn may or may not be the place where the death occurred. Every important physical location in

178. *Id.* ¶¶ 46-83.

179. *See* Minnesota Protocol I, *supra* note 3, § 3.

180. Minnesota Protocol II, *supra* note 2, ¶ 48.

181. *Id.* ¶ 49.

182. *Id.* ¶ 52.

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the investigation should be located and identified, including the site of encounters between the victim(s) and any identified suspects, the location of any crimes, and possible burial sites.¹⁸³

“The term ‘crime scene’ is used without prejudice to the determination of whether a crime has actually occurred.”¹⁸⁴

Any forensic analysis, including but not limited to the crime scene, requires . . . documentation . . . [by] photography, measurement, note-taking, and inventory. These should all be cross-referenced against each other to improve the independent understanding of a death scene and increase the credibility of the collected evidence.¹⁸⁵

Every stage of evidence recovery, storage, transportation and forensic analysis, from crime scene to court and through to the end of the judicial processes, should be effectively recorded to ensure the integrity of the evidence. Chain of custody includes the identity and sequence of all persons who possessed [an] item [of evidence] from the time of its acquisition by officials to its presentation in court. Any gaps in that chain can prevent the introduction of the item as evidence against a criminal defendant. Evidential material should be transported in a manner that protects it from manipulation, degradation and cross-contamination with other evidence. Each piece of evidence recovered, including human remains, should be uniquely referenced and marked to ensure its identification from point of seizure to analysis and storage. To meet chain of evidence and integrity requirements, the transportation, tracking and storage of this evidence should include the investigator’s details.¹⁸⁶

C. INTERVIEWING WITNESSES AND SUSPECTS AND WITNESS PROTECTION

A new section in the Minnesota Protocol describes good practice for interviewing witnesses and suspects and for ensuring witness protection. It notes that “[i]nterviews form an integral part of almost any investigation. If conducted well, they can obtain accurate, reliable and complete information from victims, witnesses, suspects and others.”¹⁸⁷ By contrast, “[p]oorly conducted interviews can undermine an investigation and place people at risk.”¹⁸⁸

Alongside detailed guidance on conducting interviews with people who might have information about a potentially unlawful death, the Protocol notes that “[i]nvestigators conducting interviews should approach all witnesses with an open mind and observe the highest ethical standards. A

183. *Id.* ¶¶ 56, 58.

184. *Id.*

185. *Id.* ¶ 175.

186. *Id.* ¶ 65.

187. Minnesota Protocol II, *supra* note 2, ¶ 84.

188. *Id.*

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careful assessment of risk, strategies and adequate human and financial resources must be in place to ensure the safety and security of all witnesses in the case,” including by establishing an effective witness protection Programme where appropriate.¹⁸⁹

“All formal and informal interviews should be recorded, regardless of where they take place, right from the commencement of an investigator’s contact with a prospective witness or suspect. In certain circumstances this may be subject to the consent of the prospective witness or suspect.”¹⁹⁰

**D. RECOVERY AND IDENTIFICATION OF DEAD BODIES AND
EVIDENCE MANAGEMENT**

This new section in the 2016 Protocol captures the remarkable evolution of forensic science since the publication of the first Protocol, particularly as it applies to the collection and analysis of evidence and to human identification.¹⁹¹

Developments in the field of forensic genetics and DNA analysis have made it possible today to reliably identify minuscule and very old samples of human tissue.¹⁹² Forensic archaeology, anthropology, and pathology have, over the past thirty years, significantly expanded the forensic scientists’ toolbox for the recovery, analysis, documentation, and identification of human skeletal remains, as well as the scientific assessment of the manner and cause of death.¹⁹³ The standards for admissibility of forensic evidence have also evolved, with more exacting requirements for the scientific basis of expert conclusions.¹⁹⁴

Since the original Protocol, practice related to identification of the dead has also evolved. While, controversially, some early investigations carried out by the international criminal tribunals for the former Yugoslavia and Rwanda focused on gathering evidence for prosecution over the needs of families to have their loved ones identified,¹⁹⁵ forensic scientists examining the dead are now expected to seek to identify remains as a matter of principle

189. *Id.*

190. *Id.* ¶ 88.

191. *Id.* ¶¶ 115-147.

192. Veronique Greenwood, *How Science Is Putting a New Face on Crime Solving*, NAT’L GEOGRAPHIC (July 2016), <https://www.nationalgeographic.com/magazine/2016/07/forensic-science-justice-crime-evidence/>.

