

**AMICUS CURIAE BRIEF TO
THE COMMUNITY COURT OF
JUSTICE OF THE ECONOMIC
COMMUNITY OF WEST
AFRICAN STATES (ECOWAS)**

**AMNESTY
INTERNATIONAL**



Amnesty International
International Secretariat
Peter Benenson House
1 Easton Street
London WC1X 0DW
United Kingdom

AI index: AFR 44/005/2012

**IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC
COMMUNITY OF WEST AFRICAN STATES (ECOWAS)
HOLDEN AT ABUJA, NIGERIA**

SUIT NO: ECW/CCJ/APP/10/10

BETWEEN:

- | | | | |
|-----|--------------------------------|-----|------------|
| 1. | THE REGISTERED TRUSTEES OF THE |) | |
| | SOCIO-ECONOMIC RIGHTS & |) | |
| | ACCOUNTABILITY PROJECT (SERAP) |) | |
| 2. | ISRAEL OKARI |) | |
| 3. | JOY WILLIAMS |) | |
| 4. | AUSTIN ONWE |) | |
| 5. | TAMNO TONYE AMA |) | |
| 6. | VICTOR OPIUM |) | |
| 7. | MARK BOMOWE |) | |
| 8. | NAPOLEON TOKUBIYE |) | |
| 9. | JONATHAN BOKOKO |) | |
| 10. | WILLIAMS TAMUNO |) | |
| 11. | LINUS JOHN |).. | PLAINTIFFS |

AND

- | | | | |
|----|---|------|------------|
| 1. | THE FEDERAL REPUBLIC OF NIGERIA |) | |
| 2. | ATTORNEY GENERAL OF THE FEDERATION
& MINISTER OF JUSTICE |) | |
| 3. | GOVERNOR OF RIVERS STATE |) | |
| 4. | ATTORNEY GENERAL &
COMMISSIONER FOR JUSTICE
OF RIVERS STATE |) | |
| 5. | COMMISSIONER FOR URBAN
DEVELOPMENT, RIVERS STATE |)... | DEFENDANTS |

**AMICUS CURIAE BRIEF SUBMITTED BY AMNESTY INTERNATIONAL PURSUANT
TO THE INHERENT JURISDICTION OF THE HONOURABLE COURT**

Contents

I.	Introduction.....	5
II	Discussion of the legal and human rights issues involved in the case.....	5
A	<i>Right to life and the use of actual or potentially lethal force by law enforcement officials, including during demonstrations</i>	7
B	<i>Right to an effective remedy, including the obligations of states to investigate and prosecute allegations of violations of the right to life and other serious human rights violations</i>	14
C	<i>Right to protection against forced evictions</i>	21
III	Conclusion	27
	ANNEX 1: Description and interest of Amicus	29
	ANNEX 2: International standards on the use of force and firearms by law enforcement officials	30
	ANNEX 3: Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions to the General Assembly (UN Doc. A/61/311) 5 September 2006 (excerpt)	36

I. Introduction

1. This amicus brief is respectfully submitted by Amnesty International ('AI'), to the ECOWAS Court of Justice, Abuja, Nigeria (See Annex 1 for brief details about the organisation submitting the amicus curiae brief.)
2. The brief aims to provide the ECOWAS Court of Justice with information on international legal and human rights standards and jurisprudence relating to: (i) the right to life, including the interpretation of Article 4 of the African Charter on Human and Peoples' Rights by the African Commission on Human and Peoples' Rights, and, accordingly, the obligations of states with regard to the use of force and firearms by law enforcement officials during demonstrations; (ii) the right to an effective remedy, including the obligation of states to investigate allegations of violations of the right to life, and prosecute perpetrators; and (iii) protection and safeguards against forced evictions.
3. This brief examines relevant jurisprudence of the African Commission on Human and Peoples' Rights, the European Court of Human Rights and the Inter-American Court of Human Rights, as well as applicable rules of public international law on the above-highlighted issues.
4. Amnesty International hopes this information will be of assistance to the Court as it considers various legal issues in this case arising from the use of force and firearms by law enforcement officials in policing a demonstration by a crowd protesting against the planned demolition of their homes, resulting in at least one person dead and 12 seriously injured; and as it interprets the provisions of relevant international human rights treaties and standards, including the African Charter on Human and Peoples' Rights, applicable in Nigeria.

II Discussion of the legal and human rights issues involved in the case

5. The present case raises questions about the compatibility of Nigeria Police Force Order 237 (Rules for guidance in use of firearms by the police), with international human rights standards, and obligations of Nigeria under international human rights treaties such as the African Charter on Human and Peoples' Rights to which it is a state party. The Force provides for much wider grounds for the use of lethal force than is permissible under international law and standards.

6. Sections 3(d)¹ and 3(e) of Force Order 237 permit police officers to shoot suspects and detainees who attempt to escape or avoid arrest. Under section 3(e) of Force Order 237, the police are allowed to use firearms to “arrest a person who takes to flight in order to avoid arrest, provided the offence is such that the accused may be punished with death or imprisonment for 7 years or more”. Escaping custody or resisting arrest is punishable with seven years imprisonment under Nigerian legislation. As such, the Force Order 237 allows police officers to shoot with impunity anyone who flees.
7. Section 6 of Force Order 237 instructs police officers that in situations of “riot” “[a]ny ring-leaders in the forefront of the mob should be singled out and fired on”. “Riot” is described as a situation in which “12 or more people must remain riotously assembled beyond a reasonable time after the reading of the proclamation”.
8. The only limitations on the use of force in Force Order 237 are that “firearms must only be used as a last resort” and “if there are no other means of effecting [the suspect’s] arrest, and the circumstances are such that his subsequent arrest is unlikely”.² If a police officer shoots at an unarmed man “it would be most difficult to justify the use of firearms.”³ These provisions are impermissibly broad and do not require the existence of an imminent or grave threat of death or serious injury and have a more lenient standard of necessity than what is required by international standards.
9. The UN Special Rapporteur on extrajudicial, summary or arbitrary executions expressed his concerns about Force Order 237 in his report in January 2006: “These rules practically provide the police carte blanche to shoot and kill at will.” He therefore recommended that Police Order No. 237 “be amended immediately to bring it into conformity with the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.”⁴
10. The other human right and legal issue involved in this case is whether or not Nigeria has an obligation under the African Charter on Human and Peoples’ to protect its citizens against forced evictions that do not meet international standards.
11. The Nigerian laws and Constitution do not provide an effective remedy against the use of forced evictions. Although the Constitution contains

1 Section 3(d) gives the police the power to use firearms to “arrest a person who being in lawful custody escapes and takes the flight in order to avoid re-arrest; provided that the offence, with which he is charged or has been convicted of, is a felony or misdemeanor”.

2 Force Order 237, Sections 7 and 9.

3 Force Order 237, Section 4.

4 E/CN.4/2006/53/Add.4

some relevant provisions on fundamental objectives and directive principles of state policy, these objectives and principles express goals, not rights. Although they embrace responsibilities of enormous scope, they are not justiciable in the sense that their non-fulfilment cannot be challenged in Nigerian courts.

A *Right to life and the use of actual or potentially lethal force by law enforcement officials, including during demonstrations*

12. Article 4 of the African Charter on Human and Peoples' Rights provides: "*Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.*" Similarly, Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR) provides: "*Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*"
13. The right to life guaranteed under these and similar provisions in other human rights treaties places an attendant obligation on states to ensure the right, and is central to any system for the protection of human rights. According to the African Commission on Human and Peoples' Rights, "*the right to life is the fulcrum of all other rights. It is the fountain through which other rights flow, and any violation of this right without due process amounts to arbitrary deprivation of life.*"⁵
14. International human rights treaties that permit derogation from certain treaty obligations in time of an officially proclaimed public emergency which threatens the life of the nation do not permit any derogation from states' obligations to ensure the right to life.⁶ The African Charter on Human and Peoples' Rights contains no derogation clause, which, as the African Commission has pointed out, can be seen as an expression of the principle that the restriction of human rights is not a solution to national difficulties: the legitimate exercise of human rights does not pose dangers to a democratic state governed by the rule of law.⁷
15. International human rights law and jurisprudence have established that the obligation on states to ensure the right to life entails an obligation to respect the right, in particular to ensure that agents of the state do not arbitrarily deprive anyone of his or her life (essentially a negative

5 Communication 223/98 (2000) Forum of Conscience v. Sierra Leone, para. 19.

6 International Covenant on Civil and Political Rights (ICCPR), Article 4; European Convention on Human Rights (ECHR), Article 15.

7 Communication 74/92 Commission Nationale des Droits de l'Homme et des Libertés/Chad, para. 21.

obligation); and a positive obligation to exercise due diligence to protect life from being threatened by third parties. (A third aspect of this obligation, the positive obligation to investigate the death of a person who may have been arbitrarily deprived of life, is considered below in part II.B.)

