

PHILIPPINES: ICJ BRIEFER ON INVESTIGATION OF EXTRAJUDICIAL EXECUTIONS

I. INTRODUCTION

1. The phenomenon of extrajudicial executions in the Philippines over the years is well documented. In fact, in 2007, the UN Special Rapporteur on extrajudicial, summary and arbitrary executions, Philip Alston, conducted an official visit to the Philippines to examine the problems and institutional arrangements that have permitted extrajudicial executions to continue in the country.¹
2. Recently, a spike in the number of deaths of persons allegedly involved in the trade and sale of illegal drugs in the Philippines has been reported. This increase in deaths is alleged to be directly related to the “war against drugs” of newly elected President Rodrigo Duterte. According to news reports, as of 15 August 2016, at least 646 persons have been killed since President Rodrigo Duterte assumed office in 30 June 2016.² Many of those died during police operations and many in an allegedly unlawful manner.
3. The International Commission of Jurists (ICJ) has written to President Rodrigo Duterte, calling on him to unequivocally denounce extrajudicial killings, whether of alleged criminals or of any person in the Philippines. The ICJ also urged the Government of the Philippines to conduct prompt and impartial investigations into the police operations that resulted in these deaths. Where there are allegations that persons have been arbitrarily deprived of their life, involving a violation of the right to life, international law requires that there must be a prompt, independent and effective investigation into such allegations and that those responsible be brought to justice.³
4. This Briefing Paper focuses on the following key points:
 - a) The right to life and extrajudicial and arbitrary executions;
 - b) The obligation of the State to investigate extrajudicial and arbitrary executions; and
 - c) Recommendations on the investigation of extrajudicial killings in the Philippines, on the prosecution of perpetrators, and on compensating victims and their families.

II. THE RIGHT TO LIFE AND EXTRAJUDICIAL AND ARBITRARY EXECUTIONS

5. The most fundamental and basic of human rights is the right to life. Under Article 6 of the International Covenant on Civil and Political Rights (ICCPR), to which the Philippines is a State Party,⁴ “every human being has the inherent right to life”. Article 6 of the ICCPR also says that the right to life “shall be

¹ Report of the UN Special Rapporteur on extrajudicial, summary and arbitrary executions, Philip Alston, UN Doc A/HRC/8/3/Add.2 (2008), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/130/01/PDF/G0813001.pdf?OpenElement>.

² “The Kill List”. *The Inquirer*, 7 July 2016 (updated 15 August 2016), available at <http://newsinfo.inquirer.net/794598/kill-list-drugs-duterte>.

³ Letter of the International Commission of Jurists to Philippine President Rodrigo Duterte, 18 July 2016, available at <http://www.icj.org/philippines-icj-sends-letter-to-president-duterte-expressing-concern-over-wave-of-killings/>.

⁴ The Philippines ratified the ICCPR in 1986.

protected by law” and that “no one shall be arbitrarily deprived of his [sic] life”.

6. The right to life is the right from which all other human rights spring, the foundational or bedrock human right.⁵ The prohibition of arbitrary deprivation of life is a peremptory norm of international law, applicable to all States at all times. This means that this right cannot be overridden by other legal norms.⁶
7. Extrajudicial killings and arbitrary executions are methods of arbitrary deprivation of the right to life. The UN Office of the High Commissioner for Human Rights (OHCHR) defines “extralegal, arbitrary or summary executions” as the “deprivation of life without full judicial and legal process, and with the involvement, complicity, tolerance or acquiescence of the Government or its agents” (emphasis added). It further explains that extralegal, arbitrary or summary executions include “death through the excessive use of force by police or security forces”.⁷
8. As explained by the mandate of the UN Special Rapporteur on extrajudicial, summary and arbitrary executions, ‘arbitrary execution’ specifically refers to deaths caused by the “excessive, disproportionate and illegitimate use of force by law enforcement officers”. “If a law enforcement agent uses greater force than is necessary to achieve a legitimate objective and a person is killed, that would amount to an ‘arbitrary’ execution.”⁸
9. Further defining this focus on law enforcement officials are two key documents concerning the circumstances in which police are able to use lethal force. The UN Code of Conduct for Law Enforcement Officials provides that law enforcement officials may only use force when strictly necessary and to the extent required for the performance of their duty.⁹ The commentary on this provision explains that: “In no case should this provision be interpreted to authorise the use of force which is disproportionate to the legitimate objective to be achieved”. Added to this, the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials prohibits the use of firearms against persons “except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life...” (emphasis added).¹⁰
10. These now well-accepted positions call for very careful examination of any assertions by law enforcement that the killing of a person is in response to threats made to the lives of police officers or others. Any threats of death must be grave and imminent. Any action in response to such threats must be proportionate, which means that all other reasonable alternatives in the circumstances, such as the apprehension or non-lethal incapacitation of suspects, must be exhausted before recourse to lethal force can be made. Best practice calls for the adoption of practical measures to ensure that law

⁵ Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Protection of the right to life in the context of arrest, UN Doc A/66/330 (2011), para. 19.