193. Vernon J. Geberth, M.S., M.P.S., *30 Years of DNA Technology*, FORENSIC MAG. (Mar. 3, 2017, 3:18PM), <https://www.forensimag.com/article/2017/03/30-years-dna-technology>.

194. *See, e.g.*, *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592–93 (1993) (discussing “junk science”).

195. *See, e.g.*, Adam Rosenblatt, *International Forensic Investigations and the Human Rights of the Dead*, 32 HUM. RTS. Q. 921, 923 (2010); Eric Stover & Rachel Shigekane, *The Missing in the Aftermath of War: When Do the Needs of Victims’ Families and International War Crimes Clash?*, 84 INT’L REV. RED CROSS 845, 853 (2002).

and to advance the rights of families.¹⁹⁶ The 2003 Conference on The Missing and Their Families, organized by the ICRC, concluded that it is wrong to investigate the dead from armed conflicts or disasters if this investigation is focused exclusively on documenting the cause and manner of death and does not include efforts to identify the victims.¹⁹⁷ In addition, the duty of medico-legal experts to protect the dignity of the dead has evolved since the publication of the first edition of the Protocol to become a universal requirement.¹⁹⁸

In consideration of these developments, the new Protocol advocates for an integrated and scientifically sound approach to using forensic evidence.¹⁹⁹ It calls for forensic human identification in every case of potentially unlawful death, outlining the general principles and the scientific approach required to reliably identify single or multiple bodies.²⁰⁰ Notably, DNA testing has revolutionized victim and suspect identification, while the risks of mistaken visual identification have been widely recognized. Additional detailed guidance is provided in Section V of the Protocol for practitioners on crime-scene investigation, excavation of graves, autopsy, and the analysis of skeletal remains.²⁰¹

E. AUTOPSY

The section on autopsy outlines the general principles guiding the practice of an autopsy in cases of potentially unlawful death and the duties of forensic doctors in relation to death investigations and reporting.²⁰² Additional guidance for practitioners is provided under the Detailed Guidelines on Autopsy in Section V(D).²⁰³

In cases of potentially unlawful death, an autopsy is often the single most important and determining investigation for establishing the deceased person's identity and the cause, manner, and circumstances of death. It may also provide evidence of torture.²⁰⁴

Autopsy techniques and methods have remained consistent in many important respects since the first edition of the Protocol, which is regarded

196. *See, e.g.*, International Criminal Police Organization [INTERPOL] Res. AGN/65/RES/13/1996, at 1 (1996) (“RECOGNIZING that for legal, religious, cultural and other reasons, human beings have the right not to lose their identities after death, and that the identification of disaster victims is often of vital importance for police investigations.”).

197. Int’l Comm. of the Red Cross [ICRC], *The Missing and Their Families*, ICRC/TheMissing/01.2003/EN/10, at 11 (Feb. 19–21, 2003), <https://www.icrc.org/eng/resources/documents/report/5jahr8.htm>.

198. World Med. Assoc., WMA Statement on Forensic Investigations of the Missing (Mar. 23, 2017), <https://www.wma.net/policies-post/wma-statement-on-forensic-investigations-of-the-missing-2/>.

199. Minnesota Protocol II, *supra* note 2, ¶ 120.

200. *Id.*

201. *Id.* § V.

202. *See, e.g., id.* § IV(G).

203. *Id.* ¶¶ 250–273.

204. *Id.* ¶ 151.

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as standard practice by practitioners worldwide and has since also served as model for other standards of autopsy practice.²⁰⁵ Changes to this section were therefore kept to a minimum, incorporating critical developments such as new forms of radiological imaging, including computerized tomography (CT scanning) and magnetic resonance imaging (MRI).²⁰⁶ These techniques today offer a valuable complement to standard autopsies, including in cases of mass fatalities.²⁰⁷ In addition, the new Protocol includes updated and expanded guidance for the documentation of torture, including lessons learned from the use and implementation worldwide of the Istanbul Protocol.²⁰⁸

F. PROFESSIONAL ETHICS

Another new section in the 2016 Protocol addresses the professional ethics of investigators.²⁰⁹ It was added to highlight the important role of professional norms and duties in governing the conduct of death investigations, separate from the legal standards for investigations that Member States are required to uphold. “All those involved in investigations” bear ethical responsibilities toward victims, their family members, and others affected by an investigation.²¹⁰ “They must work to secure the integrity and effectiveness of the investigation process and to advance the goals of justice and human rights.”²¹¹

Forensic doctors, for example, may be contracted to work for the police, but they need to maintain their independence, especially when the police’s direct or indirect involvement in a death is suspected or alleged.²¹² Investigators must respect the safety, privacy, well-being, dignity, and human rights of anyone affected.²¹³ “They should [also] endeavor to respect the culture and customs of all persons affected by the investigation, as well as the wishes of family members, while still fulfilling their duty to conduct an effective investigation.”²¹⁴ The dignity of the dead must be respected throughout.