16. The UN Human Rights Committee, a body of independent experts established under the International Covenant on Civil and Political Rights (hereinafter ICCPR) to monitor states' implementation of that treaty, has stated that in order to prevent arbitrary killing by state security forces, *"the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities"*.⁸ According to the Human Rights Committee, *"The protection against arbitrary deprivation of life which is explicitly required by the third sentence of Article 6 (1) is of paramount importance. The Committee considers that States Parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity."*
17. Furthermore, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions (hereinafter UN Special Rapporteur) has noted that human rights standards on the use of force by law enforcement officials derive from the understanding that the irreversibility of death justifies stringent safeguards for the right to life, especially in relation to due process.⁹ A similar position is reflected in the jurisprudence of the African Commission, as illustrated in the case cited above.
18. If, in certain exceptional situations, in order to comply with the state's obligation of due diligence in protecting the right to life of individuals against the actions of others, it becomes necessary for law enforcement officials to use force in the face of violent attack which constitutes a threat to life, the degree of such force must be only such as is both necessary and proportionate. The UN Special Rapporteur has stressed that in these circumstances necessity and proportionality are fundamental safeguards to ensure respect and protection of the right to life.¹⁰
19. The UN Special Rapporteur has elaborated on how each of these distinct but interlinked criteria contributes to reconciling the obligations to respect and to ensure the right to life. The proportionality requirement derives from the relationship between the level of force used and the legitimate objective for which it is used. It places an absolute ceiling on the permissible level of force, based on the nature of the threat posed by the suspect. The necessity requirement imposes an obligation to minimize the level of force

⁸ Human Rights Committee, General Comment No. 6: The right to life (Article 6), para. 3.

⁹ Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions to the General Assembly (UN Doc. A/61/311) para. 36 (reproduced in Annex 3).

¹⁰ See A/61/311, para. 37.

used, regardless of the level of force that would be proportionate in that instance.

20. In general the necessary level of force should be determined by starting without force or employing force at a low level and, if that proves insufficient in the particular case, escalating the level as gradually as possible, including by issuing warnings of any intent to use firearms, unless in the circumstances of the case that would be impossible or clearly inappropriate or pointless.
21. The necessity requirement will never justify the use of force that is disproportionate; the proportionality requirement means that the escalation of force must cease when the consequences for the suspect of applying a higher level of force would outweigh the value of the objective. The application of these twin criteria means that firearms should not be used except in defence against the imminent threat of death or serious injury, and intentional lethal use of firearms is permissible only when strictly unavoidable in order to protect life.¹¹
22. The applicable international human rights law in such situations is reflected in Article 3 of the UN Code of Conduct for Law Enforcement Officials (hereinafter Code of Conduct)¹² and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (hereinafter Basic Principles on the Use of Force).¹³ These standards are key to defining the limits to the use of force by law enforcement officials. As the UN Special Rapporteur has pointed out, they were developed through intensive dialogue between law enforcement and human rights experts, and the process of their development and adoption involved a very large number of states and provides an indication of the near-universal consensus on their content.¹⁴ Around 120 states, including over 30 African states, participated in the UN Congress at which they were adopted.
23. The UN Special Rapporteur has also pointed out that some of the provisions in these standards are rigorous applications of legal rules that states have otherwise assumed under treaties they are party to or under customary international law. Among these are the instruments' core provisions on the use of force. Thus, the substance of Article 3 of the Code of Conduct and Principle 9 of the Basic Principles reflects binding international law.¹⁵

11 See A/61/311, paras 40-44.

12 Code of Conduct for Law Enforcement Officials, UN General Assembly resolution 34/169, 17 December 1979 (for text of Article 3, see Annex 2).

13 Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990 (for text, see Annex 2).

14 A/61/311 para 35.

15 A/61/311 para 35.

24. Article 3 of the Code of Conduct, combining the twin criteria of necessity and proportionality, states that "*Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty*". The commentary to this provision underlines that the use of force by law enforcement officials should be exceptional; it is not permitted to use force that is disproportionate to the legitimate objective to be achieved.
25. This principle is elaborated in the Basic Principles on the Use of Force. Principle 9, in particular, states that "*Law enforcement officials shall not use 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, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.*"
26. In line with this approach, Principle 4 expressly states that law enforcement officials, in carrying out their duty, must, as far as possible, apply non-violent means before resorting to the use of force and firearms. Principle 2 provides that authorities should develop a broad range of means and equipment for a differentiated use of force and firearms, including shields, helmets and other self-defensive equipment so as to decrease the need to use weapons of any kind.
27. Principles 13 and 14 deal specifically with policing of demonstrations. After referring to the right to peaceful assembly as embodied in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, they state: "*In the dispersal of assemblies that are unlawful but non-violent, law enforcement officials shall avoid the use of force or, where that is not practicable, shall restrict such force to the minimum extent necessary. In the dispersal of violent assemblies, law enforcement officials may use firearms only when less dangerous means are not practicable and only to the minimum extent necessary. Law enforcement officials shall not use firearms in such cases, except under the conditions stipulated in principle 9.*"
28. The African Commission has, in a case where it considered the policing of demonstrations, taken a similar position to that set out in the Basic Principles, stating that it "*deplores the abusive use of means of State violence against demonstrators even when the demonstrations are not authorised by the competent administrative authorities. The public authorities possess adequate means to disperse crowds, and that those responsible for public order must make an effort in these kind of operations*

*to cause only the barest minimum of damage and violation of physical integrity, to respect and preserve human life.*¹⁶

29. The limits on the use of force by law enforcement officials set out in the Basic Principles on the Use of Force, and endorsed by the African Commission and other human rights bodies and courts, apply at all times. Principle 8 explicitly states that *“exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles”*.¹⁷
30. Moreover, the Basic Principles on the Use of Force have been cited by the Inter-American Court of Human Rights (hereinafter Inter-American Court)¹⁸ and in numerous cases by the European Court of Human Rights (hereinafter European Court)¹⁹ where those courts found a violation of the right to life.
31. The jurisprudence of the European Court in its interpretation of the right to life under Article 2 of the European Convention on Human Rights (hereinafter European Convention) is in many ways similar to the interpretative approach by the African Commission of the right to life.
32. The European Court has over the years had the opportunity to explore in detail its interpretation of this right in its examination of numerous cases. A few such cases which this Court may find useful to consider are referred to below. Taken together, these cases cover a number of aspects of the use of force by law enforcement officials in a variety of circumstances. In several of them the Court explicitly cited and relied on the Basic Principles.²⁰
33. In ***Makaratzis v. Greece (2004)***,²¹ police officers had fired several shots at an unarmed driver of a car who had driven through a red traffic light and several police barriers, seriously wounding him. The applicant brought a complaint under Articles 2, 3 and 13 of the European Convention, that the police officers had used excessive “fire-power” against him; and that the authorities had failed to investigate the incident. The European Court found that the “chaotic way” in which the firearms had been used “in a largely uncontrolled chase” in terms of an “obsolete and incomplete” law regulating

16 Communication 204/97, *Mouvement Burkinabe des Droits de l'Homme et des Peuples v. Burkina Faso*, para. 42.

17 Principle 8.

18 See *Zambrano Vélez et al. v. Ecuador*, Judgment of July 4, 2007. Series C No. 166, http://www.corteidh.or.cr/docs/casos/articulos/seriec_166_ing.pdf.

19 See, e.g., *Makaratzis v. Greece*, *Nachova and Others v. Bulgaria*, and *Simsek and Others v. Turkey*, cited below.

20 See, e.g., *Makaratzis v. Greece*, *Nachova and Others v. Bulgaria*, *Simsek and Others v. Turkey*, cited below.

21 Appl. No. 50385/99, Judgment of 20 December 2004.

the use of firearms had amounted to a violation of Article 2 of the European Convention.²²

34. Citing and relying heavily on several paragraphs²³ of the Basic Principles, the Court said that, “*The object and purpose of the [European Convention] as an instrument for the protection of individual human beings also requires that Article 2 be interpreted and applied so as to make its safeguards practical and effective.*”²⁴

35. The European Court also said that,

*[States are required] not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps within its internal legal order to safeguard the lives of those within its jurisdiction. This involves a primary duty on the State to secure the right to life by putting in place an appropriate legal and administrative framework to deter the commission of offences against the person, backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions....the use of lethal force by police officers may be justified in certain circumstances. Nonetheless, Article 2 does not grant a carte blanche. Unregulated and arbitrary action by State agents is incompatible with effective respect for human rights. This means that, as well as being authorised under national law, policing operations must be sufficiently regulated by it, within the framework of a system of adequate and effective safeguards against arbitrariness and abuse of force whether in the context of a prepared operation or a spontaneous chase of a person perceived to be dangerous: a legal and administrative framework should define the limited circumstances in which law-enforcement officials may use force and firearms, in the light of the international standards which have been developed in this respect.*²⁵

36. Along these lines, the European Court has also indicated that the lack of a domestic legal framework on use of lethal force is relevant to assessing the proportionality of response by law enforcement officials in any given situation.²⁶ The Court said that:

Article 2 covers not only intentional killing but also the situations in which it is permitted to “use force” which may result, as an unintended

22 P. 40 of the Annual Activity Report, 2004, available at <http://www.echr.coe.int/NR/rdonlyres/D1DFB6C3-DBE1-4C3B-BA06-26EF5D6A4291/0/2004GrandChamberactivityreport.pdf>

23 The European Court quoted robustly paragraphs 5, 7, 9, 10, 22 and 23 of the Basic Principles.

24 See para. 56 of the Judgment, cited above.

25 See paras 56, 57, 58, and 59 of the Judgment, cited above.

26 *Isayeva v. Russia* (2005), Appl. No. 57950/00, Judgment of 24 February 2005.

