

December 3, 2020

Michelle Bachelet Jeria
U.N. High Commissioner for Human Rights
Office of the High Commissioner for Human Rights
Geneva, Switzerland

Re: The Global Human Rights Clinic at the University of Chicago Law Submission to the United Nations High Commissioner for Human Rights pursuant to Human Rights Council resolution 43/1 on the “Promotion and protection of the human rights and fundamental freedoms of Africans and of people of African descent against excessive use of force and other human rights violations by law enforcement officers”

Dear U.N. High Commissioner for Human Rights:

In the United States, the recent killings and severe injury of Rekia Boyd, Michael Brown, Eric Garner, Laquan McDonald, Philando Castile, Breonna Taylor, George Floyd, Tony McDade, Rayshard Brooks, Jacob Blake, and many others continue a long history of state sanctioned violence towards communities of color in the name of police discretion. These many and terrible deaths raise questions about whether police in the United States sufficiently serve their mandate to protect public safety and enforce the law when necessary.

The 193 member states of the United Nations, which include the United States, have developed principles and standards to constrain, direct and ensure the proper use of force by law enforcement officers. These principles – legality, necessity, proportionality and accountability – have been developed and concretized in various forms in the international system.¹ The rules they establish represent the best global effort to consider how police discretion and accountability can contribute to a just and humane society that respects and protects the rights of all individuals, including the rights to life, equality, liberty and security of person, as well as freedom from torture and cruel, inhuman or degrading treatment, and freedom from discrimination.²

Some of these principles have been adopted and articulated by courts and law makers in the United

¹ The three main sources for these international standards include the *U.N. Code of Conduct for Law Enforcement Officials*, G.A. Res. 34/169 of 17 (Dec. 17, 1979); the *U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Aug. 27-Sept. 7, 1990, 112-13, U.N. Doc. A/CONF.144/28/Rev.1 (1991); and a 2014 report by the U.N. Special Rapporteur on extrajudicial, summary, or arbitrary executions on protection of the right to life during law enforcement, U.N. Doc. A/HRC/26/36 (Apr. 1, 2014) (by Christof Heyns).

² Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Exec. Rep. 102-23, 999 U.N.T.S. 171.

States.³ However, the United States lacks a comprehensive and effective national legal framework that places specific conditions on the use of force and establishes mechanisms of accountability.⁴ While the Constitution sets some limits on the use of force, the standards set by the Supreme Court in its case law fall woefully short of meeting the international standards, and Congress has failed to take action to fill this critical gap in federal law.⁵ Due to the decentralized nature of law enforcement in the United States, and the failure of national leadership to set uniform, federal standards, the main restrictions on police use of force exist at the state and local levels. State law and police departmental policies provide the principles and standards on use of force and the consequences for when that authority is abused.

While, in many states, legislation provides some direction on the use of force to police departments, research and data indicates that state laws have overwhelmingly failed to do so in an effective manner. In 2015, Amnesty International, USA released “Deadly Force: Police Use of Lethal Force in the United States,” evaluating state laws’ compliance with international human rights standards. Alarmingly, the report found that not a single state’s law fully complied.

Police department policies are the other main source of accountability for the use of force. These internal departmental policies provide the primary guidance to police officers on when and how they may use lethal force. However, when the Global Human Rights Clinic of the University of Chicago Law School evaluated the police department policies of the 20 largest American cities during 2017-2018, a similar pattern emerged: none of the policies analyzed complied with international human rights standards of legality, necessity, accountability and proportionality.⁶ These use of force policies grant police undue discretion and insufficient guidance on when lethal force can be used, and they fail to establish strong enough accountability mechanisms.

Deep, structural reform of the United States’ law enforcement system is needed. Reforms must be rooted in the international principles of legality, necessity, proportionality and accountability. Legality requires that legislative standards comply with international principles on the use of force; necessity mandates immediacy of a particularized threat and the use of force as a last resort; proportionality mandates that the use of force must be proportional to the threat or resistance the officer confronts, and accountability requires mechanisms that guarantee effective and independent investigation for all instances of lethal use of force. Based on these four principles, the United States must reform its law enforcement according to the following recommendations:

I. Legality: Use of force policies must sit within a human rights compliant federal and state legislative framework that properly balances security needs with individual human rights.