⁶ UN Human Rights Committee, *General Comment No. 24: General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, UN Doc CCPR/C/21/Rev.1/ Add.6 (1994), para. 10.

⁷ UN Office of the High Commissioner for Human Rights, *Professional Training Series No. 5/Add. 2, Human Rights and Law Enforcement: A Trainer’s Guide on Human Rights for the Police*, 2002, page 15, available at <http://www.ohchr.org/Documents/Publications/training5Add2en.pdf>.

⁸ Report by the Special Rapporteur on summary or arbitrary executions, UN Doc. E/CN.4/1983/16 (1983), para. 66, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G83/106/80/PDF/G8310680.pdf?OpenElement>.

⁹ UN Code of Conduct for Law Enforcement Officials, adopted under UN General Assembly resolution 34/169 (1979), Article 3.

¹⁰ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the 1990 UN Congress on the Prevention of Crime and the Treatment of Offenders, Principle 9.

enforcement officials adhere to these requirements, such as the establishment of protocols, combined with training, the wearing of body cameras and the like.

III. THE DUTY OF THE STATE TO INVESTIGATE EXTRAJUDICIAL KILLINGS

11. Under international law, the Philippines is obliged to investigate extrajudicial, summary or arbitrary killings. This duty arises from the general obligation to respect and guarantee human rights, which is enshrined in Article 2(1) of the ICCPR. According to the UN Human Rights Committee, the legal obligation under Article 2(1) of the ICCPR is both negative and positive: while States parties must refrain from violating the rights recognized in the Covenant (e.g. they must not arbitrarily deprive persons of their life), States must also adopt legislative, administrative, judicial, educative and other necessary measures to protect these rights (e.g. they must protect against arbitrary deprivation of life, including by holding perpetrators to account).¹¹ If the State fails to investigate allegations of extrajudicial killings, this could in and of itself give rise to a violation of the Covenant.¹²
12. The Human Rights Committee has further explained that the duty to investigate arises from the obligation of States Parties to the ICCPR to provide an effective remedy to victims of human rights violations, set out in Article 2(3) of the ICCPR, when read in conjunction with the right to life under Article 6.¹³ This duty is also an aspect of the obligation to respect, ensure respect for and implement international human rights law within the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.¹⁴
13. Investigations of extrajudicial, summary or arbitrary killings must be thorough, prompt, impartial and independent.¹⁵
14. Investigations of extrajudicial, summary or arbitrary killings should be geared towards establishing the crime committed and prosecuting those responsible for these crimes.¹⁶ Truth commissions or any group organized merely to establish "historical truth", without intending to establish the facts of the extrajudicial killings and prosecuting those responsible, do not complete or substitute the State's obligation to investigate under international law.¹⁷

IV. CHARACTERISTICS OF INVESTIGATIONS OF EXTRAJUDICIAL KILLINGS

¹¹ UN Human Rights Committee, *General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para.8, available at <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsjYoiCfMKoIRv2FVaVzRkMjTnjRO%2bfud3cPVrcM9YR0iW6Txaxgp3f9kUFpWoq%2fhW%2fTpKi2tPhZsbEJw%2fGeZRASjdFuuJQRnbJEaUhby31WiQPI2mLFDe6ZSwMMvmQGVHA%3d%3d>.

¹² *Ibid.* at para. 16.

¹³ UN Human Rights Committee, 'Draft General Comment No 36. Article 6: Right to life', UN Doc CCPR/C/GC/R.36/Rev.2 (2015), para 29.

¹⁴ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted under General Assembly resolution 60/147 (2005), Principle 3(b).

¹⁵ Principle 9 of the *Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions, Recommended by Economic and Social Council resolution 1989/65* (24 May 1989), also known as the Minnesota Protocol, available at <http://www.ohchr.org/Documents/ProfessionalInterest/executions.pdf>.