*outcome, in the deprivation of life. However, the deliberate or intended use of lethal force is only one factor to be taken into account in assessing its necessity. Any use of force must be no more than “absolutely necessary” for the achievement of one or more of the purposes [set out in article 2]. This term indicates that a stricter and more compelling test of necessity must be employed than that normally applicable when determining whether State action is “necessary in a democratic society” under paragraphs 2 of Articles 8 to 11 of the Convention. Consequently, the force used must be strictly proportionate to the achievement of the permitted aims.*²⁷

37. According to the European Court, *“In the light of the importance of the protection afforded by Article 2, the Court must subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances.”*²⁸

38. The European Court also stated that:

*The State's responsibility is not confined to circumstances where there is significant evidence that misdirected fire from agents of the state has killed a civilian. It may also be engaged where they fail to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, minimising, incidental loss of civilian life. The Court considers that using this kind of weapon in a populated area, outside wartime and without prior evacuation of the civilians, is impossible to reconcile with the degree of caution expected from a law enforcement body in a democratic society.*²⁹

39. In ***Gulec v. Turkey (1998)***,³⁰ the applicant's son was killed while taking part in a demonstration in a village in southeast Turkey. Security forces had opened fire from an armoured vehicle. The European Court noted that the demonstration had not been a peaceful one. The Court held that while the security forces may have been justified in using force, they had used a very powerful weapon and had not been equipped with less dangerous equipment such as truncheons, tear gas, riot shields, water cannon, or rubber bullets.³¹ Further, the state adduced no evidence that any of the demonstrators had themselves been armed. The Court concluded that the use of force had not been “absolutely necessary”.³²

27 See *id.* Para 173 of the Judgment, cited above

28 See para 174 of the Judgment, cited above.

29 See paras 176-191 of the Judgment, cited above.

30 Appl. No. 21593/93, Judgment of 27 July 1998

31 See para. 71 of the Judgment, cited above.

32 See para. 73 of the Judgment, cited above.

40. In *Nachova and Others v. Bulgaria (2005)*,³³ the applicant's relatives were killed by military police who were trying to arrest them in relation to a non-violent offence. The European Court held that in the circumstances any resort to potentially lethal force was prohibited by Article 2 of the European Convention, as the police were aware that the victims posed no threat and they were not suspected of having committed a violent offence, *"even if a failure to use lethal force may result in the opportunity to arrest the fugitive being lost"*.³⁴
41. The European Court also found that the officer who shot them used "grossly excessive" force, as he used an automatic rifle, instead of the handgun he was carrying, there were other means available to effect the arrest, and one of the deceased had been shot in the chest suggesting the possibility that he had turned to surrender before he was shot. The Court was also critical of the planning and control of the arrest operation, the deficient legal regulation and lack of adequate training, and concluded that the authorities had failed to comply with their obligation to minimise the risk of loss of life.³⁵
42. Consistent with its practice, the court quoted and relied heavily on the UN Basic Principles, highlighted above. The Court thus stated that, *"the national law regulating policing operations must secure a system of adequate and effective safeguards against arbitrariness and abuse of force and even against avoidable accident. In particular, law-enforcement agents must be trained to assess whether or not there is an absolute necessity to use firearms not only on the basis of the letter of the relevant regulations but also with due regard to the pre-eminence of respect for human life as a fundamental value"*.³⁶

B Right to an effective remedy, including the obligations of states to investigate and prosecute allegations of violations of the right to life and other serious human rights violations

43. The ICCPR, to which Nigeria is a state party, in Article 2(3) places an obligation on states to ensure that individuals have effective remedies for violations of human rights. This obligation entails establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations, including of the right to life, under domestic law.³⁷ In particular, the obligation on states to ensure the right to life includes an obligation to

33 Appl. No. 43577/98; 43579/98, Judgment of 6 July 2005

34 Id. See para. 95 of the Judgment, cited above.

35 See paras 89, 90, and 93 of the Judgment, cited above.

36 See para. 95 of the Judgment, cited above.

37 Human Rights Committee, General Comment No. 31, "Nature of the legal obligation on States Parties to the Covenant" (2004), (CCPR/C/21/Rev.1/Add.13), para. 15.

investigate alleged violations of the right to life “*promptly, thoroughly and effectively through independent and impartial bodies*”,³⁸ making reparation, including compensation, to those whose rights have been violated;³⁹ taking steps to prevent a recurrence of the violation;⁴⁰ and ensuring that those responsible are brought to justice.⁴¹ Failure to investigate allegations of violations of the right to life or failure to bring perpetrators to justice can give rise to separate breaches of the ICCPR.⁴²

44. The African Charter on Human and Peoples’ Rights (hereinafter African Charter) places on states a similar obligation to that imposed by the ICCPR. As the African Commission has pointed out: “*The Charter specifies in Article 1 that the States Parties shall not only recognise the rights duties and freedoms adopted by the Charter, but they should also undertake ... measures to give effect to them. In other words, if a State neglects to ensure the rights in the African Charter, this can constitute a violation, even if the state or its agents are not the immediate cause of the violation.*”⁴³

45. Similarly, the 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,⁴⁴ adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, apply a duty to investigate arising out of both branches of law. Paragraph 3 states: “*The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to: (a) Take appropriate legislative and administrative and other appropriate measures to prevent violations; (b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate,*

38 Human Rights Committee, General Comment No. 31, para. 15. See also Commission on Human Rights resolution 2004/37, para. 5, in relation to the mandate of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions: “Reiterates the obligation of all States to conduct exhaustive and impartial investigations into all suspected cases of extrajudicial, summary or arbitrary executions, to identify and bring to justice those responsible, while ensuring the right of every person to a fair and public hearing by a competent, independent and impartial tribunal established by law, to grant adequate compensation within a reasonable time to the victims or their families and to adopt all necessary measures, including legal and judicial measures, in order to bring an end to impunity and to prevent the recurrence of such executions, as stated in the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.”

39 General Comment 31, para. 16.

40 General Comment 31, para. 17.

41 General Comment 31, para. 18.

42 General Comment 31, paras 15 and 18.

43 Communication 74/92 Commission Nationale des Droits de l’Homme et des Libertés/Chad, para. 20.

44 21 March 2006, UN Doc A/RES/60/147.

take action against those allegedly responsible in accordance with domestic and international law; (c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, irrespective of who may ultimately be the bearer of responsibility for the violation; and (d) Provide effective remedies to victims, including reparation, as described below.”

46. With regard to violations in the context of law enforcement operations, a number of other international standards build on the principles reflected in the African Charter and elaborate in some detail on the particular measures states should take to fulfil these obligations. Most prominently, in 1989 the UN Economic and Social Council adopted the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, which states that governments must ensure that any such executions are recognised as offences under their criminal laws, and are punishable by appropriate penalties which take into account the seriousness of such offences, and that exceptional circumstances including a state of war or threat of war, internal political instability or any other public emergency may not be invoked as a justification of such executions.⁴⁵
47. Similarly, the Basic Principles on the Use of Force states that governments must ensure that arbitrary or abusive use of force and firearms by law enforcement officials is punished as a criminal offence under their law, and that exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles.⁴⁶
48. The Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions set out detailed guidance for the thorough, prompt and impartial investigations which must take place into all suspected cases of extra-legal, arbitrary and summary executions, and which should guide states whenever they carry out investigations into allegations of violations of the right to life in the course of law enforcement operations. The investigative authority must have the power to obtain all the information necessary to the inquiry, and those conducting the investigation shall have at their disposal all necessary resources for effective investigation and the authority to oblige witnesses, including officials allegedly involved, to appear and testify, and to demand the production of evidence.⁴⁷ Those potentially implicated must be removed from any position of control or power, whether direct or indirect, over complainants, witnesses and their families, as well as over those conducting investigations, who must be protected from any form of

45 UN Principles on Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Principle 1

46 Principles 7 and 8.

47 Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions Principle 10.

intimidation.⁴⁸ Where established investigative procedures are inadequate, including because of lack of expertise or impartiality or the apparent existence of a pattern of abuse, such investigations must be pursued through an independent commission of inquiry or similar procedure, comprising members who are independent of any institution, agency or person that may be the subject of the inquiry, and chosen for their recognized impartiality, competence and independence as individuals.⁴⁹ A public report must be made within a reasonable period of time on the methods and findings of such investigations.⁵⁰

49. The families of victims of extra-legal, arbitrary or summary executions must be entitled to fair and adequate compensation within a reasonable period of time,⁵¹ and those identified by the investigation as having participated in such executions must be brought to justice.⁵² Orders from a superior officer or a public authority may not be invoked as a justification for such executions, and superior officers or other public officials may be held responsible for acts committed by those under their authority if they had a reasonable opportunity to prevent such acts.⁵³

50. The African Commission on Human and Peoples' Rights has also commented on these obligations of states in terms of the African Charter on Human and Peoples' Rights.

