

**Inter-American Commission on Human Rights**  
*Written Submission in Support of the Thematic Hearing on*

**Excessive Use of Force  
by the Police against Black Americans  
in the United States**

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# Executive Summary & Recommendations

## A. Executive Summary

In 2015, police officers killed at least 1139 people in the United States.<sup>1</sup> Over 25 percent of these victims of police violence were Black Americans<sup>2</sup>—a number grossly disproportionate to the share of the national population that is Black.<sup>3</sup> Statistically, Black Americans are significantly more likely to die at the hands of police than white, Latino, and Asian Americans.<sup>4</sup> And among those people killed by the police, Black victims are more than twice as likely as white victims to have been unarmed at the time of their death.<sup>5</sup>

Discriminatory police violence is by no means a new phenomenon in the United States. In recent years, however, reinvigorated protests and the organizing efforts of human rights defenders in the movement for Black lives and other community groups have thrust these injustices into the public eye.<sup>6</sup> Despite widespread and growing recognition of the gravity of the problem and the need for radical changes in law enforcement practices, police officers are still rarely held accountable for their actions. Investigations and prosecutions of killings and excessive use of force by the police are the exception rather than the norm.<sup>7</sup> When officers do face criminal charges, they are often acquitted or, if convicted, receive much lighter

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<sup>1</sup> *The Counted: People Killed by Police in the US*, The Guardian, <http://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database> (last visited Jan. 22, 2016) [hereinafter *Guardian Database*] (reporting 1139 people killed by police in 2015); see also *Investigation: Police Shootings*, Wash. Post, <http://www.washingtonpost.com/graphics/national/police-shootings/> (last visited Jan. 25, 2016) [hereinafter *Washington Post Database*] (reporting 987 people fatally shot by police in 2015).

<sup>2</sup> This submission uses the term “Black” in order to be as inclusive as possible of all individuals of African descent in the United States, some of whom may not identify as “African-American.”

<sup>3</sup> The U.S. Census Bureau estimated that Black Americans constituted 13.2% of the country’s population in 2014. *State and County QuickFacts*, United States Census Bureau (Sept. 30, 2015), <http://quickfacts.census.gov/qfd/states/00000.html>. In 2015, however, over one quarter of people killed by police were Black. See *Guardian Database*, *supra* note 1 (reporting that 302 of 1139 victims of police killing in 2015, or 26.5%, were Black); *Washington Post Database*, *supra* note 1 (reporting that 242 of the 954 people fatally shot by police in 2015 as of December 22, , or 25.4%, were Black).

<sup>4</sup> *Guardian Database*, *supra* note 1; *Washington Post Database*, *supra* note 1. Some studies indicate that Native Americans are killed by police officers at a higher rate, relative to their share of the national population, than Black Americans. For example, “according to the Center on Juvenile and Criminal Justice, a nonprofit organization that studies incarceration and criminal justice issues, police kill Native Americans at a higher rate than any other ethnic group.” A.J. Vicens, *Native Americans Get Shot By Cops at an Astonishing Rate: So why aren’t you hearing about it?*, Mother Jones (July 15, 2015, 5:57 PM EDT), <http://www.motherjones.com/politics/2015/07/native-americans-getting-shot-police>; see also Cecily Hilleary, *Native Americans Most Likely Victims of Deadly Police Force*, Voice of America (Aug. 15, 2015, 6:50 AM), <http://www.voanews.com/content/native-americans-most-likely-victims-of-deadly-force-by-police/2918007.html>.

<sup>5</sup> See Jon Swaine, Oliver Laughland, & Jamiles Lartey, *Black Americans killed by police twice as likely to be unarmed as white people*, The Guardian (June 1, 2015), <http://www.theguardian.com/us-news/2015/jun/01/black-americans-killed-by-police-analysis>. “In a [Washington] Post analysis looking at population-adjusted rates, unarmed black men were seven times as likely as unarmed whites to die from police gunfire.” Kimberly Kindy & Kennedy Elliott, *987 people were shot and killed by police this year: Here’s what we learned*, Wash. Post (Dec. 26, 2015), <https://www.washingtonpost.com/graphics/national/police-shootings-year-end/>.

<sup>6</sup> See, e.g., Black Lives Matter, <http://blacklivesmatter.com/> (last visited Jan. 25, 2016); Campaign Zero, <http://www.joincampaignzero.org/#vision> (last visited Jan. 25, 2016); Mothers Against Police Brutality, <http://www.mothersagainstpolicebrutality.com/> (last visited Jan. 25, 2016); Say Her Name, <http://www.aapf.org/sayhername/> (last visited Jan. 25, 2016).

<sup>7</sup> See, e.g., Chase Madar, *Why It’s Impossible to Indict a Cop*, The Nation (Dec. 25, 2014), <http://www.thenation.com/article/why-its-impossible-indict-cop/>; Rueben Fischer-Baum, *Allegations of Police Misconduct Rarely Result in Charges*, FiveThirtyEight (Nov. 25, 2014, 9:45 AM), <http://fivethirtyeight.com/datalab/allegations-of-police-misconduct-rarely-result-in-charges/>; James Pinkerton, *Hard to Charge*, Houston Chron., <http://www.houstonchronicle.com/local/investigations/item/Bulletproof-Part-3-Hard-to-charge-24421.php> (last viewed Oct. 5, 2015); Philip M. Stinson, *Police Integrity Lost*, Bowling Green State Univ. Criminal Justice Program Blog (Aug. 20, 2014), <https://blogs.bgsu.edu/pilproject/2014/08/20/police-crime-involving-firearms/>.

sentences than are typical for civilians convicted of similar crimes.<sup>8</sup> Impunity and the lack of accountability lie at the heart of a cycle of police violence and discrimination against Black Americans.

Discriminatory and excessive use of force by the police violates the obligations of the United States under international law to respect and protect the rights to life and security of person, to freedom from arbitrary detention, torture and cruel, inhuman and degrading treatment (“CIDT”), and to equality before the law. The American Declaration on the Rights and Duties of Man (“American Declaration”), which is a source of legal obligations for the United States as a member of the Organization of American States (“OAS”), protects the right to life (Article I), the right to equality before the law (Article II), the right to recognition of juridical personality and civil rights (Article XVII), the right to protection from arbitrary arrest (Article XXV), and the right to due process of law (Article XXVI).<sup>9</sup> These rights are similarly enshrined in other international human rights instruments, including the Universal Declaration of Human Rights (“UDHR”),<sup>10</sup> as well as treaties that are legally binding on the United States, including the International Covenant on Civil and Political Rights (“ICCPR”),<sup>11</sup> the International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”),<sup>12</sup> and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”).<sup>13</sup>

This submission examines the factors that contribute to the excessive and discriminatory use of force by police against Black Americans from the perspective of international human rights law. It exposes how the legal framework regulating the use of force by police in the United States, police training programs, and policing methods, fall short of international human rights law requirements and relevant international standards. After this summary, Part II of the document provides a statistical overview of the issue, establishing the pervasiveness of police use of deadly force and its disproportionate impact on Black Americans. Part III describes relevant U.S. obligations under international human rights law and analyzes the discrepancy between the legal framework governing the use of force in the United States and international standards. Parts IV and V examine how police training techniques and policing methods in the United States undergird the excessive use of deadly force against Black Americans. Part VI addresses the lack of accountability for police killings of civilians. Finally, in Part VII, this submission critically assesses some steps that the federal government has taken toward reform, including efforts by the Department of Justice to enact consent decrees with certain police departments and the President’s Task Force on 21<sup>st</sup> Century Policing. The submission identifies areas where the report of the Task Force falls short of international human rights standards and offers further recommendations on how the United States can fulfill its international obligations with regard to the excessive use of force against Black Americans. A summary of each of these sections follows below.