205. See, e.g., Council of Europe Comm. of Ministers, *Recommendation no. R (99)3 of the Comm. of Ministers to Member States on the Harmonisation of Medico-Legal Autopsy Rules* (adopted Feb. 2, 1999), [https://www.coe.int/t/dg3/healthbioethic/texts_and_documents/RecR\(99\)3.pdf](https://www.coe.int/t/dg3/healthbioethic/texts_and_documents/RecR(99)3.pdf); see also, U.N. OFFICE ON DRUGS AND CRIME, *FORENSIC AUTOPSY: MANUAL FOR FORENSIC PATHOLOGISTS* (Oct. 2015), https://staff.najah.edu/media/scientific-research/books/2017/05/29/PSEX02_Autopsy-compressed_1.pdf.

206. See Minnesota Protocol II, *supra* note 2, ¶ 158.

207. See generally Stephen M. Cordner et al., *Forensic Medical Response to the 2009 Victorian Bushfires Disaster*, 205 *FORENSIC SCI. INT’L* 2–7 (2011).

208. See Minnesota Protocol II, *supra* note 2, ¶ 271.

209. *Id.* ¶¶ 41–45.

210. *Id.* ¶ 41.

211. *Id.*

212. *Id.* ¶ 44.

213. *Id.* ¶ 41.

214. *Id.* ¶ 43.

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G. THE PARTICIPATION AND PROTECTION OF FAMILY MEMBERS

The 2016 Protocol devotes attention to the rights of the families of a person suspected of having been killed or disappeared, including setting out their right to participate in investigations.²¹⁵ The rights-based approach of the 2016 Protocol ensures that the interests and rights of those most affected by the alleged rights violation are upheld throughout the investigation. Recognizing the special interest of families in investigations and the right of families to be informed as set out in the 1991 Protocol, the 2016 revision provides additional detail on Member States' duties to families.²¹⁶ Member States "must enable all close relatives to participate effectively in the investigation" and ensure that families are kept informed of the investigation progress, with funding provided for a lawyer where necessary.²¹⁷ In addition, Member States must protect family members from any retaliation resulting for their involvement in investigations.²¹⁸

The revised Protocol also explains families' rights in relation to the remains of their deceased relatives, including the right to be informed following any identification, and to have remains returned to them to enable dignified and culturally appropriate burial.²¹⁹

VI. Soft Law and Other Standards on the Right to Life

What is the legal status of the Minnesota Protocol? It is not a legally binding treaty or a resolution voted for by Member States.²²⁰ Nor did it follow the route of the U.N. Principles on the Investigation of Extrajudicial Executions, which was adopted by ECOSOC and endorsed by the General Assembly.²²¹ But as the Statute of the International Court of Justice recognizes, "judicial decisions and the teachings of the most highly qualified publicists" are "subsidiary means for the determination of rules of law."²²²

The Protocol thus derives its influence from the expertise of its authors, the mandate given them by the U.N. Special Rapporteur, the fact that it was developed in collaboration with the OHCHR at the request of the Human Rights Council, its careful consultation process, and the significant prior use of the earlier Protocol by international human rights bodies and practitioners. The intent of the drafters was to summarize accurately and

215. Minnesota Protocol II, *supra* note 2, ¶¶ 35–37.

216. See Minnesota Protocol I, *supra* note 3, § III(D)(13).

217. Minnesota Protocol II, *supra* note 2, ¶ 35.

218. *Id.* ¶ 36.

219. *Id.* ¶ 37.

220. Office of High Commissioner Launches Revised Guidelines for Investigating Unlawful Killings, INT'L JUSTICE RES. CTR. (June 5, 2017), <https://ijrcenter.org/2017/06/05/office-of-high-commissioner-launches-revised-guidelines-for-investigating-unlawful-killings/>.