51. In ***Amnesty International and Others v Sudan (1999)***,⁵⁴ the African Commission elaborated on the nature of a state's duty to investigate, requiring that investigations be sufficiently thorough: "*Investigations must be carried out by entirely independent individuals, provided with the necessary resources, and their findings should be made public and prosecutions initiated in accordance with the information uncovered.*"⁵⁵

52. In ***Zimbabwe Human Rights NGO Forum v Zimbabwe, (2006)***,⁵⁶ the African Commission also stated: "*To expect victims of violations to undertake private prosecutions where the state has not instituted criminal*

48 Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Principle 15.

49 Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Principle 11.

50 Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Principle 17.

51 Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Principle 20.

52 Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Principle 18.

53 Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Principle 19.

54 ACHPR Nos. 48/90, 50/91, 52/91, 89/93 (1999)

55 Id. Para. 51.

56 ACHPR No. 245/02 (2006)

action against perpetrators of crimes or even follow up with the Attorney-General what course of action has been taken by the state as the respondent state seems to suggest in this matter would be tantamount to the state relinquishing its duty to the very citizens it is supposed to protect. Thus, even if the victims of the criminal acts did not institute any domestic judicial action...the respondent state...holds the ultimate responsibility of harnessing the situation and correcting the wrongs complained of.”⁵⁷

53. Citing with approval the decision of the Inter-American Court in the case of **Velásquez Rodríguez v Honduras**⁵⁸ the African Commission also said:

“[S]tates are obliged to investigate every situation involving a violation of the rights protected by [international law]. Moreover, governments [are required] to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation. This represents an authoritative interpretation of an international standard on state duty. The opinion of the [Inter-American] Court could also be applied, by extension, to article 1 of the African Charter of Human and Peoples’ Rights, which requires states parties to ‘recognize the rights, duties and freedoms enshrined in the Charter and ... undertake to adopt legislative and other measures to give effect to them....[T]he underlying aspect is that it is up to states, and states alone, to carry out obligations established by international human rights treaties.”⁵⁹

54. States’ obligations to investigate and prosecute violations of the right to life and other human rights violations has also been elaborated by the European Court in numerous cases where the Court has found a violation of the right to life because of a failure by the state to conduct a prompt, thorough and independent investigation. Some examples are highlighted below.

55. In **Gulec v Turkey**, cited above, the European Court stated that,

The general legal prohibition of arbitrary killing by the agents of the State laid down in Article 2 would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision, read in conjunction with the State’s general duty under Article 1 of the Convention to “secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention”, requires by implication that there should be some form of effective official

57 Id. Paras 69, 70.

58 Series C, No. 4, 9 Human Rights Law Journal 212 (1988).

59 ACHPR Communication No. 245/02 (2006), at paras 144 and 149.

*investigation when individuals have been killed as a result of the use of force by [for example] agents of the State.*⁶⁰

56. In ***Nachova and Others v. Bulgaria***, also cited above, the European Court stated that, “States have a general obligation under Article 2 of the Convention to conduct an effective investigation in cases of deprivation of life.”⁶¹

57. In ***Makaratzis v Greece***, cited above, the European Court also stated that:

*The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State’s general duty under Article 1 to “secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention”, requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force. The essential purpose of such an investigation is to secure the effective implementation of the domestic laws safeguarding the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. Since often, in practice, the true circumstances of the death in such cases are largely confined within the knowledge of State officials or authorities, the bringing of appropriate domestic proceedings, such as a criminal prosecution, disciplinary proceedings and proceedings for the exercise of remedies available to victims and their families, will be conditioned by an adequate official investigation, which must be independent and impartial. The same reasoning applies in the case under consideration, where the Court has found that the force used by the police against the applicant endangered his life. The investigation must be capable, firstly, of ascertaining the circumstances in which the incident took place and, secondly, of leading to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, inter alia, eyewitness testimony and forensic evidence. A requirement of promptness and reasonable expedition is implicit in this context. Any deficiency in the investigation which undermines its capability of establishing the circumstances of the case or the person responsible is liable to fall foul of the required standard of effectiveness.*⁶²

58. The Inter-American Court has also developed a body of law and jurisprudence similar to those developed by the African Commission and the European Court, highlighted above.

60 Id. Para. 77.

61 Id. Para. 156.

62 Paras. 73, 74.

59. The Inter-American Court has reaffirmed that states party to the American Convention on Human Rights, (a convention which contains provisions similar to those in the African Charter on Human and Peoples' Rights) investigate, prosecute, and punish every violation of rights protected by the convention. The Inter-American Court has underscored this duty through a consistent body of case law, and recognized the obligation as emerging from the commitment of states to ensure and guarantee rights protected by the American Convention and to satisfy victims' rights.
60. Thus, in ***Velásquez Rodríguez v Honduras (1988)***,⁶³ a case involving violation of the right to life in the context of a systematic and selective practice of forced disappearances carried out with the assistance or tolerance of the government of in Honduras, the Inter-American Court concluded:

*The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights [to life and physical integrity of the person in the instant case] is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. This obligation implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention.*⁶⁴

61. *The Velásquez-Rodríguez* holding is a consequence of the Inter- American Court's interpretation of Article 1(1) of the American Convention (which is essentially the same as the provisions of Article 2 of the African Charter).⁶⁵ The Court explained: "Article 1(1) is essential in determining whether a violation of the human rights recognized by the Convention can be imputed to a State Party. In effect, that article charges the States Parties with the fundamental duty to respect and guarantee the rights recognized in the Convention. Any impairment of those rights which can be attributed under the rules of international law to the action or omission of any public

63 Inter-Am. Ct. H.R. (ser. C) No. 4

64 Id. para. 166.

65 Id. ("The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.").

*authority constitutes an act imputable to the State, which assumes responsibility in the terms provided by the Convention.*⁶⁶

62. The Court further stated that, “*the failure to investigate is a violation by Honduras of a legal duty under Article 1(1) of the [Inter-American] Convention [of Human Rights] to ensure the rights recognized by Article 4(1). That duty is to ensure to every person subject to its jurisdiction the inviolability of the right to life and the right not to have one’s life taken arbitrarily. These rights imply an obligation on the part of States Parties to **take reasonable steps to prevent situations that could result in the violation of that right*** [emphasis added]”⁶⁷

63. In a further comment on states’ obligations to ensure the right to life the Inter-American Court also referred, in *Paniagua-Morales v Guatemala*,⁶⁸ to the situation of impunity “the total lack of investigation, prosecution, capture, trial and conviction of those responsible” which continued to exist in Guatemala with regard to the acts of the case in question. It held the state responsible for failure to abide by Article 1(1) of the American Convention, in connection with the violation of inter alia, the right to life and stressed that “*the State has the obligation to use all the legal means at its disposal to combat that situation, since impunity fosters chronic recidivism of human rights violations, and total defenselessness of victims and their relatives.*”⁶⁹

C Right to protection against forced evictions

64. Nigeria as a state party to the African Charter on Human and Peoples’ Rights has legal obligations under both the Charter and other international treaties it has ratified to recognize the right of everyone to adequate housing. This human right has been broadly interpreted to include everyone’s right to live somewhere in security, peace and dignity.⁷⁰ The right to adequate housing imposes an obligation on states to ensure a degree of security of tenure, which guarantees legal protection against forced evictions, harassment and other threats.