- a. The federal government should ensure federal, state and local policing complies

³ See e.g. *Scott v. Harris*, 550 U.S. 371 (2007); *Graham v. Connor*, 490 U.S. 386 (1989); *Tennessee v. Garner*, 471 U.S. 1 (1985); 42 U.S.C. § 14141; 41 U.S.C. § 1983; 18 U.S.C. § 242.

⁴ U.S. Commission on Civil Rights, Briefing Report, *Police Use of Force: An Examination of Modern Policing Practices* (Nov. 2018); Richard M. Thompson II, Congressional Research Service, *Police Use of Force: Rules, Remedies, and Reforms* (Oct. 30, 2015).

⁵ *Scott v. Harris*, 550 U.S. 371 (2007). See also Richard M. Thompson II, Congressional Research Service, *Police Use of Force: Rules, Remedies, and Reforms* (Oct. 30, 2015).

⁶ See *Deadly Discretion: The Failure of Police Use of Force Policies to Meet Fundamental International Human Rights Law and Standards*, Global Human Rights Clinic (2020) <https://chicagounbound.uchicago.edu/ihrcl/>.

with international human rights standards and commitments of the United States. The U.S. Congress should deploy its legislative and spending powers to ensure police use force in a human rights-compliant manner, including requiring that police use of force policies meet the standards of necessity, proportionality and accountability, and that law enforcement officers protect and enable individual human rights.

- b. State legislatures should enact legal limits on police use of force that comply with international human rights and standards of necessity, proportionality and accountability and protect and enable individual human rights.
- c. In light of extensive evidence of excessive use of force by federal, state and local law enforcement during lawful demonstrations, government at all levels should re-evaluate the presence of armed police during lawful public gatherings. Alternatives to law enforcement and unarmed and specialized community engagement police units have been shown to be more effective in providing assistance in organized events and public gatherings than armed units in other countries, as documented in *Defending Dissent: Towards State Practices that Protect and Promote the Rights to Protest* (IHRC/INCLC 2018).

II. Necessity: All law and policies on police use of force must comply with the necessity requirement and only allow for force when “absolutely necessary” to save the life or prevent serious bodily harm of an officer or civilian as a “last resort” to other alternatives.

- a. U.S. Congress should revise the standard under 42 U.S.C. § 1983 permitting police officers to use force from a “reasonableness” standard to “only as a last resort and when absolutely necessary to prevent death or serious bodily harm.”
- b. U.S. Congress should legally require all federal law enforcement officers to use identified de-escalation techniques to de-escalate all threats posed to officers and others prior to the use of force and mandate all state and local law enforcement agencies accepting federal funds to require use of such techniques. De-escalation techniques include communication and verbal engagement, warnings and clear instructions, avoiding taunting or menacing language, evaluating the situation to identify alternative causes for lack of compliance (e.g., mental impairment, intoxication, fear, and language barriers), use of time and distance to create room for the situation to calm down, taking cover or disengaging.
- c. U.S. Congress should eliminate by law the use of “no knock” warrants during all federal law enforcement investigations because they have led to the use of lethal force when it was not necessary or proportional.
- d. State legislatures and state and local law enforcement agencies should require, by law and in departmental policies, that law enforcement officers use de-escalation techniques to de-escalate all threats posed to officers and others prior to the use of force. De-escalation techniques include communication and verbal engagement, warnings and clear instructions, avoiding taunting or menacing language,

evaluating the situation to identify alternative causes for lack of compliance (e.g., mental impairment, intoxication, fear and language barriers), use of time and distance to create room for the situation to calm down, taking cover or disengaging.

- e. State legislatures and state and local law enforcement agencies should require, by law and in departmental policies, any officer standing by while another officer uses unlawful force on a subject to intervene to stop the use of force.
- f. State and local law enforcement agencies should remove from their policies any exceptions that permit the use of lethal force when the situation does not present an immediate and particularized threat of lethal force or serious bodily harm, and where the use of lethal force is not absolutely necessary as a last resort. This includes eliminating all “escaping suspect or fugitive exceptions” and all “blanket self-defense or prevention of crime exceptions” that allow the use of lethal force to capture a suspect, in self-defense or in response to the commission of a felony of any kind, regardless of the nature of the threat posed by the subject.