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<sup>8</sup> Kimberly Kindy & Kimbriell Kelly, *Thousands dead, few prosecuted*, Wash. Post (Apr. 11, 2015), <http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/>.

<sup>9</sup> American Declaration on the Rights and Duties of Man, Res. XXX, Final Act of the Ninth Int’l Conf. of Am. States (Pan American Union), Bogota, Colombia, Mar. 30–May 2, 1948, at 38 [hereinafter American Declaration].

<sup>10</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71, art. 6 (1948) [hereinafter UDHR]. Whether the UDHR is binding on states is contentious, but many scholars consider it to be customary international law. Regardless of whether the UDHR itself is binding on the United States, many of the rights contained within the UDHR are restated in legally binding treaties, such as the ICCPR.

<sup>11</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, *ratified by the U.S.* Sept. 8, 1992, 999 U.N.T.S. 171 [hereinafter ICCPR].

<sup>12</sup> International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, *ratified by the U.S.* Nov. 20, 1994, 660 U.N.T.S. 195 [hereinafter ICERD].

<sup>13</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, *ratified by the U.S.* Nov. 20, 1994, 1465 U.N.T.S. 85 [hereinafter CAT].

## Pervasive and Disproportionate Police Violence against Black Americans

Online databases documenting the deaths of those killed by police officers in the United States are helping to expose discrimination against Black Americans and increase pressure for urgent reforms. In the wake of high-profile police killings in the past three years, media outlets have begun to collate this information in order to paint a more complete (and heretofore unavailable) picture of police violence in the United States. Sites such as “Killed by Police” and databases published by the *Washington Post* and the *Guardian* provide invaluable information about those who have been killed and the circumstances of their deaths.<sup>14</sup>

These databases reveal the disparate treatment of Black Americans by the police. According to the U.S. Census Bureau, Black Americans constituted 13.2% of the country’s population in 2014.<sup>15</sup> The proportion of individuals killed by police in 2015 who were Black, however is far higher: At the end of 2015, the *Guardian* counted 1139 people killed by law enforcement that year, of whom 302, or 26.5%, were Black.<sup>16</sup> Among unarmed victims, the discrepancy is even greater: Of the 223 unarmed people killed by the police during the same period, 75, or 33.6%, were Black.<sup>17</sup> The *Washington Post* reported similar numbers: As of December 22, 2015, the newspaper counted 954 people fatally *shot* by the police in 2015, of whom 242, or 25.4%, were Black.<sup>18</sup> Among the 88 unarmed people shot dead by police, 34 were Black: 38.6% of the total.<sup>19</sup> All except one of these unarmed Black victims were men.<sup>20</sup>

While police violence affects Black women as well as men,<sup>21</sup> the figures regarding the rates of killing of Black men are particularly stark: Although Black men constituted approximately 6% of the national population according to 2013 figures,<sup>22</sup> they made up 25.5% of all victims of police violence in 2015 (according to the *Guardian*<sup>23</sup>), and 24.4% of those fatally shot by police 2015 as of December 22, 2015 (according to the *Washington Post*<sup>24</sup>)—a rate more than four times their share of the national population.

Police violence not only affects people differently based on their race, but also based on their socioeconomic status, mental health, gender identity, and sexual orientation, among other characteristics. Intersecting forms of discrimination and structural biases compound one another, exacerbating rights violations. For example, cities where some of the highest-profile police killings have occurred in the past two years, such as Baltimore, Maryland, have long histories of economic inequality that falls along racial

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<sup>14</sup> *Killed By Police 2015*, Killed By Police, <http://killedbypolice.net/> (last visited Dec. 14, 2015); *Guardian Database*, *supra* note 1; *Washington Post Database*, *supra* note 1.

<sup>15</sup> *State and County QuickFacts*, United States Census Bureau (Sept. 30, 2015), <http://quickfacts.census.gov/qfd/states/00000.html>.

<sup>16</sup> *Guardian Database*, *supra* note 1.

<sup>17</sup> *Id.*

<sup>18</sup> *Washington Post Database*, *supra* note 1. The *Washington Post Database* includes only individuals fatally shot by the police, while the *Guardian Database* includes all individuals killed by the police, regardless of the means of their death.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> See, e.g., #SayHerName, *Resisting Police Brutality Against Black Women* (July 16, 2015), <http://www.aapf.org/sayhernamereport/>; Jessie J. Holland, *Police Brutality Against Black Women Comes Into National Spotlight*, Associated Press (Oct. 31, 2015), [http://www.huffingtonpost.com/entry/police-brutality-against-black-women-comes-into-national-spotlight\\_us\\_5634b4e9e4b0c66bae5ca657](http://www.huffingtonpost.com/entry/police-brutality-against-black-women-comes-into-national-spotlight_us_5634b4e9e4b0c66bae5ca657) (discussing, among others, the cases of the schoolgirl assaulted by a police officer in Spring Valley High School in South Carolina and Sandra Bland in Texas).

<sup>22</sup> See U.S. Census Bureau, Bureau of the Census for the Bureau of Labor Statistics, *Current Population Survey, 2013 Annual Social and Economic (ASEC) Supplement*, Appendix C: Table 1: Population by Age, Race, Sex, Origin and Population Status (March 2013), <https://www.census.gov/prod/techdoc/cps/cpsmar13.pdf>; see also *The Black Alone Population in the United States: 2012*, U.S. Census Bureau, <http://www.census.gov/population/race/data/ppl-ba12.html> (indicating that Black men made up just under 6% of the national population in 2012).

<sup>23</sup> *Guardian Database*, *supra* note 1.

<sup>24</sup> *Washington Post Database*, *supra* note 1.

lines due in part to explicit government policies and in part to implicit social dynamics and institutionalized racism.<sup>25</sup> In addition, at least one-fourth of all people fatally shot by the police in 2015 displayed signs of mental illness.<sup>26</sup> According to an extensive 2011 national survey, 60% of all Black transgender individuals who interacted with police reported experiencing harassment or physical or sexual assault, compared to 24% of white transgender individuals.<sup>27</sup>

Advocates and activists, particularly local organizers and leaders of color, have been highlighting the persistent problems faced by Black communities in the United States and articulating what steps need to be taken to address these issues. Movements against anti-Black racism are gaining strength and Americans are demanding justice. International human rights bodies, such as the Committee on the Elimination of Racial Discrimination (“CERD”), have likewise voiced “concern at the brutality and excessive use of force by law enforcement officials against members of racial and ethnic minorities, including against unarmed individuals, which has a disparate impact on African Americans and undocumented migrants crossing the United States–Mexico border.”<sup>28</sup> The United States has a duty to take urgent action to prevent and remedy the excessive use of force by police against Black Americans.