66 Id. para 164.

67 Id. Para. 188.

68 Id. Para. 173.

69 Id para. 173.

70 Human Rights Council, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Miloon Kothari UN doc. A/HRC/7/16 (13 February 2008), para. 4. See also UN CESCR, General Comment 4

65. Thus, no evictions must be carried out unless appropriate procedural protections are in place including genuine consultation with all affected individuals to identify all feasible alternatives to evictions, due process safeguards such as adequate notice prior to evictions, the ability to challenge the eviction and receive appropriate remedies, including compensation for all losses and that adequate alternative housing is provided to those affected, who are unable to provide for themselves.
66. The right to adequate housing is protected under various international and regional treaties, including Articles 14, 16 and 18 of the African Charter on Human and Peoples' Rights (as stated by the African Commission); Article 11.1 of the International Covenant on Economic, Social and Cultural Rights, Article 17 of the ICCPR, Articles 16(1) and 27(4) of the Convention on the Rights of the Child, Article 14(2) of the Convention on the Elimination of All Forms of Discrimination against Women, and Article 5 (e) of the International Convention on the Elimination of All Forms of Racial Discrimination, all of which Nigeria has ratified.
67. Although the right to housing is not expressly mentioned in the African Charter, the African Commission has held that the right, given its integral links to other rights, is protected under the Charter:

Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health...the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the combined effect of Articles 14, 16 and 18 reads into the Charter a right to shelter or housing which the Nigerian Government has apparently violated.⁷¹

68. In so doing the African Commission has underscored two fundamental elements in the realisation of the right to housing: firstly, the prohibition on states parties not to forcibly evict housing and secondly not to obstruct efforts by individuals and communities to rebuild lost homes. Accordingly, *"the right to housing goes beyond having a roof over ones head. It extends to embody the individual's right to be let alone and live in peace-whether under a roof or not."*⁷² States and their agents must therefore not engage in any act that obstructs the enjoyment of the contents of the right to housing.⁷³
69. The African Commission on Human and Peoples' Rights during its recently concluded 50th Ordinary Session in Banjul, The Gambia, reaffirmed its

71 Inter-Am. Ct. H.R. (ser. C) No. 4, para. 60.

72 See Communication 155/96, para. 61.

73 See id.

position on protection against forced evictions when it adopted its Principles and Guidelines on the implementation of Economic, Social and Cultural Rights in the African Charter (hereinafter ESCR Guidelines). Drawing on both established international standards and relevant African provisions, the ESCR Guidelines further clarify and strengthen the protection of the right to an adequate housing, including safeguards against forced evictions.

70. The Chairperson of the African Commission Ms Modupe Atoki, during said the launch of the Guidelines that, *“The ESCR Guidelines make the African Charter a complete instrument for the protection and promotion of human rights. Not only do they confirm economic, social and cultural rights as enforceable rights, but they also assist States to develop national action plans to work towards realization of these rights.”*
71. According to the ESCR Guidelines, *“Forced evictions are acts and/or omissions involving the coerced or involuntary displacement of individuals, groups and communities from homes and/or lands and common property resources that were occupied or depended upon, thus eliminating or limiting the ability of an individual, group or community to reside or work in a particular dwelling, residence or location, without the provision of, and access to, appropriate forms of legal or other protection.”*⁷⁴ Significantly, the Guidelines require states parties to the African Charter to *“Ensure that any legal use of force must respect the principles of necessity and proportionality, as well as the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.”*
72. Similarly, the UN Committee on Economic, Social and Cultural Rights which provides authoritative guidance on the interpretation of the International Covenant on Economic, Social and Cultural Rights (CESCR) to which Nigeria is a state party defines a forced eviction as *“the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of and access to, appropriate forms of legal or other protection.”*⁷⁵

74 See also Basic Principles and Guidelines on Development-Based Evictions and Displacement: Annex 1 of the Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living (2006), para. 4. See also the following cases by the Committee Against Torture: (a) In 2001 the Committee expressed concern about Israeli demolition policies “which may, in certain instances, amount to cruel, inhuman or degrading treatment or punishment”; (b) In 2004 the Committee expressed concern regarding the ill-treatment in Greece of “... Roma by public officials in situations of forced evictions or relocation”; (c) In *Hijrizi v Yugoslavia* (Communication No. 161/2000) the UNHRC held that the destruction of a Roma settlement constituted “acts of cruel, inhuman or degrading treatment or punishment” contrary to Article 16 of the CAT.

75 Committee on Economic, Social and Cultural Rights, General Comment 7, The Right to Adequate Housing: forced evictions, para. 3.

73. The Committee on Economic, Social and Cultural Rights has also stated that the right to housing should not be interpreted in a narrow restrictive sense as a “roof over one’s head” or one which views shelter exclusively as a commodity.⁷⁶
74. The Committee has stated that “instances of forced eviction are prima facie incompatible with the requirements of the Covenant”.⁷⁷ The Committee has also emphasised, “*In essence, the obligations of States parties to the Covenant in relation to forced evictions are based on article 11.1, read in conjunction with other relevant provisions. ... The State itself must refrain from forced evictions and ensure that the law is enforced against its agents or third parties who carry out forced evictions*”.⁷⁸
75. The UN Human Rights Committee has also stated that forced evictions contravene article 17 of the ICCPR, which provides for the right to the protection of the law against arbitrary or unlawful interference with a person’s privacy, family or home.⁷⁹
76. Similarly, the European Court has developed the concept of “home” in several of its judgments. One of the criteria used by the Court to assess what constitutes a “home” protected under Article 8 is “sufficient and continuing links with a place”.⁸⁰
77. While reviewing cases, the European Court has considered if there is a pressing social need and if the measure employed is proportionate to the legitimate aim pursued.⁸¹ In ***Connors v United Kingdom***, the European Court made it clear that deprivation of home requires a fair and public hearing and other procedural safeguards, including “the requirement to establish proper justification for the serious interference with human rights”. The Court held that the eviction in this case could not be “justified by a “pressing social need” or proportionate to the legitimate aim being pursued.”⁸²
78. The former UN Commission on Human Rights (now the Human Rights Council) has also recognised that forced evictions constitute gross

76 CESCR. General Comment No. 4, The Right to Adequate Housing, 13/12/91, para. 6 and 7.

77 CESCR, General Comment 4: The right to adequate housing (article 11.1), (Sixth session, 13 December 1991), para. 18. Id.

78 CESCR, General Comment 7, para 8.

79 See Concluding Observations of the Human Rights Committee: Kenya, UN Human Rights Committee, CCPR/CO/83/KEN 29 April 2005, para 22.

80 O’Rourke v. United Kingdom (Application no. 39022/97), decision of the European Court of Human Rights 2001

81 Gillow v. United Kingdom (Application no. 9063/80), judgment of the European Court of Human Rights 1986, para. 55; Olsson v. Sweden (Application no. 1 0465/83), judgment of the European Court of Human Rights 1988, para. 67

82 Connors v. United Kingdom (Application no. 66746/01), judgment of the European Court of Human Rights 2004, para. 92

violations of a range of human rights, in particular the right to adequate housing.⁸³

79. Additionally, the Committee on Economic, Social and Cultural Rights has emphasised that under the International Covenant on Economic, Social and Cultural Rights, evictions may be carried out only as the last resort, once all other feasible alternatives have been explored in consultation with affected people and only after appropriate procedural and legal safeguards are in place.⁸⁴ *“States parties shall ensure, prior to carrying out any evictions, and particularly those involving large groups, that all feasible alternatives are explored in consultation with the affected persons, with a view to avoiding, or at least minimizing, the need to use force”*.⁸⁵

80. The Committee has stated “Appropriate procedural protection and due process are essential aspects of all human rights but are especially pertinent in relation to a matter such as forced evictions which directly invokes a large number of the rights recognized in both the International Covenants on Human Rights.”⁸⁶ The Committee considers that the procedural protections which should be applied in relation to forced evictions include:

- genuine consultation with those affected by the possible or planned eviction;
- affected individuals must be provided with reasonable notice prior to the scheduled date of eviction;
- information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected;
- especially where groups of people are involved, government officials or their representatives to be present during an eviction;
- all persons carrying out the eviction to be properly identified;
- evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise;
- provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts;

83 UN Commission on Human Rights Resolution 1993/77, para 1.

84 CESCR, General Comment 7, The Right to Adequate Housing: forced evictions, 20/05/1997, paras 13 and 15,

85 CESCR, General Comment 7, The Right to Adequate Housing: forced evictions, 20/05/1997, para. 13.

86 CESCR, General Comment 7, The Right to Adequate Housing: forced evictions, 20/05/1997, para 15.

➤ provision of legal remedies⁸⁷

81. Adequate alternative housing and compensation for all losses must be made available to those affected, regardless of whether they rent, own, occupy or lease the land or housing in question. Evictions must not “render individuals homeless or vulnerable to the violation of other human rights.”⁸⁸

82. The Committee has also noted that even when an eviction is considered to be justified, “it should be carried out in strict compliance with the relevant provisions of international human rights law and in accordance with general principles of reasonableness and proportionality.”⁸⁹