¹⁶ *Jose Antonio Coronel and others v. Colombia*, UN Human Rights Committee Communication No. 778/1997, UN Doc CCPR/C/76/D/778/1997 (2002); and *Sathasivam v. Sri Lanka*, UN Human Rights Committee Communication No. 1436/2005, UN Doc CCPR/C/93/D/1436/2005 (2008).

¹⁷ *La Cantuta v. Peru*, Inter-American Court of Human Rights, Judgment of 29 November 2006, Series C, No. 162, para 224.

15. **Due diligence and good faith:** All available legal means must have been used in pursuit of the investigation. All the facts and the complexity of the crimes must have been taken into account.¹⁸ “Perfunctory and unproductive” investigations do not fulfill or satisfy the obligation to undertake investigations with due diligence.¹⁹

For the investigation of deaths that occurred in the course of police operations, investigators could seek the following information from law enforcement officials:

- a) What law enforcement Standard Operating Procedures (SOPs) and other policy documents exist relevant to the use of firearms, deadly force, and the investigation of cases where an officer has used deadly force?
- b) What is the chain of command relevant to the incident in which deadly force was used and what is the information gathered from the directly involved officer(s) (the officer(s) who actually discharged a firearm or deployed another form of deadly force), their subordinates and superiors, and all other personnel directly and indirectly involved in the incident?
- c) Did you obtain the directly involved officer’s firearm and clothes immediately after the incident and store it in such a manner that allowed for a proper forensic examination?
- d) Did you ensure that all officers involved in the incident in which deadly force was used were separated, within reason, immediately after the incident and prior to being interviewed?
- e) Did you ensure that all officers involved in the incident in which deadly force was used receive appropriate psychological and emotional support?
- f) Have you created a complete case file including records of all investigative steps undertaken and all witness interviews; expert technical and/or forensic reports such as those relating to crime scene, autopsy, biological, telecommunication or other forensic analysis; all notes, job sheets, media (such as photo and video) and incident reports created by the authorities as part of their investigation?
- g) Have you seized all closed circuit television (CCTV) footage, which may have captured the incident in which deadly force was used, or any other events relevant to the investigation?

16. **Duty to investigate ex officio:** Extrajudicial killings must be investigated, regardless of whether or not there is a formal complaint.²⁰ The UN Human Rights Committee has stated that “in all cases of brutality or excessive use of force by a law enforcement officer in which the victim does not file a complaint, the State Party should systematically ensure an investigation ex officio”.²¹ The mere knowledge that a person has been killed as a result of the use of force by agents of the State gives rise to an obligation to carry out a prompt, independent and effective investigation.²²

17. **Impartial and independent investigations:** The investigating body and the investigators must not be those suspected of being involved in the crime. They must be independent of the alleged perpetrators and the institutions/agencies

¹⁸ International Commission of Jurists, *Practitioners Guide No. 9: Enforced Disappearance and Extrajudicial Execution—Investigation and Sanction*, 2015, page 130.

¹⁹ Human Rights Committee, *Views of 2 April 2009, Abubakar Amirov and others v. The Russian Federation*, Communication No. 1447/2006, para. 114.

²⁰ Principle 9 of the Minnesota Protocol, see note 15.

²¹ *Concluding observations of the Human Rights Committee: Dominican Republic*, CCPR/C/DOM/CO/5, 19 April 2014, para. 14.

²² See, for example, *Ergi v Turkey* (1998) ECHR 59, paras 82-83.

that the alleged perpetrators belong to.²³ Prosecutors may play the role of investigators as they are tasked to look into these cases in their established investigative procedures. Prosecutors also have the “fundamental role in protecting society against the culture of impunity” and are the “gateway” to the criminal justice system.²⁴ Prosecutors are also required to perform their duties with impartiality and must “avoid all political, social, religious, racial, cultural, sexual, or other discrimination”.²⁵ If such established investigative procedures, such as those followed by prosecutors in the Philippines, are found inadequate because of lack of capacity, resources, or impartiality, then the State is required to pursue investigations through an independent commission of inquiry.