221. See Economic and Social Council Res. 1989/65 (May 1, 1989), <http://www.un-documents.net/1989-65.htm>.

222. Statute of the International Court of Justice, art. 38(1)(d), June 26, 1945.

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concisely existing international law on the right to life and investigation obligations.

The Protocol falls into the category of supplementary standards found in many fields of international law which, while not qualifying as directly binding law, are highly influential in terms of shaping decision-making. Such instruments dealing with the right to life have often been relied upon by international courts and treaty bodies, to give content to the legal obligations of Member States. This has been the case, for example, with the Code of Conduct for Law Enforcement Officials of 1979²²³ and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials of 1990.²²⁴ The U.N. Principles on the Investigation of Extrajudicial Executions have been cited widely.²²⁵

The Minnesota Protocol has also been cited regularly by U.N. bodies,²²⁶ regional courts,²²⁷ and national courts²²⁸ as encapsulating international standards on the investigation of suspicious deaths, and it has been relied upon by international organizations and NGOs as setting good practice for such investigations.²²⁹ Its most frequent use thus far has been in the medical

223. See, e.g., *Dorzema v. Dominican Republic*, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 251, ¶ 78 (Oct. 24, 2012); *Zambrano Velez v. Ecuador*, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (Ser. C) No. 166, ¶¶ 99, 101 (July 4, 2007).

224. See, e.g., *Giuliani v. Italy*, App. No. 23458/02, Eur. Ct. H.R., ¶ 154 (2011); *Finoghenov v. Russia*, App. Nos. 18299/03 and 27311/03, Eur. Ct. H.R., ¶ 162 (2011); *Zambrano Velez v. Ecuador*, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (Ser. C) No. 166, ¶¶ 99, 101 (July 4, 2007).

225. *Vargas-Areco v. Paraguay*, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (Ser. C) No. 155, ¶ 91 (Sept 26, 2006); *McCann v. United Kingdom*, App. No. 18984/91, Eur. Ct. H.R., ¶ 140 (1995); *Kelly v. United Kingdom*, App. No. 30054/96, Eur. Ct. H.R., ¶ 78 (2001); U.N. Hum. Rts. Comm., *Olmedo v. Paraguay*, at ¶ 3.6, U.N. Doc. CCPR/C/104/D/1828/2008 (2008).

226. U.N. Hum. Rts. Comm., *Olmedo v. Paraguay*, at ¶ 3.6, U.N. Doc. CCPR/C/104/D/1828/2008 (2008).

227. *Gonzalez v. Venezuela*, Merits, Judgement, Inter-Am. Ct. H.R. (Ser. C) No. 256, ¶¶ 133, 136, 141 (2012); *Sanchez v. Honduras*, Preliminary Objections, Merits, Reparations and Costs, Judgement, Inter-Am. Ct. H.R. (Ser. C) No. 99, ¶ 127 (2003); *McKerr v. United Kingdom*, App. No. 28883/95, Eur. Ct. H.R., ¶¶ 97, 103, 136 (2001); *Shanaghan v. United Kingdom*, App. No. 37715/97, Eur. Ct. H.R., ¶¶ 74, 80 (2001).

228. *In Re McKerr*, [2004] UKHL 12, ¶ 39.

229. Amnesty Int'l, *If You Are Poor You Are Killed: Extrajudicial Executions in the Philippines* "War on Drugs", at 65, AI Index ASA 35/5517/2017 (2017), https://www.amnestyusa.org/wp-content/uploads/2017/04/philippines_ejk_report_v19_final_0.pdf; Amnesty Int'l, *Waiting in Vain, Jamaica: Unlawful Police Killings and Relatives Long Struggle for Justice*, at 22, 27, 32, 38, 40, 50, AI Index AMR 38/5092/2016 (2016), https://www.amnestyusa.org/wp-content/uploads/2017/04/jamaica_waiting_in_vain_-_report_eng.pdf; Hum. Rts. Watch, *All Thieves Must Be Killed: Extrajudicial Executions in Western Rwanda*, at 5–6 (2017), https://www.hrw.org/sites/default/files/report_pdf/rwanda0717_web_1.pdf; Hum. Rts. Watch, *No Justice Just Adds to the Pain: Killings, Disappearances, and Impunity in the Philippines*, at 71–72 (2011), <https://www.hrw.org/sites/default/files/reports/philippines0711WebRevised.pdf>; Hum. Rts. Watch, *Work on Him Until He Confesses: Impunity for Torture in Egypt*, at 61 (2011), https://www.hrw.org/sites/default/files/reports/egypt0111webwcover_0.pdf.