III. Proportionality: In addition to being necessary, the use of force must always be proportionate to the threat the officer confronts and weighed against the fundamental human rights of the individual, including the rights to life and security of person.

- a. U.S. Congress should condition all federal funds for state and local law enforcement agencies on the agencies’ review and elimination of the use of police techniques, tactics and technologies that pose a risk of death or serious bodily harm but that are not necessary or proportional to the threats posed to officers or others, including chokeholds, carotid holds, neck restraints, tear gas and rubber bullets, among others.
- b. State legislatures and state and local law enforcement agencies should eliminate, by law and in departmental policies, the use of police techniques, tactics and technologies that pose a risk of death or serious bodily harm but that are not necessary or proportional to the threats posed to officers or others, including chokeholds, carotid holds, neck restraints, tear gas and rubber bullets, among others.
- c. State and local law enforcement policies should require that all use of force be strictly proportionate to the threat confronted, removing all exceptions or equivocations.

IV. Accountability: Accountability requires an independent, external review of each use of lethal force by the police as well as departmental transparency of use of force policies and practices.

- a. U.S. Congress should require by law that the Department of Justice establish a program to collect, store, analyze and make public, data on police actions, including all incidents involving the use of lethal force, from the 50 U.S. states and territories, and mandate all state and local law enforcement agencies to report periodically with accurate and comprehensive data on police actions to the Department of Justice.

- b. U.S. Congress should eliminate by law the doctrine of “qualified immunity” for law enforcement officers prosecuted for violations of the Constitution under 42 U.S.C. § 1983. 15.
- c. U.S. Congress should revise 18 U.S.C. § 242 to lower the standard of criminal intent required to convict law enforcement officers of a criminal violation of constitutional rights from “willfully” to “knowingly or with reckless disregard.”
- d. U.S. Congress should legally require all uniformed federal officers, at all times, to wear body cameras and use dashboard cameras and mandate state and local law enforcement agencies receiving federal funds to ensure their use by all state and local law enforcement officers.
- e. State legislatures and state and local law enforcement agencies should require, by law and departmental policies, all state and local law enforcement officers, at all times, to wear body cameras and use dashboard cameras.
- f. State and local law enforcement policies should mandate full reporting to an external, independent civilian oversight body empowered to conduct independent, publicly accessible investigations for every incident involving the use of deadly force, including any time an officer discharges a firearm or uses a technique, tactic or technology capable of causing death or serious bodily harm.

V. To strengthen international norms and institutions to ensure policing protects and promotes international human rights:

- a. The Secretary-General of the United Nations, Mr. António Guterres, should convene a High-Level Panel on Law Enforcement and Human Rights to address police abuse of human rights around the world comprised of global leaders, eminent experts, people affected by police abuse and law enforcement representatives tasked with, among other things, reviewing and updating the U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and developing a set of actionable recommendations to ensure policing is grounded in the protection and promotion of international human rights.
- b. The United Nations General Assembly should convene a High-Level Meeting on Law Enforcement and Human Rights to address police abuse of human rights around the world during which Heads of Member States are called upon to review their national policies and practices and commit, through a Political Declaration, to ensuring all policing is grounded in the protection and promotion of international human rights.

Conclusion


These recommendations are not exhaustive, but are important steps in reforming the United States’ legal and law enforcement systems to become compliant with basic international standards on the

use of lethal force. Compliance with these standards will ensure the United States comes closer to achieving the necessary balance between granting police the discretion and resources needed to achieve their purpose and holding them accountable when they abuse their power in violation of the human rights of the communities they serve.

Respectfully,



Claudia M. Flores
Director Global Human Rights Clinic
Associate Clinical Professor of Law



Mariana Olaizola Rosenblat
Global Human Rights Clinic Fellow
Lecturer in Law

The Global Human Rights Clinic
Mandel F. Legal Aid Clinic
University of Chicago Law School
6020 S. University Ave.
Chicago, IL 60637
(773) 702-9611
cmflores@uchicago.edu
olaizola@uchicago.edu