### **Legal Framework Regulating the Use of Force by Police**

Like other law enforcement agents, police officers inevitably confront situations in which they must decide whether to use force and how much force is appropriate. The Inter-American Court of Human Rights has held that States have a duty to adapt their national laws to ensure that “security forces, which are entitled to use legitimate force, respect the right to life of the individuals under their jurisdiction.”<sup>29</sup> The U.N. Human Rights Committee likewise has described situations in which the use of force by authorities of the State has the capacity to deprive life as being of the “utmost gravity” and has stressed that “the law must strictly control and limit the circumstances in which a person may be deprived of his or her life.”<sup>30</sup> In order to ensure “the conditions required for the full enjoyment and exercise of the right to life,” the State must adequately regulate the use of lethal force, in particular.<sup>31</sup>

The legal framework regulating the use of force in the United States does not conform to the requirements of international human rights law or international best practices. The United States has not implemented the standards contained in the U.N. Code of Conduct for Law Enforcement Officials (“U.N. Code of

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<sup>25</sup> See, e.g., *The economic and racial inequality problem in Baltimore exists in many US cities*, Business Insider (May 3, 2015), <http://www.businessinsider.com/income-and-racial-inequality-maps-2015-5>; Editorial, *How Racism Doomed Baltimore*, N.Y. Times (May 9, 2015), <http://www.nytimes.com/2015/05/10/opinion/sunday/how-racism-doomed-baltimore.html>; *Baltimore: The divided city where Freddie Gray lived and died*, Al Jazeera America (Apr. 29, 2015), <http://america.aljazeera.com/articles/2015/4/29/baltimore-protests-race-and-poverty-freddie-gray.html>.

<sup>26</sup> See *Washington Post Database*, *supra* note 1; see also Kindy & Elliott, *supra* note 5.

<sup>27</sup> National Center for Transgender Equality & National Gay and Lesbian Task Force, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 5 (2011), [http://endtransdiscrimination.org/PDDs/NTDS\\_Exec\\_Summary.pdf](http://endtransdiscrimination.org/PDDs/NTDS_Exec_Summary.pdf).

<sup>28</sup> Comm. on the Elimination of Racial Discrimination, *Concluding observations on the combined seventh to ninth periodic reports of the United States of America*, U.N. Doc. CERD/C/USA/CO/7-9, ¶ 17 (Sept. 25, 2014); see also Comm. Against Torture, *Concluding observations on the combined third to fifth periodic reports of the United States of America*, U.N. Doc. CAT/C/USA/CO/3-5, ¶ 26 (Dec. 14, 2014) (expressing “concern about the numerous reports of police brutality and excessive use of force by law enforcement officials, in particular against persons belonging to certain racial and ethnic groups, immigrants and LGBTI individuals . . . [as well as] racial profiling by police and immigration offices and the growing militarization of policing activities.”).

<sup>29</sup> *Nadege Dorzema v. Dominican Republic*, Merits, Reparation, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 251, ¶ 80 (Oct. 24, 2012); *Aranguren v. Venezuela*, Merits, Reparations and Costs, Judgment, Inter-Am Ct. H.R. (ser. C) No. 150, ¶ 66 (July 5, 2006).

<sup>30</sup> Human Rights Comm., *Gen. Comment No. 6; art. 6, (right to life)*, U.N. Doc. HRI/GEN/1/Rev.1, ¶ 3 (1994).

<sup>31</sup> *Case of Children’s Rehabilitation*, Merits, Reparation, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 112, ¶ 156 (Sept. 2, 2004); *Paquiyauri v. Peru*, Merits, Reparations and Costs, Judgment, Inter-Am Ct. H.R. (ser. C) No. 110, ¶ 128 (July 8, 2004); *Chang v. Guatemala*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 152 (Nov. 25, 2003).

Conduct”),<sup>32</sup> adopted by the U.N. General Assembly in 1979. Nor has it implemented the U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (“U.N. Basic Principles”),<sup>33</sup> developed at a U.N. conference on crime prevention and the treatment of offenders in 1990. These two U.N. documents together provide authoritative guidance on internationally accepted methods of policing and the use of force.<sup>34</sup> They require law enforcement to “apply nonviolent means before resorting to the use of force.”<sup>35</sup> If force is “unavoidable,” police must “exercise restraint in such use and act in proportion to the seriousness of the offence.”<sup>36</sup> In all circumstances where force is used, police should “minimize damage ... and respect and preserve human life”<sup>37</sup> and dignity.<sup>38</sup> “[I]ntentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.”<sup>39</sup>

The Inter-American Court of Human Rights has held that States have an obligation to “be clear when defining domestic policies on the use of force and pursue strategies to implement the [U.N. Basic Principles].”<sup>40</sup> In the United States, however, the legal framework for the use of force, training practices, and policing methods do not clearly and systematically reflect or uphold these international standards. The discrepancies between the U.S. legal framework and international human rights standards are starkest with regard to the treatment of lethal versus non-lethal force, the circumstances in which recourse to force and lethal force is permissible, and the purposes for which the use of force is deemed legitimate.

The Fourth Amendment of the U.S. Constitution, which guarantees the right of the people to be free from unreasonable seizure of their person, is the primary lens through which police use of force is analyzed in the United States.<sup>41</sup> In its Fourth Amendment jurisprudence on use of force,<sup>42</sup> the U.S. Supreme Court focuses solely on the “reasonableness” of police actions under the circumstances. This approach contrasts with the U.N. Basic Principles’ categorization of different types of force, which distinguishes the lethal use of force from other forms of force.<sup>43</sup> Because the U.S. constitutional standard regarding the use of force does not treat lethal force as a separate category, permitted in only limited circumstances, there is no uniform floor or common baseline for individual state laws on lethal force. Unsurprisingly, this leads to considerable variation in how individual state statutes define lethal force and regulate the circumstances in which it may be used.<sup>44</sup> As of June 2015, nine states and the District of Columbia had no laws on the

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<sup>32</sup> U.N. G.A. Res. 34/169, Code of Conduct for Law Enforcement Officials (1979) [hereinafter U.N. Code of Conduct].

<sup>33</sup> United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990) [hereinafter U.N. Basic Principles].

<sup>34</sup> See, e.g., Human Rights Watch, *Shielded From Justice: Police Brutality and Accountability in the United States*, n.251 and accompanying text (1998), <https://www.hrw.org/legacy/reports98/police/uspo38.htm> (“While [the U.N. Code of Conduct] is not binding, it does provide authoritative guidance for interpreting international human rights law regarding policing.”); Amnesty Int’l, *10 Basic Human Rights Standards for Law Enforcement Officials* (Dec. 1998), <https://www.amnesty.org/download/Documents/156000/pol300041998en.pdf> (citing the U.N. Code of Conduct and the U.N. Basic Principles as authoritative sources on policing standards).

<sup>35</sup> U.N. Basic Principles, *supra* note 33, princ. 4.

<sup>36</sup> *Id.* at princ. 5.

<sup>37</sup> *Id.*

<sup>38</sup> U.N. Code of Conduct, *supra* note 32, art. 2.

<sup>39</sup> U.N. Basic Principles, *supra* note 33, princ. 9.

<sup>40</sup> *Nadege Dorzema et al. v. Dominican Republic*, Merits, Reparations and Costs, Judgment of Oct. 24, 2012, Inter-Am. Ct. H.R. (ser. C) No. 251, ¶ 80 (Oct. 24, 2012).

<sup>41</sup> See U.S. Const. amend. IV.

<sup>42</sup> See *Tennessee v. Garner*, 471 U.S. 1 (1985); *Graham v. Connor*, 490 U.S. 386 (1989); *Scott v. Harris*, 550 U.S. 372, 382 (2007). *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014), arguably constitutes a fourth case in this line, as it expanded on the reasoning of *Scott v. Harris*. See also Tim Longo, *Defining Instrumentalities of Deadly Force*, 27 *Touro L. Rev.* 261, 261–62 (2011) (discussing the three Supreme Court precedents that form the body of use-of-force case law).

<sup>43</sup> U.N. Basic Principles, *supra* note 33, princ. 9.