The UN Human Rights Committee has urged States that if allegations of extrajudicial executions are made against security forces, whether military or civilian, investigations should be carried out by an independent commission of inquiry.²⁶ This independent commission of inquiry must be comprised of members who are known for their “impartiality, competence, and independence” as individuals. They should be independent of any institution, agency, or person that may be subject of the investigation.²⁷

18. Thorough and effective: The *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, also known as the *Minnesota Protocol*, lays out recommendations on what must be done to comply with the standards under international law on investigations of extrajudicial executions:

(a) Autopsy²⁸

- The body of the victim should not be disposed of until an adequate autopsy has been conducted.
- A physician, preferably an expert in forensic pathology, shall conduct the autopsy and shall have the right of access to all investigative data, to the place where the body was discovered, and to the place where the death is thought to have occurred.
- The autopsy shall, at the minimum, establish the identity of the victim and the cause and manner of death. The time and place of death shall also be determined to the extent possible.
- Detailed color photographs of the deceased shall be included in the autopsy report in order to document and support the findings of the investigation.
- The autopsy report must describe any and all injuries to the deceased, including any evidence of torture.

(b) Protection of witnesses and complainants²⁹

- Witnesses and complainants should be protected from any form of reprisal or intimidation.
- Those alleged to be involved or implicated in the extrajudicial killing should be removed from any position of control or power, whether over

²³ *Supra* note 18 at page 135.

²⁴ *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, A/HRC/20/19, 7 June 2012, para. 35, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/138/14/PDF/G1213814.pdf?OpenElement>*

²⁵ Guideline 13 (a) of the Guidelines on the Role of Prosecutors, adopted at the 8th Congress of the United Nations on the Prevention of Crime and Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, UN Doc. A/CONF.144/28/Revs.1., available at <http://hrlibrary.umn.edu/instree/i4grp.htm>

²⁶ *Concluding observations of the Human Rights Committee: Sri Lanka, CCPR/C/79/Add.56, 23 July 1995, para. 15.*

²⁷ Principle 11 of the Minnesota Protocol, see note 15.

²⁸ Principles 12, 13, and 14 of the Minnesota Protocol, see note 15.

²⁹ Principle 15 of the Minnesota Protocol, see note 15.

complainants, witnesses and their families, or over those conducting investigations.

(c) Information to families³⁰

- When the identity of the victim has been ascertained, his or her family or relatives should be informed immediately.
- Family members of the deceased or their legal representatives should have access to any hearing and information relevant to the investigation. They should also be entitled to present other evidence.
- The family shall have the right to insist that a medical or other qualified representative be present at the autopsy.

(d) Investigation report³¹

- A written report shall be made within a reasonable time on the methods and findings of such investigations. This report shall be made public.
- The Government shall, within a reasonable period of time, either reply to the report of the investigation, or indicate the steps to be taken in response to it.

19. **Prompt and without delay:** As soon as a complaint of an alleged extrajudicial execution has been made, or even in the absence of such a complaint but as soon as authorities are made aware of the same, an investigation must be commenced immediately.³² This is very important to ensure that evidence does not disappear or are not destroyed or tampered with.³³

20. **Adequate legal powers for investigation:** Those tasked to undertake investigations of extrajudicial executions must be vested with the powers necessary to carry out the investigation, obtain all necessary information, and have access to places and documents subject to legal privilege or restrictions/confidentiality on ground of national security restrictions. They must also be able to compel the attendance of witnesses and possible perpetrators and accomplices.³⁴

21. **Action following the finding of an extrajudicial execution:** In the event that a proper investigation finds that a person has been arbitrarily deprived of his or her life, three consequences follow:

(a) Prosecution: The UN Human Rights Committee has explained that investigations and prosecutions of alleged deprivations of life "should be aimed at ensuring that those responsible are brought to justice, at promoting accountability and preventing impunity...".³⁵ Consistent with this, the *Minnesota Protocol* also provides that: "Governments shall prohibit by law all extra-legal, arbitrary and summary executions and shall ensure that any such executions are recognized as offences under their criminal laws, and are punishable by appropriate penalties which take into account the seriousness of such offences".³⁶ The Human Rights Committee has further stated that: "Immunities and amnesties provided to perpetrators of intentional killings and to their superiors, leading to de

³⁰ Principle 16 of the Minnesota Protocol, see note 15.

³¹ Principle 17 of the Minnesota Protocol, see note 15.

³² *Supra* note 18 at page 146.

³³ *Ibid.*

³⁴ Principles 10 and 11 of the Minnesota Protocol, see note 15.

³⁵ UN Human Rights Committee, *Draft General Comment No. 36, Article 6: the right to life*, UN Doc. CCPR/C/GC/R.36/Rev.2 (2 September 2015), para 29.