sphere, where it has become the standard for assessing the compliance of an autopsy with international law.²³⁰

The experts who engaged in updating the Protocol did so at the behest of the Special Rapporteur in collaboration with the OHCHR and after the OHCHR was requested to do so by the predecessor of the Human Rights Council. Extensive consultation with Member States and other stakeholders took place under the auspices of the Special Rapporteur and the OHCHR in developing the document. The Minnesota Protocol also serves to give content to the U.N. Principles on the Investigation of Extrajudicial Executions, which were endorsed by the General Assembly. Because the OHCHR published the Protocol, it has a more formal nature than many other expert documents.

In this context, it is instructive to look at the status of the “sister” instrument to the Minnesota Protocol, namely the “Istanbul Protocol,”²³¹ which is to the investigation of torture what the Minnesota Protocol is to investigation of unlawful death. Officially known as the U.N. Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, it was the use of the Minnesota Protocol as a reference point by the Turkish Medical Association that led to the collaboration that resulted in the adoption of the Istanbul Protocol.²³² The Istanbul Protocol is also essentially an expert document and has likewise been widely used in the field by lawyers, courts, medical and other professionals.²³³ Both documents stand uncontested as the leading standards in their respective fields.

VII. Looking Forward

As the U.N. High Commissioner for Human Rights writes in his Foreword to the 2016 Minnesota Protocol, “[a] suspicious death occurring anywhere in the world is potentially a violation of the right to life, often described as the supreme human right, and therefore a prompt, impartial and effective investigation is key to ensuring that a culture of accountability—rather than impunity—prevails.”²³⁴

The main issue for the vast majority of unlawful killings is not acceptance of the substantive standards: Member States and others who may be implicated typically do not deny that it is wrong to kill someone who does

230. J. PAYNE-JAMES ET AL., *SIMPSON’S FORENSIC MEDICINE*, 33 (13th ed. 2014); Stephen Cordner & Helen McKelvie, *Developing Standards in International Forensic Work to Identify Missing Persons*, 84 INT’L REV. RED CROSS 848, 871–81 (2002).

231. See, e.g., OFF. OF THE U.N. HIGH COMM’R FOR HUM. RTS., *ISTANBUL PROTOCOL: MANUAL ON THE EFFECTIVE INVESTIGATION AND DOCUMENTATION OF TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT*, U.N. Doc., HR/P/PT/8/Rev. 1, U.N. Sales No. E.04.XIV.3 (1999) [hereinafter *Istanbul Protocol*].

232. See Holger Furtunayr & Andreas Frewer, *Documentation of Torture and the Istanbul Protocol: Applied Medical Ethics*, 13 MED. HEALTH CARE AND PHIL. 279, 281 (2010).

233. *Istanbul Protocol*, *supra* note 231.

234. *Minnesota Protocol II*, *supra* note 2, § V.

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not pose a threat. Instead, they deny that this is what happened in a particular case when a body is found. Member States may, for example, claim that the perpetrators were not their agents or people for whose actions they are responsible, or they may claim that the person in fact posed a threat. Instead, most often contested are the facts and the evidence. To secure better protection of the right to life, the capacity and willingness of Member States to undertake effective investigations to answer the questions about perpetrators and surrounding circumstances must be strengthened. The Minnesota Protocol is aimed at furthering an evidence- and rights-based approach to accountability. Investigations are but one initial step in the broader process of accountability, which entails assigning responsibility and also reparations and reform.

The new Minnesota Protocol is premised on the idea of investigations as part of a holistic process, and as a chain involving a whole range of players who all need to fulfill their roles in order to ensure that the work of other participants in the process comes to fruition and that accountability is achieved. Its added value is that it restates the international standards applicable to the process as a whole, enabling everyone involved to work from the same shared understanding.

For twenty-five years, the 1991 Minnesota Protocol has served to establish some of the core components of a global understanding of what a proper investigation entails, especially from a medical perspective. The new Protocol seeks to strengthen both the normative value and the practical content of accountability, providing a global reference point on international law standards and how to achieve effective and reliable investigations into potential violations of the right to life, while involving all the relevant scientific disciplines and experts. By ensuring that each of the links of the investigation chain reflects the latest developments, the 2016 Protocol provides a basis from which professionals in all parts of the world can reinforce and promote a fundamental aspect of the protection of the right to life—ensuring accountability for unlawful killing.