<sup>44</sup> Amnesty Int’l, *Deadly Force: Police Use of Lethal Force in the United States* 2, 4, 21 (2015), [https://www.amnestyusa.org/sites/default/files/aiusa\\_deadlyforcereportjune2015.pdf](https://www.amnestyusa.org/sites/default/files/aiusa_deadlyforcereportjune2015.pdf).



use of lethal force by law enforcement officers.<sup>45</sup> Many of the state laws that do exist fail to meet the domestic constitutional standard, let alone the standard set by international law.<sup>46</sup>

Moreover, the legal framework for the use of force in the United States does not clearly require exhaustion of non-violent or less-than-lethal means before resort to lethal force.<sup>47</sup> Nor does it consistently prohibit the use of force to maintain law and order, prevent escape, or apprehend a suspect, in absence of an imminent threat of death or serious injury.<sup>48</sup> Guidelines issued by the U.S. Department of Justice state that deadly force is unnecessary if non-deadly force is sufficient to accomplish a law enforcement purpose.<sup>49</sup> While these Guidelines represent an improvement upon the constitutional standard of “reasonableness”, they still set the baseline at non-deadly force rather than at non-violent means of defusing the situation. This approach is at odds with the standard set forth in the U.N. Basic Principles requiring exhaustion of alternatives to force.<sup>50</sup>

The absence of sufficiently clear, specific, and objective criteria regarding what constitutes lawful use of force in a given context contributes to an over-reliance on officers’ subjective views in determining the reasonableness of their actions. Deferring to the views of officers, however, runs the risk of allowing their biases—whether explicit or implicit—to define the parameters of the lawful use of force. Implicit bias, including racial bias, affects perception and may contribute to officers’ decisions to use lethal force unnecessarily.<sup>51</sup> Bringing the domestic legal framework into line with international standards would help clarify and strengthen the rules governing the use of force, minimize the influence of racial bias, and ensure greater respect for and protection of human rights.

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> For instance, in *Harris v. Serpas*, 745 F.3d 767, 772–73 (5th Cir.), cert. denied, 135 S. Ct. 137 (2014), the U.S. Court of Appeals for the Fifth Circuit ruled that officers were reasonable in fatally shooting Mr. Harris after he raised a knife above his shoulder in a stabbing position. The court reached this decision despite the fact that the officers initially found Mr. Harris lying down on his back and had received no reports that he was a threat to anyone but himself before they used Tasers on him, leading him to become agitated. The court did not contemplate whether officers could have used other less-than-lethal means to deescalate the situation, or consider any of the officers’ actions leading up to the shooting. Because the officers “reasonably feared for their safety at the moment of the fatal shooting,” the Fifth Circuit concluded that the use of lethal force was not excessive. *Id.* at 773. An analysis of the “use of force” policies of 17 police departments in the largest cities in the United States found that less than half of them (7 of 17) required de-escalation, and officers in at least four departments (Chicago, Houston, Los Angeles, and San Antonio) are not required to give a verbal warning, when possible, before shooting at civilians. See Use of Force Policy Review, <http://useofforceproject.org/#review> (last visited Jan. 25, 2016).

<sup>48</sup> For instance, in *McKenney v. Harrison*, the U.S. Court of Appeals for the Eighth Circuit ruled that an officer’s fatal Tasing of an unarmed person suspected of a misdemeanor as he lunged toward an open window was a reasonable use of force because the individual’s sudden movement could be interpreted as an attempt to flee, only a single Taser shock was used, the officer was in a position of having to make a split second decision, and some form of warning was given. There was no evidence that the suspect posed an imminent threat to the life or limb of the law enforcement officers or bystanders. The officer’s only apparent objective was bringing this individual into custody. *McKenney v. Harrison*, 635 F.3d 354, 360 (8th Cir. 2011). Permitting the prioritization of law and order over preservation of life does not comport with international human rights law. See Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, ¶ 73, U.N. Doc. A/HRC/26/36 (April 1, 2014) (by Christof Heyns).

<sup>49</sup> U.S. Dep’t of Justice, *Principles for Promoting Police Integrity: Examples of Promising Police Practices and Policies* (2001), <https://www.ncjrs.gov/pdffiles1/ojp/186189.pdf>.

<sup>50</sup> See U.N. Basic Principles, *supra* note 33, at princ. 4; see also U.N. Code of Conduct, *supra* note 32, at art. 3. This issue is described by the Inter-American Commission on Human Rights in *Leydi Dayán Sánchez v. Colombia*, Case 12.009, Inter-Am. Comm’n H.R., Report No. 43/08, ¶ 54 (2008).

<sup>51</sup> Tracey G. Gove, *Implicit Bias and Law Enforcement*, Police Chief 45–56 (Oct. 2011) [http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display\\_arch&article\\_id=2499&issue\\_id=102011](http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=2499&issue_id=102011).

## Police Training

International human rights law requires the United States to ensure that all law enforcement agents are properly trained in the lawful use of force and non-discrimination to prevent human rights abuses resulting from the excessive and discriminatory use of force.<sup>52</sup> As agents of the State, police officers must be informed of their obligations under international human rights law regarding the use of force and non-discrimination. They also must be trained to conduct themselves in a manner that fulfills these obligations, and respects and protects the rights of the individuals with whom they interact.<sup>53</sup> At the same time, police officers, as individual citizens and employees of the State, have a right to proper training so that they are equipped to perform their duties safely and effectively.<sup>54</sup>

There are 800,000 police officers across the United States, belonging to approximately 18,000 separate local and state law enforcement agencies, including more than 12,500 police departments.<sup>55</sup> The decentralization of policing in the United States, coupled with a lack of transparency regarding police training policies and practices, impedes meaningful evaluation of whether police training complies with international human rights law and norms. According to the *Guardian's* database of police killings, the U.S. cities with the highest number of police killings in 2015 were Los Angeles, Houston, Las Vegas, Indianapolis, and Phoenix.<sup>56</sup> While the police department manuals for several of these cities are posted online, they are not uniformly available and there is little public information regarding the content of police training programs.<sup>57</sup> To be sure, disclosure of training manuals and policies is insufficient on its own to ensure that police conduct respects rights. But the lack of transparency surrounding what police are and are not being taught impedes efforts to identify the sources of abusive conduct and to design effective solutions.

<sup>52</sup> See, e.g., Comm. on the Elimination of Racial Discrimination, *General Recommendation XXXI, on the prevention of racial discrimination in the administration and functioning of the criminal justice system*, § I.B.5(b), U.N. Doc. A/60/18, at 101 (2005); see also Comm. on the Elimination of Racial Discrimination, *General Recommendation XIII on the training of law enforcement officials in the protection of human rights*, U.N. Doc. A/48/18, at ¶ 2 (1993) (“The fulfillment of these obligations very much depends upon national law enforcement officials who exercise police powers, especially the powers of detention or arrest, and upon whether they are properly informed about the obligations their State has entered into under the Convention.”).

<sup>53</sup> For example, in the words of the Committee on the Elimination of Racial Discrimination, “[l]aw enforcement officials should receive intensive training to ensure that in the performance of their duties they respect as well as protect human dignity and maintain and uphold the human rights of all persons without distinction as to race, color or national or ethnic origin.” Comm. on the Elimination of Racial Discrimination, *General Recommendation XXXI*, *supra* note 52, ¶ 2.