83. Many domestic courts have also condemned the practice of forced evictions. ***In Olga Tellis & ors. v Bombay Municipal Corporation & ors, July 10, 1985***, the Indian Supreme Court held that the forced evictions of various slum and pavement dwellers violated their right to life and should be subject to appropriate safeguards. In so doing the Court emphasised that *“Procedural safeguards have their historical origins in the notion that conditions of personal freedom can be preserved only when there is some instinctual check on arbitrary action on the part of the public authorities. The right to be heard has two facets, intrinsic and instrumental. The -intrinsic value of that right consists in the opportunity which it gives to individuals or groups, against whom decision taken by public authorities operate, to participate in the processes by which those decisions are made, an opportunity that expresses their dignity as persons. Even the law of Torts requires that though a trespasser may be evicted forcibly, the force-used must be no greater than what is reasonable and appropriate to the occasion and, what is even more important, the trespasser should be asked and given a reasonable opportunity to depart before force is used to expel him.”*⁹⁰

84. The South African Constitutional Court has held that prior to any eviction authorities must engage meaningfully with residents if it is likely to result in homelessness. Meaningful engagement should enable authorities to understand their economic situation and, within available resources, provide adequate alternative accommodation.⁹¹

87 CESCR, General Comment 7, The Right to Adequate Housing: forced evictions, 20/05/1997, para. 15,

88 CESCR, General Comment 7, para. 16.

89 CESCR, General Comment 7, para. 14.

90 Id. Para. 93.

91 Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v. City of Johannesburg and others, CCT 24/07.

III Conclusion

85. The present case directly engages Articles 1, 2, 4, 14, 16 and 18 of the African Charter on Human and Peoples' Rights and other similar provisions of international and regional human rights treaties and standards. This Brief aims to assist the Honourable Court in its determination of the scope of these and other similar provisions in terms of the rights guaranteed and the obligations imposed on states parties.
86. Amnesty International notes that Article 14(g) of the Revised Treaty of the Economic Community of West African States provides for the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.
87. It is the Amicus' submission that the weight of international standards and jurisprudence highlighted above support and guarantee the right to life, and limit the use of force and firearms by law enforcement agencies to only as a matter of last resort where other means remain ineffective or without any promise of achieving the intended result, and that intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.
88. This Court has itself endorsed the legal principles advanced in this case in its *Slavery Case*, when it insisted that the lack of effective remedy for slavery, and the absence of investigation and prosecution of perpetrators violated the provisions Article 2 of the African Charter on non-discrimination.⁹² In that case, the Court stated that, *"[i]t should be underlined that since human rights are inherent to the human being, they are "inalienable, imprescriptible and sacred" and do not suffer any limitation."*⁹³
89. Amnesty International recognises the importance of this Court's jurisprudence in shaping human rights norms and practices in ECOWAS countries and across Africa, and globally.
90. It is submitted also that the cases highlighted above have demonstrated that where there are alleged violations of the right to life, the state must ensure a prompt, impartial and effective investigation of such allegations, prosecute suspected perpetrators in a fair trial and ensure an effective remedy and reparation to victims.
91. Furthermore, Amnesty International wishes to emphasize that forced evictions – i.e., evictions without the consultation of the community

92 Mme Hadijatou Mani Koraou v The Republic of Niger, 27 October 2008, ECW/CCJ/JUD/06/08, para. 49.

93 *Id.* para. 56.

affected, without adequate notice and one which may lead to people being rendered forcibly evicted – represent a violation of international law and Nigeria's obligations under the African Charter.

92. The present case offers the Honourable Court a significant opportunity to clarify the legal issues relating to the right to life and the use of force and firearms by law enforcement agencies; the right to an effective remedy including the obligations of states to investigate and prosecute allegations of violation of the right to life, and other human rights violations; and the procedural and other safeguards that must be complied with in any situation of eviction.

Respectfully submitted,

Kolawole Olaniyan (Barrister and Solicitor of the Supreme Court of Nigeria)
Maggie Maloney (Adviser)
Iain Byrne (Adviser)
Aster van Kregten (Adviser)

Amnesty International
1 Easton Street
London WC1X 0DW
Kolaniya@amnesty.org
+442074135606

FOR SERVICE ON:

FEMI FALANA, ESQ
 PLAINTIFFS/RESPONDENTS COUNSEL
 FALANA & FALANA'S CHAMBERS
 22, MEDITERRANEAN STREET,
 IMANI ESTATE,
 MAITAMA,
 ABUJA.

1ST AND 2ND DEFENDANTS/APPLICANTS
 C/O THEIR COUNSEL
 MAIMUNA LAMI GOGO SHIRU
 FEDERAL MINISTRY OF JUSTICE
 SHEHU SHAGARI WAY,

ABUJA.

3RD TO 5TH DEFENDANTS/APPLICANTS
C/O THEIR COUNSEL
A.G KARIBO ESQ
MINISTRY OF JUSTICE
PORT HARCOURT
RIVERS STATE.

ANNEX 1: Description and interest of Amicus

Amnesty International is a worldwide movement of people working for respect and protection of internationally recognized human rights principles. The organization has over 2.8 million members and supporters in more than 150 countries and territories and is independent of any government, political ideology, economic interest, or religion. It bases its work on international human rights instruments adopted by the United Nations and regional bodies. It has consultative status before the United Nations Economic and Social Council, the United Nations Educational, Scientific and Cultural Organization, and the Council of Europe, has working relations with the Inter-Parliamentary Union and the African Union, and is registered as a civil society organization with the Organization of American States.

As part of Amnesty International's mission to take action to prevent grave abuses of human rights, the organization has a particular interest in the application of international human rights standards on the right to life and the use of force by law enforcement agencies during demonstrations; the right to an effective remedy, including the obligations of states to investigate and prosecute allegations of human rights violations; and the right to adequate housing and obligations on governments to ensure protection against forced evictions.

ANNEX 2: International standards on the use of force and firearms by law enforcement officials

A: Code of Conduct for Law Enforcement Officials Adopted by General Assembly resolution 34/169 of 17 December 1979 (excerpt)

Article 3: Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.

Commentary:

(a) This provision emphasizes that the use of force by law enforcement officials should be exceptional; while it implies that law enforcement officials may be authorized to use force as is reasonably necessary under the circumstances for the prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders, no force going beyond that may be used.

(b) National law ordinarily restricts the use of force by law enforcement officials in accordance with a principle of proportionality. It is to be understood that such national principles of proportionality are to be respected in the interpretation of this provision. In no case should this provision be interpreted to authorize the use of force which is disproportionate to the legitimate objective to be achieved.

(c) The use of firearms is considered an extreme measure. Every effort should be made to exclude the use of firearms, especially against children. In general, firearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender. In every instance in which a firearm is discharged, a report should be made promptly to the competent authorities.

B: Basic Principles on the Use of Force and Firearms by Law Enforcement Officials

Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990

Whereas the work of law enforcement officials¹²¹ is a social service of great importance and there is, therefore, a need to maintain and, whenever necessary, to improve the working conditions and status of these officials,

121 In accordance with the commentary to article 1 of the Code of Conduct for Law Enforcement Officials, the term "law enforcement officials" includes all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention. In countries where police powers are exercised by military authorities, whether uniformed or not, or by State security forces, the definition of law enforcement officials shall be regarded as including officers of such services.

Whereas a threat to the life and safety of law enforcement officials must be seen as a threat to the stability of society as a whole,

Whereas law enforcement officials have a vital role in the protection of the right to life, liberty and security of the person, as guaranteed in the Universal Declaration of Human Rights and reaffirmed in the International Covenant on Civil and Political Rights,

Whereas the Standard Minimum Rules for the Treatment of Prisoners provide for the circumstances in which prison officials may use force in the course of their duties,

Whereas article 3 of the Code of Conduct for Law Enforcement Officials provides that law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty,

Whereas the preparatory meeting for the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Varenna, Italy, agreed on elements to be considered in the course of further work on restraints on the use of force and firearms by law enforcement officials,

Whereas the Seventh Congress, in its resolution 14, inter alia , emphasizes that the use of force and firearms by law enforcement officials should be commensurate with due respect for human rights,

Whereas the Economic and Social Council, in its resolution 1986/10, section IX, of 21 May 1986, invited Member States to pay particular attention in the implementation of the Code to the use of force and firearms by law enforcement officials, and the General Assembly, in its resolution 41/149 of 4 December 1986, inter alia, welcomed this recommendation made by the Council,

Whereas it is appropriate that, with due regard to their personal safety, consideration be given to the role of law enforcement officials in relation to the administration of justice, to the protection of the right to life, liberty and security of the person, to their responsibility to maintain public safety and social peace and to the importance of their qualifications, training and conduct,

The basic principles set forth below, which have been formulated to assist Member States in their task of ensuring and promoting the proper role of law enforcement officials, should be taken into account and respected by Governments within the framework of their national legislation and practice, and be brought to the attention of law enforcement officials as well as other persons, such as judges, prosecutors, lawyers, members of the executive branch and the legislature, and the public. General provisions

1. Governments and law enforcement agencies shall adopt and implement rules and regulations on the use of force and firearms against persons by law enforcement officials. In developing such rules and regulations, Governments and law enforcement agencies shall keep the ethical issues associated with the use of force and firearms constantly under review.