³⁶ Paragraph 1 of the Minnesota Protocol, see note 15.

facto impunity, are, as a rule, incompatible with the duty to respect and ensure the right to life, and to provide victims with an effective remedy".³⁷

The Minnesota Protocol clarifies that an order from a superior officer or public authority cannot be invoked as justification for the commission of an extrajudicial killing. Superior officers or public authorities involved in extrajudicial killings may be held responsible for acts committed by those under their authority if they had reasonable opportunity to prevent such acts.³⁸

- (b) Remedy:** In the event that a violation of the right to life is found, the UN Human Rights Committee explains that "a remedy must be provided that would include, in view of the particular circumstances of the case, adequate measures of compensation, rehabilitation and satisfaction".³⁹ The Committee also refers to the following elements of the right to truth as an aspect of the right to redress:

"The State party should take, among other things, appropriate measures to establish the truth relating to the events leading to the deprivation of life, including revealing the reasons for targeting certain individuals and the procedures employed by State forces before, during and after the time in which the deprivation occurred, and identifying bodies of individuals who had lost their lives. It should also disclose relevant details about the investigation to the victim's next of kin and make public its findings, conclusions and recommendations, unless absolutely prevented from doing so due to a compelling need to protect the public interest or the legal rights of directly affected individuals."⁴⁰

- (c) Guarantees of non-recurrence:** The right to a remedy for the violation of the right to life includes guarantees for non-repetition, such that investigations and prosecutions of alleged deprivations of life "should be aimed at... drawing necessary lessons for revising practices and policies with a view to avoiding repeated violations".⁴¹

V. RECOMMENDATIONS

22. To comply with its obligations under Articles 2(1), 2(3) and 6 of the ICCPR, the Government of the Philippines should undertake **prompt, independent and effective investigations** into allegations of extrajudicial killings in the country. In this light, the Government of the Philippines should:

- (a) Direct the **prosecutors under the Department of Justice** to conduct investigations into the extrajudicial killings using the Department's established investigative procedures. If such procedures are found to be inadequate because of lack of expertise or impartiality, the Government of the Philippines should convene **an independent commission of inquiry** to conduct such investigations. (*See paragraph 17*)
- (b) Physicians, preferably those with expertise in **forensic pathology**, should be included in the body tasked to investigate extrajudicial killings. (*See paragraph 18(a)*)
- (c) The body tasked to investigate extrajudicial killings, whether it is the Department of Justice or an independent commission of inquiry, should

³⁷ *Supra* note 35 at para 29.

³⁸ Principle 19 of the Minnesota Protocol, see note 15.

³⁹ *Supra* note 35 at para 30. See also Principle 20 of the Minnesota Protocol.

⁴⁰ *Ibid.*

⁴¹ *Ibid.* at para 29.

investigate all cases, regardless of whether or not a formal complaint has been filed. (See paragraph 16)

- (d) The body tasked to investigate extrajudicial killings should be given **all necessary resources** for it to be able to adequately undertake its task. (See paragraphs 15 and 20)
 - (e) As an immediate priority and noting that many of the victims remain unidentified, the body tasked to conduct the investigation of extrajudicial killings should **identify all the victims and the cause and manner of death**. (See paragraph 18(a))
 - (f) **Family members of all the victims must be informed** immediately. (See paragraph 18(c))
 - (g) The body tasked to conduct investigations into extrajudicial killings must **provide information to the families of victims and their legal representatives**, keeping them up-to-date on the progress and status of the investigations. (See paragraph 18(c))
 - (h) The **safety of witnesses and complainants** must be guaranteed. They should be protected from any form of reprisal and/or intimidation, as a consequence of their providing information or evidence. (See paragraph 18(b))
 - (i) The body tasked to investigate the extrajudicial killings must **submit a written report** within a reasonable time on the methods and findings of its investigations. It must **make this report public**. (See paragraph 18(d))
23. The Government of the Philippines should **prosecute and bring to justice**, in proceedings in line with international standards of due process and with the guarantee not to impose the death penalty, those persons identified in the written report of the investigations as having participated in the extrajudicial killings.⁴² (See paragraph 21(a))
24. Families of victims of extrajudicial killings should be entitled to **fair and adequate compensation, rehabilitation and satisfaction** within a reasonable period of time. (See paragraph 21(b))
25. The conduct and outcomes of the investigations and prosecutions should be aimed at establishing **guarantees of non-recurrence** by drawing necessary lessons for revising practices and policies with a view to avoiding repeated violations. (See paragraph 21(c))

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⁴² Principle 18 of the Minnesota Protocol, see note 15.