<sup>54</sup> See Report on Citizen Security and Human Rights, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II. doc. 57, 92 (2009), <https://www.cidh.oas.org/pdf%20files/SEGURIDAD%20CIUDADANA%202009%20ENG.pdf> (describing the entitlement to “constant training that enables the police officer to perform his or her functions” (quoting Domínguez Vial, Andrés Policía y Derechos Humanos, Policía de Investigaciones de Chile/IIDH, Santiago, 1996)). The Report specifies: “The men and women who serve on the police force must receive ongoing instruction and practical training in human rights, and thorough training and instruction in the area of tactical danger assessment, so that they are able to determine, in every situation, whether the use of force, including lethal force, is proportionate, necessary and lawful.” *Id.*

<sup>55</sup> The last census of law enforcement occurred in 2008. See Brian A. Reeves, *Census of State and Local Law Enforcement Agencies*, 2008, NDJ 233982, Bureau of Justice Statistics (July 26, 2011); see also, Sunil Dutta, *We should get rid of local policing: Ferguson shows why the system doesn't work*, Wash. Post (Nov. 25, 2014), <https://www.washingtonpost.com/posteverything/wp/2014/11/25/we-should-get-rid-of-local-policing-ferguson-shows-why-the-system-just-doesnt-work> (noting that the United States employs 756,246 sworn officers).

<sup>56</sup> *Guardian Database*, *supra* note 1.

<sup>57</sup> Compare *Department Manual*, Los Angeles Police Dep't, [http://www.lapdonline.org/lapd\\_manual/](http://www.lapdonline.org/lapd_manual/) (last visited Dec. 22, 2015), *Department Manual*, Las Vegas Metropolitan Police Department, <http://www.lvpmisa.org/Forms/Dept.%20Man%207-14-07.pdf> (last visited Dec. 22, 2015), and *Operations Order Manual*, Phoenix Police Department (<http://azcommonlaw.com/wp-content/uploads/2014/07/phoenix-police-department.pdf> (last visited Dec. 22, 2015)), with *Houston Police Department*, City of Houston, <http://www.houstonpolice.org/go/doc/2133/289249/> (last visited Oct. 14, 2015), *Indianapolis Metropolitan Police Department*, Indianapolis, <http://www.indy.gov/eGov/City/DPS/IMP/DPSPages/home.aspx> (last visited Oct. 14, 2015). Through Freedom of Information Act requests, Campaign Zero obtained and disclosed the use of force policies of the police departments of 17 major cities. See Use of Force Policy Database, <http://useofforceproject.org/database> (last visited Jan. 25, 2016).

The United States has an obligation to protect the right to life.<sup>58</sup> Death resulting from the excessive use of force by police officers violates the right to life. Under both the American Declaration<sup>59</sup> and the ICCPR, the United States also must *give effect* to the right to life.<sup>60</sup> This positive obligation includes mandatory training of the State's law enforcement officers.<sup>61</sup> Accordingly, in order to give effect to the right to life under the American Declaration and the ICCPR, the United States must ensure that its police officers are adequately trained.<sup>62</sup>

International human rights law bans all forms of torture and CIDT, universally and without exception.<sup>63</sup> While lawful use of force by police does not constitute torture or CIDT,<sup>64</sup> excessive and unlawful use of force by police officers may.<sup>65</sup> Under CAT, the United States has an obligation to train police forces to avoid torture and CIDT.<sup>66</sup> Proper anti-CIDT training should occur regularly and should inform police officers of all provisions of the Convention, including the possibility of criminal liability for violations, as well as relevant provisions of U.S. domestic law.<sup>67</sup>

International human rights law prohibits discrimination and requires equality before the law.<sup>68</sup> The United States has a binding obligation to eliminate all forms of racial discrimination.<sup>69</sup> Under ICERD,

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<sup>58</sup> American Declaration, *supra* note 9, art. I; ICCPR, *supra* note 11, art. 6; *see also* U.N. Office of the High Commissioner for Human Rights, *Human Rights and Law Enforcement: A Manual on Human Rights Training for the Police*, Professional Training Series No. 5, U.N. Doc. HR/P/PT/5, ¶¶ 879–889 (1997) (describing respect for human rights by police as principle fundamental to the promotion and protection of human rights through policing, with practical implications for law enforcement command and management, including training).

<sup>59</sup> American Convention on Human Rights, arts. 2 & 4, Nov. 22, 1969, OAS Treaty Series No. 36, 1144 UNTS 123, 9 ILM 99 [hereinafter ACHR].

<sup>60</sup> ICCPR, *supra* note 11, art. 2. (“Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, ... to adopt such laws or other measures as may be necessary to *give effect* to the rights recognized in the present Covenant.”) (emphasis added).

<sup>61</sup> *See* Nadege Dorzema v. Dominican Republic, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 251, ¶ 81 (Oct. 24, 2012); *see also* *Human Rights and Law Enforcement: A Manual on Human Rights Training for the Police*, Professional Training Series No. 5, *supra* note 58, ¶¶ 879–889.

<sup>62</sup> *See* Montero Aranguren et al. (Detention Center of Catia) v. Venezuela. Merits, Reparations and Costs. Judgment, Inter-Am Ct. H.R. (Ser C) No. 150, ¶ 147 (July 5, 2006).

<sup>63</sup> CAT, *supra* note 13, art. 1.; ACHR, *supra* note 59, art. 5(2); Inter-American Convention to Prevent and Punish Torture, art. 2, Dec. 9, 1985, OAS Treaty Series No. 67, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 Rev. 9 (2003) (entered into force Feb. 28, 1987) [hereinafter IACPT].

<sup>64</sup> CAT, *supra* note 13, art. 1 (“...[CIDT] does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”).

<sup>65</sup> *See, e.g.,* Gayle v. Jamaica, Case 12.418, Inter-Am. Comm’n H.R., Report No. 92/05, ¶ 63 (2005) (finding that the excessive use of force by police for the purpose of the criminal justice was CIDT); *see also* Finca “La Exacta” v. Guatemala, Case 11.382, Inter-Am. Comm’n H.R., Report No. 57/02, doc. 5 rev. 1, ¶ 41 (2002).

<sup>66</sup> CAT, *supra* note 13, arts. 10.1 & 16.1 (mandating anti-torture training in art. 10.1 “[e]ach State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel,” and providing in art. 16.1 that training must include the prohibition against cruel, inhuman or degrading treatment).

<sup>67</sup> Manfred Nowak & Elizabeth McArthur, *Article 10 Training of Personnel*, in *The United Nations Convention Against Torture: A Commentary* 390 (2008).

<sup>68</sup> Charter of the United Nations, art. 3.1, Oct. 24, 1945, 1 UNTS XVI [hereinafter UN Charter]; American Declaration, *supra* note 9, art. II; ACHR, *supra* note 59, arts. 1, 24; ICCPR, *supra* note 11, arts. 2(1), 26; ICERD, *supra* note 12, arts. 2, 5(a); *see also* Nadege Dorzema et al. v. Dominican Republic. Merits, Reparations and Costs. Judgment, Inter-Am Ct. H.R. (Ser C) No. 251 ¶ 224 (Oct. 24, 2012) (“[T]here is an indissoluble connection between the obligation to respect and ensure human rights and the principle of equality and non-discrimination.”).

<sup>69</sup> ICERD, *supra* note 12, art. 2. (defining racial discrimination as, “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”); ICCPR, *supra* note 11, art. 26 (“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political

States must *ensure* that their public authorities act in conformity with this obligation,<sup>70</sup> including by ensuring that police treat all people equally.<sup>71</sup> States should pursue this duty by training police officers on their obligations to respect and protect human dignity and the human rights of all, without regard to race.<sup>72</sup> The Committee on the Elimination of Racial Discrimination has repeatedly noted that racial profiling in the United States violates obligations under ICERD.<sup>73</sup>

In sum, police officers must be trained to understand which types of force are permissible, under which circumstances. Law enforcement agents must be equipped with tactics and tools that encourage de-escalation measures and alternatives to deadly force. Police training must not be limited, however, to teaching the mechanics of policing; it must also encompass programs to combat racial bias and overcome ignorance regarding the history of racial injustice in the United States. Furthermore, the public must also have access to, and opportunities to influence the content of, police training programs.