2. Governments and law enforcement agencies should develop a range of means as

broad as possible and equip law enforcement officials with various types of weapons and ammunition that would allow for a differentiated use of force and firearms. These should include the development of non-lethal incapacitating weapons for use in appropriate situations, with a view to increasingly restraining the application of means capable of causing death or injury to persons. For the same purpose, it should also be possible for law enforcement officials to be equipped with self-defensive equipment such as shields, helmets, bullet-proof vests and bullet-proof means of transportation, in order to decrease the need to use weapons of any kind.

3. The development and deployment of non-lethal incapacitating weapons should be carefully evaluated in order to minimize the risk of endangering uninvolved persons, and the use of such weapons should be carefully controlled.

4. Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.

5. Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall:

(a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved;

(b) Minimize damage and injury, and respect and preserve human life;

(c) Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment;

(d) Ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment.

6. Where injury or death is caused by the use of force and firearms by law enforcement officials, they shall report the incident promptly to their superiors, in accordance with principle 22.

7. Governments shall ensure that arbitrary or abusive use of force and firearms by law enforcement officials is punished as a criminal offence under their law.

8. Exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles. Special provisions

9. Law enforcement officials shall not use 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, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when

strictly unavoidable in order to protect life.

10. In the circumstances provided for under principle 9, law enforcement officials shall identify themselves as such and give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident.

11. Rules and regulations on the use of firearms by law enforcement officials should include guidelines that:

(a) Specify the circumstances under which law enforcement officials are authorized to carry firearms and prescribe the types of firearms and ammunition permitted;

(b) Ensure that firearms are used only in appropriate circumstances and in a manner likely to decrease the risk of unnecessary harm;

(c) Prohibit the use of those firearms and ammunition that cause unwarranted injury or present an unwarranted risk;

(d) Regulate the control, storage and issuing of firearms, including procedures for ensuring that law enforcement officials are accountable for the firearms and ammunition issued to them;

(e) Provide for warnings to be given, if appropriate, when firearms are to be discharged;

(f) Provide for a system of reporting whenever law enforcement officials use firearms in the performance of their duty. Policing unlawful assemblies

12. As everyone is allowed to participate in lawful and peaceful assemblies, in accordance with the principles embodied in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, Governments and law enforcement agencies and officials shall recognize that force and firearms may be used only in accordance with principles 13 and 14.

13. In the dispersal of assemblies that are unlawful but non-violent, law enforcement officials shall avoid the use of force or, where that is not practicable, shall restrict such force to the minimum extent necessary.

14. In the dispersal of violent assemblies, law enforcement officials may use firearms only when less dangerous means are not practicable and only to the minimum extent necessary. Law enforcement officials shall not use firearms in such cases, except under the conditions stipulated in principle 9. Policing persons in custody or detention

15. Law enforcement officials, in their relations with persons in custody or detention, shall not use force, except when strictly necessary for the maintenance of security and order within the institution, or when personal safety is threatened.

16. Law enforcement officials, in their relations with persons in custody or detention, shall not use firearms, except in self-defence or in the defence of others against the immediate threat of death or serious injury, or when strictly necessary to prevent the escape of a person in custody or detention presenting the danger referred to in principle 9.

17. The preceding principles are without prejudice to the rights, duties and responsibilities of prison officials, as set out in the Standard Minimum Rules for the Treatment of Prisoners, particularly rules 33, 34 and 54. Qualifications, training and counselling

18. Governments and law enforcement agencies shall ensure that all law enforcement officials are selected by proper screening procedures, have appropriate moral, psychological and physical qualities for the effective exercise of their functions and receive continuous and thorough professional training. Their continued fitness to perform these functions should be subject to periodic review.

19. Governments and law enforcement agencies shall ensure that all law enforcement officials are provided with training and are tested in accordance with appropriate proficiency standards in the use of force. Those law enforcement officials who are required to carry firearms should be authorized to do so only upon completion of special training in their use.

20. In the training of law enforcement officials, Governments and law enforcement agencies shall give special attention to issues of police ethics and human rights, especially in the investigative process, to alternatives to the use of force and firearms, including the peaceful settlement of conflicts, the understanding of crowd behaviour, and the methods of persuasion, negotiation and mediation, as well as to technical means, with a view to limiting the use of force and firearms. Law enforcement agencies should review their training programmes and operational procedures in the light of particular incidents.

21. Governments and law enforcement agencies shall make stress counselling available to law enforcement officials who are involved in situations where force and firearms are used. Reporting and review procedures

22. Governments and law enforcement agencies shall establish effective reporting and review procedures for all incidents referred to in principles 6 and 11 (f). For incidents reported pursuant to these principles, Governments and law enforcement agencies shall ensure that an effective review process is available and that independent administrative or prosecutorial authorities are in a position to exercise jurisdiction in appropriate circumstances. In cases of death and serious injury or other grave consequences, a detailed report shall be sent promptly to the competent authorities responsible for administrative review and judicial control.

23. Persons affected by the use of force and firearms or their legal representatives shall have access to an independent process, including a judicial process. In the event of the death of such persons, this provision shall apply to their dependants accordingly.

24. Governments and law enforcement agencies shall ensure that superior officers are held responsible if they know, or should have known, that law enforcement officials under their command are resorting, or have resorted, to the unlawful use of force and firearms, and they did not take all measures in their power to prevent, suppress or report such use.

25. Governments and law enforcement agencies shall ensure that no criminal or disciplinary sanction is imposed on law enforcement officials who, in compliance with the Code of Conduct for Law Enforcement Officials and these basic principles, refuse to carry out an order to use force and firearms, or who report such use by other officials.

26. Obedience to superior orders shall be no defence if law enforcement officials knew that an order to use force and firearms resulting in the death or serious injury of a person was manifestly unlawful and had a reasonable opportunity to refuse to follow it. In any case, responsibility also rests on the superiors who gave the unlawful orders.

ANNEX 3: Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions to the General Assembly (UN Doc. A/61/311) 5 September 2006 (excerpt)

B. Case study: the use of lethal force by law enforcement officials

33. One issue frequently underscored in communications that I have sent to Governments is that of the lethal use of force by law enforcement officials. My report on Nigeria provides a compelling example of what happens when the rules governing such situations are inconsistent with the fundamental principles reflected in the basic international norms, as elaborated upon in standards originally adopted on a non-binding basis.¹²² Nigeria's standing "rules for guidance in use of firearms by the police" (Police Order No. 237) authorize the use of firearms if a police officer cannot "by any other means" arrest or re-arrest any person who is suspected (or has already been convicted) of an offence punishable by death or at least seven years' imprisonment. The rules which elaborate upon this provision are even more permissive. They note that any person who seeks to escape from lawful custody commits a felony warranting a seven-year sentence. As a result shooting to kill someone charged with stealing goods of negligible value would be justified if the person were alleged to be escaping from custody. The only qualification contained in the rules is that "firearms should only be used if there are no other means of effecting his arrest, and the circumstances are such that his subsequent arrest is unlikely".

34. These rules attempt to codify the principle of necessity, but completely ignore the principle of proportionality which, as we shall see below, constitutes the twin pillars of international law in this area. Rather than permitting the intentional lethal use of force only "in order to protect life", these rules permit deliberate killing even to prevent the possible repetition of minor thefts. The consequences in relation to armed robbery — a capital offence in Nigeria — have been devastating. According to official statistics, 2,402 armed robbers have been killed by the police since 2000. (In 2004, one "armed robber" was killed for every six reported armed robberies.) While many of these were executions that would not have satisfied even the principle of necessity, it is the inadequacy of the rules on proportionality that makes the pretext of a fleeing armed robber available. Another example from Nigeria illuminates the human consequences of failing to properly incorporate international standards on necessity into domestic rules on the use of lethal force. In "operation fire-for-fire", a 2002 campaign against crime, the Inspector-General of Police pre-authorized police officers to fire in "very difficult situations". The result, revealed in police statistics, was that in the first 100 days, 225 suspected criminals were killed, along with 41 innocent bystanders.