Ultimately, the efficacy of police training in the proper use of force and non-discrimination must be gauged by its effects on officer conduct. So long as Black Americans continue to be disproportionately victimized by excessive use of force, training programs must continue to be scrutinized and improved in order to ensure that they better prepare officers to respect and uphold the human rights of all. To be sure, the problem of discriminatory police violence is not simply one of inadequate training. It cannot be separated from systemic racism and inadequate accountability mechanisms, discussed further below. All too often, officers display appropriate policing habits when operating in wealthy, white neighborhoods, suggesting that they do not lack the capacity to police humanely—they just choose not to apply that knowledge in low-income, Black communities. Thus, efforts to end the disproportionate victimization of Black Americans by police must not be limited to reform of training programs. Nor should the call for improved training become a means to increase police budgets and thereby contribute to heightened police presence or militarization of the police in the very communities suffering from excessive use of force today.

## Police Practices

Aggressive police practices are deeply rooted in a history of discrimination against Black Americans and are part of a system of racial and social control.<sup>74</sup> Historians have documented, for example, how the

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or other opinion, national or social origin, property, birth or other status.”); *see also* Nadege Dorzema et al. v. Dominican Republic, Merits, Reparations and Costs, Judgment, Inter-Am Ct. H.R. (Ser C) No. 251 ¶ 231 (Oct. 24, 2012) (relying on the ICERD definition of racial discrimination).

<sup>70</sup> ICERD, *supra* note 12, art. 2(a).

<sup>71</sup> *Id.* at art. 5(a) (“In compliance with the fundamental obligations laid down in article 2 ... States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: (a) The right to equal treatment before the tribunals and all other organs administering justice”).

<sup>72</sup> *See* Comm. on the Elimination of Racial Discrimination, *General Recommendation XXXI, on the prevention of racial discrimination in the administration and functioning of the criminal justice system*, § I.B.5(b), U.N. Doc. A/60/18, at 101 (2005); *see also* Comm. on the Elimination of Racial Discrimination, *General Recommendation XIII on the training of law enforcement officials in the protection of human rights*, U.N. Doc. A/48/18, at ¶ 2 (1993) (“The fulfilment [sic] of these obligations very much depends upon national law enforcement officials who exercise police powers, especially the powers of detention or arrest, and upon whether they are properly informed about the obligations their State has entered into under the Convention.”).

<sup>73</sup> U.N. Comm. on the Elimination of Racial Discrimination, *Concluding observations on the combined seventh to ninth periodic reports of the United States of America*, U.N. Doc. CERD/C/USA/CO/7-9, ¶ 8 (Sept. 25, 2014); U.N. Comm. on the Elimination of Racial Discrimination, *Concluding observations on the combined fourth to sixth periodic reports of the United States of America*, U.N. Doc. CERD/C/USA/CO/6, ¶ 14 (May 8, 2008).

<sup>74</sup> *See* Sarah Childress, *Michelle Alexander: “A System of Racial and Social Control”*, Frontline (Apr. 29, 2014), <http://www.pbs.org/wgbh/frontline/article/michelle-alexander-a-system-of-racial-and-social-control/>.

“first modern-style police forces” began as slave patrols in the pre-Civil War South.<sup>75</sup> From the time of slavery, through the era of *de jure* racial discrimination, to contemporary policing practices, race has been central “in the formation and organizing ethos of the police.”<sup>76</sup> Today, four interrelated trends in aggressive and discriminatory police practices contribute to the use of excessive force disproportionately against Black Americans: “broken windows” policing, racial profiling, the increasing militarization of police forces, and policing motivated by profit. The disproportionate use of these tactics against Black Americans contravenes international human rights law.

First, broken windows policing is a law enforcement strategy that targets petty crimes such as loitering, spitting, vandalism, marijuana possession, and public consumption of alcohol, on the theory that these minor infractions, if left unaddressed, invite more mischief and increasingly serious crime.<sup>77</sup> Data show that this type of policing is concentrated in communities of color,<sup>78</sup> with little evidence of effectiveness.<sup>79</sup> Instead, results indicate that broken windows policing practices “may have done more harm than good,”<sup>80</sup> increasing the frequency of civilian encounters with police and thereby elevating the exposure of members of targeted communities to the risk of police violence.<sup>81</sup>

According to one count, in 2014, police officers across the country killed more than 287 people who were involved in minor offenses.<sup>82</sup> The killing of Eric Garner throws this issue into sharp relief. Garner, an unarmed 43-year-old Black man, was killed on July 17, 2014, when he was violently restrained by several New York City police officers during an arrest for selling individual untaxed cigarettes. Despite Garner’s repeated cries of “I can’t breathe,” the arresting officer did not relent in his use of force until Garner lied unconscious on the pavement.<sup>83</sup>

Second, racial profiling also imposes a disproportionate burden on communities of color. Black Americans are more likely than members of other ethnic and racial groups to be stereotyped as violent criminals or drug abusers.<sup>84</sup> Although national surveys have demonstrated similar rates of drug use among different racial groups, law enforcement has targeted Black Americans for drug crimes in grossly disproportionate numbers since the launch of the federal government’s “war on drugs” in the 1980s.<sup>85</sup> CERD has repeatedly recommended that the United States strengthen its efforts to combat racial

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<sup>75</sup> James Conser, Rebecca Paynich & Terry Gingerich, *Law Enforcement in the United States* 50 (3d ed. 2013).

<sup>76</sup> Sandra Bass, *Policing Space, Policing Race: Social Control Imperatives and Police Discretionary Decisions*, 28 *Social Justice* Vol. 28, No. 1 (83), *Welfare & Punishment In the Bush Era* (Spring 2001), at 159, 163.

<sup>77</sup> James Q. Wilson & George L. Kelling, *Broken Windows*, *Atlantic Monthly* (Mar. 1982), <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465>.

<sup>78</sup> Christina Sterbenz, *How New York City Became Safe Again*, *Business Insider* (Dec. 2, 2014), <http://www.businessinsider.com/criticism-for-giulianis-broken-windows-theory-2014-12> (last visited Sept. 27, 2015). *See also* Randall G. Shelden, *Assessing ‘Broken Windows’: A Brief Critique*, Center on Criminal and Civil Justice, n.d., at 11, <http://www.cjcj.org/uploads/cjcj/documents/broken.pdf>.

<sup>79</sup> *See* Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 *U. Chi. L. Rev.* 271, 316 (2006) (concluding that “there appears to be no good evidence that broken windows policing reduces crime, nor evidence that changing the desired intermediate output of broken windows policing—disorder itself is sufficient to affect changes in criminal behavior”).

<sup>80</sup> Christina Sterbenz, *How New York City Became Safe Again*, *Business Insider* (Dec. 2, 2014), <http://www.businessinsider.com/criticism-for-giulianis-broken-windows-theory-2014-12> (last visited Sept. 27, 2015). *See also* Randall G. Shelden, *Assessing ‘Broken Windows’: A Brief Critique*, Center on Criminal and Civil Justice, n.d., at 11, <http://www.cjcj.org/uploads/cjcj/documents/broken.pdf>.

<sup>81</sup> *Id.*

<sup>82</sup> *Broken Windows Policing*, Campaign Zero (2015), <http://www.joincampaignzero.org/brokenwindows> (last visited Oct. 1, 2015).

<sup>83</sup> Melanie Eversley & Mike James, *No charges in NYC chokehold death; federal inquiry launched*, *USA Today* (Dec. 4, 2014), <http://usatoday.com/story/news/national/2014/12/03/chokehold-grand-jury/19804577>.

<sup>84</sup> Kelly Welch, *Black Criminal Stereotypes and Racial Profiling*, 23 *J. Contemporary Crim. Justice* 276, 278 (2007).

<sup>85</sup> *Id.* at 279.

profiling, emphasizing that the use of policing tactics with racially disparate impacts contravenes the State's obligations under ICERD.<sup>86</sup> The racial profiling of Black Americans is a self-perpetuating cycle. When Black Americans are arrested and jailed at grossly outsized rates, they are stereotyped as criminals. That stereotype in turn fuels the profiling of Black individuals and communities, driving the rates of police encounters, arrests, and incarceration even higher.<sup>87</sup>

According to updated guidelines issued by the U.S. Department of Justice in December 2014, federal law enforcement officers are absolutely forbidden from relying upon generalized stereotypes based on race.<sup>88</sup> The articulation of such a prohibition is a positive step, but its effectiveness is yet unproven. The previous version of the federal guidelines was issued in 2003, after President George W. Bush declared that racial and ethnic profiling was “wrong” and promised to “end it in America.”<sup>89</sup> Despite such pronouncements, the 2003 guidelines failed to stem the tide of racial profiling, which continued to drive encounters between Black Americans and the police for the next decade.<sup>90</sup>

Third, police departments also have become more militarized; they use heavy arms and combat equipment with greater frequency,<sup>91</sup> and deploy SWAT<sup>92</sup> teams to carry out everyday policing duties,<sup>93</sup> including in response to reports of non-violent crimes. Despite recent U.S. actions to ban federal transfers of certain military-style equipment to police departments, similar gear may still be purchased from private vendors.<sup>94</sup> The militarization of the police encourages disproportionate responses by law enforcement and is at odds with principles enshrined in international human rights law.<sup>95</sup>

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<sup>86</sup> See Comm. on the Elimination of Racial Discrimination, *Concluding observations on the combined seventh to ninth periodic reports of the United States of America*, U.N. Doc. CERD/C/USA/CO/7-9, ¶ 8 (Sep. 25, 2014); Comm. on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America*, U.N. Doc. CERD/C/USA/CO/6, ¶ 14 (May 8, 2008).

<sup>87</sup> See generally Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010).

<sup>88</sup> U.S. Dep't of Justice, *Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity* (Dec. 2014), <http://www.justice.gov/sites/default/files/ag/pages/attachments/2014/12/08/use-of-race-policy.pdf>.

<sup>89</sup> U.S. Dep't of Justice, *Justice Department Issues Policy Guidance to Ban Racial Profiling* (June 17, 2003), [http://www.justice.gov/archive/opa/pr/2003/June/03\\_crt\\_355.htm](http://www.justice.gov/archive/opa/pr/2003/June/03_crt_355.htm).

<sup>90</sup> See, e.g., David Harris, *Driving while Black: Racial Profiling on our Nation's Highways*, ACLU (June 1999), <https://www.aclu.org/report/driving-while-black-racial-profiling-our-nations-highways>; Gina Castle Bell et al., *Exploring Black and White Accounts of 21st-Century Racial Profiling: Riding and Driving While Black*, 15 Qualitative Research Reports in Comm'n 1 (Oct. 16, 2014), <http://www.tandfonline.com/doi/abs/10.1080/17459435.2014.955590>.

<sup>91</sup> Lauren Carroll, *Rand Paul says federal program incentivizes police militarization*, Politifact (Aug. 21, 2014), <http://www.politifact.com/truth-o-meter/statements/2014/aug/21/rand-paul/rand-paul-says-federal-program-incentivizes-police/>. The 1990 National Defense Authorization Act authorized the transfer of military equipment from the federal Department of Defense (“DOD”) to law enforcement agencies for use in “counterdrug activities,” ostensibly to aid in the “war on drugs.” Bret McCabe, *Does the Militarization of American police help them serve and protect*, John's Hopkins Magazine (Spring 2015), <http://hub.jhu.edu/magazine/2015/spring/aclu-militarization-of-police>; *The 1033 Program*, Justnet, [https://www.justnet.org/other/1033\\_program.html](https://www.justnet.org/other/1033_program.html) (last visited Oct. 11, 2015).

<sup>92</sup> SWAT stands for “Special Weapons and Tactics” and commonly refers to a unit within a police force that is trained to respond to unusually dangerous situations.

<sup>93</sup> ACLU, *War Comes Home* (Jun. 2014), <https://www.aclu.org/report/war-comes-home-excessive-militarization-american-police>.

<sup>94</sup> Colleen McCain Nelson, *Obama Calls for Restricting Military Gear to Local Police*, Wall St. J. (May 18, 2015), <http://www.wsj.com/articles/white-house-to-announce-new-policing-standards-1431943381>.

<sup>95</sup> See, e.g., Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, *Study on police oversight mechanisms*, U.N. Doc. A/HRC/14/24/Add.8 (May 28, 2010) (by Philip Alston), ¶ 12 (“The presence of a military rather than civilian ethos within a police force contributes significantly to the number of human rights violations committed by that force.”); Inter-Am. Comm'n H.R., *The Situation of People of African Descent in the Americas*, OEA/Ser.L/V/II.Doc.62 ¶¶ 163–180 (Dec. 5, 2011), [http://www.oas.org/en/iachr/afro-descendants/docs/pdf/AFROS\\_2011\\_ENG.pdf](http://www.oas.org/en/iachr/afro-descendants/docs/pdf/AFROS_2011_ENG.pdf).

Finally, in many municipalities, policing motivated by profit—sometimes called “for-profit policing”—underlies the disproportionately high rates of police-civilian interactions among Black and low-income communities. Law enforcement agencies stand to raise considerable revenue from a variety of practices, including criminal and civil asset forfeiture,<sup>96</sup> and from fines and administrative charges for minor offenses, which take a particularly severe toll on impoverished communities.<sup>97</sup> In its investigation of the Ferguson Police Department in Missouri, for example, the Department of Justice noted that revenue-seeking police and court practices have a disparate impact on Black Americans and increase civilian-police encounters in Black communities.<sup>98</sup> After the release of the Department of Justice report, President Obama commented on the racial biases underlying for-profit policing: “What we saw was that the Ferguson Police Department, in conjunction with the municipality, saw traffic stops, arrests, and tickets as a revenue generator, as opposed to serving the community, and that it systematically was biased against African Americans in that city who were stopped, harassed, mistreated, abused, called names, fined.”<sup>99</sup>

### Investigations and Accountability for Excessive Use of Force by Police

International human rights law guarantees individuals the right to an effective remedy for violations of their human rights.<sup>100</sup> The United States bears a corresponding duty to provide access to such remedy.<sup>101</sup> Police impunity lies at the heart of a cycle of violence and discrimination against Black Americans. The prohibition against the arbitrary deprivation of life is ineffective without accessible and independent proceedings to verify the legality of the use of force; thus, the State has a duty to adopt laws and practices for effective investigation.<sup>102</sup> The Inter-American Court has defined impunity as “the absence of any investigation, pursuit, capture, prosecution and conviction” of those responsible for the violations of human rights.<sup>103</sup> Further, this Commission has noted that such impunity “corrodes the foundations of a democratic state”<sup>104</sup> and “fosters chronic recidivism of human rights violations and the total defenselessness of victims and their relatives.”<sup>105</sup> Full compliance with the obligations to investigate, prosecute, punish, and provide redress, in accordance with due process, is essential to combat impunity.<sup>106</sup>

<sup>96</sup> For more on civil asset forfeiture, see Marian R. Williams et al., *Policing For Profit: The Abuse of Civil Asset Forfeiture*, Institute for Justice (March 2010), [http://www.ij.org/images/pdf\\_folder/other\\_pubs/assetforfeituretoemail.pdf](http://www.ij.org/images/pdf_folder/other_pubs/assetforfeituretoemail.pdf).