35. The principles of international human rights law applicable in such contexts draw significantly upon the Code of Conduct for Law Enforcement Officials¹²³ and the Basic

122 See E/CN.4/2006/53/Add.4, paras. 18 and 43-47.

123 General Assembly resolution 34/169 of 17 December 1979.

Principles on the Use of Force and Firearms by Law Enforcement Officials.¹²⁴ Each of these instruments has played a central role in defining the limits to the use of force by law enforcement officials.¹²⁵ They are of special interest for two reasons. First, they were developed through intensive dialogue between law enforcement experts and human rights experts. Second, the process of their development and adoption involved a very large number of States and provides an indication of the near universal consensus on their content.¹²⁶ Of course, neither the consensus between law enforcement and human rights experts nor the consensus among States about the desirability of compliance with the Code of Conduct and the Basic Principles is definitive in terms of their formal legal status, and some of the provisions are clearly guidelines rather than legal dictates. However, some provisions of the Code of Conduct and the Basic Principles are rigorous applications of legal rules that States have otherwise assumed under customary or conventional international law. Among these are the instruments' core provisions on the use of force. Thus, the substance of article 3 of the Code of Conduct and principle 9 of the Basic Principles reflects binding international law.

36. Human rights standards on the use of force derive from the understanding that the irreversibility of death justifies stringent safeguards for the right to life, especially in relation to due process. A judicial procedure, respectful of due process and arriving at a final judgement, is generally the sine qua non without which a decision by the State and its agents to kill someone will constitute an "arbitrary deprivation of life" and, thus, violate the right to life.¹²⁷

37. Arbitrariness is not, however, simply the opposite of due process. The human rights obligations of States include protecting the right to life of private individuals against the actions of other private individuals.¹²⁸ That is, States must not only refrain from killing but must also exercise due diligence in preventing murder. Clearly there are instances in which the decision not to kill someone suspected of, or engaged in, the commission of a violent crime would itself result in the deaths of others. The typical situation would be one in which a suspect is threatening someone with a gun, apparently with the intention of shooting him, and in which the officer could expect to be shot if he attempted to arrest the gunman and bring him before a court. No reasonable interpretation of the State's obligation to respect the right to life would definitively rule out a police officer's decision to use lethal force in such a situation. As a result, due process remains the ideal against which "second best" safeguards for such situations

124 Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990.

125 The phrase "law enforcement officials" includes all government officials exercising "police powers", sometimes including "military authorities" and "security forces" as well as police officers. (Code of Conduct, art. 1, commentary (a) and (b); Basic Principles, preamble, note).

126 Nigel S. Rodley, *The Treatment of Prisoners Under International Law* (2nd ed.) (Oxford University Press, 1999), pp. 355-368, provides an overview of the development of the Code of Conduct and Basic Principles.

127 See International Covenant on Civil and Political Rights (ICCPR), art. 6 (1).

128

must be measured. Necessity and proportionality are among the most fundamental of these second best safeguards.

38. The safeguards of necessity and proportionality are included in article 3 of the Code of Conduct and its commentary. Article 3 states: “Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.” The commentary appended to this provision explains that:

“... ”

“(b) ... In no case should this provision be interpreted to authorize the use of force which is disproportionate to the legitimate objective to be achieved.

“(c) The use of firearms is considered an extreme measure. In general, firearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender. ...”

39. Similarly, the Basic Principles’ most general statement on the use of lethal force, principle 9, provides that:

“Law enforcement officials shall not use 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, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.”

40. To fully understand the legal basis for these provisions it is important to distinguish the proportionality criterion from the necessity criterion and to evaluate the contribution each safeguard makes to reconciling the obligations to respect and to ensure while adhering as closely as possible to the due process ideal.

41. While the proportionality requirement imposes an absolute ceiling on the permissible level of force based on the threat posed by the suspect to others, the necessity requirement imposes an obligation to minimize the level of force applied regardless of the level of force that would be proportionate. With respect to the use of firearms, the applicable standard of necessity is that the resort to this potentially lethal measure must be made “only when less extreme means are insufficient to achieve these objectives”. The question of a measure’s sufficiency can hardly be determined in advance. It is, rather, determined by the nature of the resistance put up by the suspect. In general, the way in which law enforcement officials should determine the necessary level of force is by starting at a low level and, in so far as that proves insufficient in the particular case, graduating, or escalating, the use of force.¹²⁹ Indeed, force should not normally be the

129 The issue of whether there are some situations in which an immediate recourse to lethal force may be strictly necessary in order to protect the lives of others arises in the context of

first resort: so far as the circumstances permit, law enforcement officials should attempt to resolve situations through non-violent means, such as persuasion and negotiation.¹³⁰ As expressed in the Basic Principles, “They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result”.¹³¹ If it should become necessary to use force, the level of that force should be escalated as gradually as possible. While the relevant provisions of the Basic Principles are not exhaustive, they are suggestive of the course such escalation might take. As a first step, officials should attempt to “restrain or apprehend the suspected offender” without using force that carries a high risk of death — perhaps by physically seizing the suspect.¹³² If the use of firearms does prove necessary, law enforcement officials should “give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident”.¹³³ Like the escalation of force, one purpose of providing a warning is to avoid prejudging the level of resistance that will be shown. If the warning does not suffice, any use of firearms should be such as to “[m]inimize damage and injury”.¹³⁴ The furthest extreme on this continuum of force is, of course, the intentional lethal use of force. This must be resorted to only when “strictly unavoidable”.¹³⁵

42. Proportionality deals with the question of how much force might be permissible. More precisely, the criterion of proportionality between the force used and the legitimate objective for which it is used requires that the escalation of force be broken off when the consequences for the suspect of applying a higher level of force would “outweigh” the value of the objective.¹³⁶ Proportionality could be said to set the point up to which the lives and well-being of others may justify inflicting force against the suspect — and past

so-called shoot-to-kill policies. See E/CN.4/2006/53, paras. 44-54; see also Center for Human Rights and Global Justice, *Irreversible Consequences: Racial Profiling and Lethal Force in the “War on Terror”* (New York: New York University School of Law, 2006) available at <http://www.nyuhr.org/docs/CHRGJ%20Irreversible%20Consequences.pdf>.

130 See Basic Principles, principle 4; see also principle 20.

131 *Ibid.*, principle 4.

132 Code of Conduct, art. 3, commentary (c).

133 Basic Principles, principle 10.

134 *Ibid.*, principle 5 (b); see also principle 11 (b).

135 Basic Principles, principle 9; see also Code of Conduct, art. 31. The distinction drawn between the use of firearms and the intentionally lethal use of firearms stems from the recognition that any use of firearms is potentially lethal. Shots fired to warn rather than strike or to stop rather than kill cannot be relied upon not to cause death. Indeed, any use of force may result in death, whether by happenstance or due to the condition of the target. Principle 9 interprets the principle of proportionality as it applies to two points on a continuum, specifying the objectives that would be proportionate to that level of force.

136 Metaphors of weighing and balancing are difficult to avoid in this context, but they risk conjuring up the idea of cost-benefit analysis. The balancing to be applied in human rights law is more in keeping with the framework used for evaluating restrictions on rights under which the reconciliation of competing values must respect “the just requirements of morality, public order and the general welfare in a democratic society” (Universal Declaration of Human Rights, art. 29 (2)).

which force would be unjustifiable and, in so far as it should result in death, a violation of the right to life. The general standard for proportionality is that the use of force must be “in proportion to the seriousness of the offence and the legitimate objectives to be achieved”.¹³⁷ From this general standard, other more precise standards may be derived for when particular levels of force may be used. The Basic Principles permit the intentional lethal use of force only “in order to protect life”.

43. With respect to the proportionality of other (potentially lethal) uses of firearms, principle 9 states: “Law enforcement officials shall not use 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, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape. ...”¹³⁸

44. This list of objectives proportionate to the use of firearms is distinguished from the objective “to protect life” only in that it includes the disruption of some conduct that is less certain, though still likely, to cost lives. The notion of proportionality at work here is fairly simple — taking someone’s life is permitted only to protect the lives of others from him or her — but gains a measure of complexity inasmuch as use of force rules must be applicable *ex ante*. The fundamental question is of proportionality between the objectively anticipatable likelihood that the use of force will result in death and the comparable anticipatable likelihood that failing to incapacitate the individual would result in the deaths of others. It must also be remembered that proportionality is a requirement additional to necessity. The principle of necessity will, thus, never justify the use of disproportionate force. If all proportionate measures have proved insufficient to apprehend a suspect, he or she must be permitted to escape.

45. It is tempting to focus on the ethical probity of law enforcement officials rather than the domestic rules regulating the use of lethal force. However, as I indicated in my first report to the Commission, in relation to respect for the right to life by military personnel, “Remedial proposals to inculcate higher ‘ethical’ standards or to develop a greater ‘moral’ sensibility [are] inadequate. Respect for human rights and humanitarian law are legally required and the relevant standards of conduct are spelled out in considerable detail. Remedial measures must be based squarely on those standards”.¹³⁹

137 Basic Principles, principle 5 (a); see also Code of Conduct, art. 3, commentary (b) (see para. 38).

138 See also Code of Conduct, art. 3, commentary (c) (see para. 38).

139 See E/CN.4/2005/7, para. 54.