<sup>97</sup> *Policing and Profit, Developments in the Law*, 128 Harv. L. Rev. 1723, 1723 (2015), <http://harvardlawreview.org/2015/04/policing-and-profit/>; Guilty Property, American Civil Liberties Union (June 2015), [http://www.aclupa.org/files/3214/3326/0426/Guilty\\_Property\\_Report\\_-\\_FINAL.pdf](http://www.aclupa.org/files/3214/3326/0426/Guilty_Property_Report_-_FINAL.pdf)

<sup>98</sup> Investigation of the Ferguson Police Department, United States Department of Justice Civil Rights Division 2–4 (Mar. 4, 2015), [http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf).

<sup>99</sup> Carey Gillam & Julia Edwards, *Obama Criticizes Ferguson as City Seeks Settlement Over Racial Bias*, Reuters (Mar. 6, 2015 7:08PM), <http://www.reuters.com/article/2015/03/07/us-usa-missouri-shooting-idUSKBN0M21VC20150307#cyJDIQMO5vbebSc3.97>.

<sup>100</sup> See, e.g., ICCPR, *supra* note 11, arts. 2, 14.

<sup>101</sup> See, e.g., Inter-Am. Comm’n H.R., *The Situation of People of African Descent in the Americas*, *supra* note 95, at ¶ 141.

<sup>102</sup> *Almonacid-Arellano v. Chile*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 154 ¶¶ 110–112, 118 (2006).

<sup>103</sup> *Case of the Ituango Massacres v. Colombia*, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 148, ¶ 299 (July 1, 2006); see also *Case of the Mapiripan Massacre v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134, ¶ 237 (Sept. 15, 2005); *Case of the Moiwana Community v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 203 (June 15, 2005); *Case of Serrano-Cruz Sisters v. El Salvador*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 120, ¶ 170 (Mar. 1, 2005).

<sup>104</sup> Inter-Am. Comm’n H.R., *Report on the Situation of Human Rights Defenders in the Americas*, OEA/Ser.L/V/II.124, Doc. 5 rev. 1, ¶ 107, (Mar. 7, 2006).

<sup>105</sup> *Id.* at ¶ 108; see also Inter-Am. Comm’n H.R., *Rep. on Citizen Security and Human Rights*, OEA/Ser.L/V/II. doc. 57, 92, at ¶ 36, (2009), <https://www.cidh.oas.org/countryrep/Seguridad.eng/CitizenSecurity.IV.htm>.

<sup>106</sup> *Report on the Situation of Human Rights Defenders in the Americas*, *supra* note 104, at ¶¶ 124, 256.

As described above, police officers tend to enjoy wide discretion to use deadly force against civilians. Research indicates that systemic biases within the judicial system also insulate police officers from criminal liability for the violation of rights. Prosecutors are less likely to file charges against members of the police because of their professional relationship,<sup>107</sup> and grand juries are less likely to indict them.<sup>108</sup> Furthermore, only state and federal prosecutors, most of whom enjoy wide discretion, may initiate criminal proceedings. Finally, criminal proceedings against police suffer from many of the same problems as internal police investigations,<sup>109</sup> including intimidated or unreliable witnesses, and limited evidence due to the influence of police unions and departmental cultures of secrecy.<sup>110</sup> Ultimately, the result is that police officers typically are held to a less stringent legal standard for conduct that causes death than civilians who commit similar acts. All too often, officers avoid punishment altogether.

Citizens wishing to lodge grievances against police officers encounter numerous obstacles, including state statutory requirements that limit the time, place, and manner in which citizens can file complaints.<sup>111</sup> Furthermore, some police departments actively discourage filing by providing incomplete information on the complaint process and refusing to accept complaints by juveniles unless submitted in person or in the presence of a parent, among other hurdles.<sup>112</sup>

Injured parties may sue individual police officers, a police department, or a municipality to obtain monetary damages for excessive use of force. Limitations on who can file a suit and when they can do so, the existence of high pleading standards, and the cost and lengthiness of proceedings, all present barriers to filing a civil case. Additionally, civil suits rarely result in institutional reform. Municipalities generally indemnify their officers, and the city pays the damage awards out of taxpayer money; most police departments do not even know how much a city has paid for police misconduct or which officers' conduct resulted in a settlement.<sup>113</sup>

Consent decrees are one of the few legal mechanisms available to address systemic discrimination within police departments. As agreements reached between a municipality and the U.S. Department of Justice, consent decrees describe the actions needed to end systematic violations of the Constitution or federal law by a given police department. By agreeing to implement remedial measures, the signatory municipality admits no liability, but avoids litigation and maintains eligibility for federal funding.<sup>114</sup> Consent decrees are approved and monitored by a federal judge and may be terminated only with judicial approval, upon determination that the remedial measures have been sufficiently implemented.<sup>115</sup> While such reforms

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<sup>107</sup> See Rueben Fischer-Baum, *Allegations of Police Misconduct Rarely Result in Charges*, FiveThirtyEight (Nov. 25, 2014 9:45AM), <http://fivethirtyeight.com/datalab/allegations-of-police-misconduct-rarely-result-in-charges/>.

<sup>108</sup> See James Pinkerton, *Hard to Charge*, Houston Chron., <http://www.houstonchronicle.com/local/investigations/item/Bulletproof-Part-3-Hard-to-charge-24421.php> (last viewed Oct. 5, 2015).

<sup>109</sup> See, e.g., Kate Mather, *LAPD found no bias in all 1,356 complaints filed against officers*, L.A. Times (Dec. 15, 2015), <http://www.latimes.com/local/lanow/la-me-ln-lapd-biased-policing-report-20151215-story.html>.

<sup>110</sup> See e.g., Margaret Talbot, *Bad Cops, Good Cops*, New Yorker (Dec. 21, 2015), <http://www.newyorker.com/magazine/2015/12/21/bad-cops-good-cops>; Press Release, U.S. Dept. of Justice, Three Atlanta Police Officers Charged in Connection with the Fatal Shooting of an Elderly Atlanta Woman, at 4 (Apr. 26, 2007), <http://www.justice.gov/archive/usao/gan/press/2007/04-26-07.pdf>.

<sup>111</sup> Alexander Shalom, *The Crisis Continues Inside Police and Internal Affairs*, Am. Civil Liberties Union of N.J., at 6 (Feb. 2013), [https://www.aclu-nj.org/files/3413/6059/3876/ACLU\\_NJ\\_Internal\\_Affairs.pdf](https://www.aclu-nj.org/files/3413/6059/3876/ACLU_NJ_Internal_Affairs.pdf).

<sup>112</sup> *Id.*

<sup>113</sup> See *Civil Suits Against Police Cost Taxpayers Millions But Rarely Result in Reforms*, Free Speech Radio News (June 23, 2015), <http://fsrn.org/2015/06/civil-suits-against-police-cost-taxpayers-millions-but-rarely-result-in-reforms/>.

<sup>114</sup> *Id.*

<sup>115</sup> See Elliot Harvey Schatmeier, *Reforming Police Use-of-force Practices: A Case Study of the Cincinnati Police Department*, 46 Colum. J.L. & Soc. Probs. 539, 448 (2013).



represent important measures to combat patterns of discriminatory and excessive use of force by law enforcement, at least two structural limitations hinder the efficacy and legitimacy of consent decrees. First, because there is no private right of action under the federal statute prohibiting systemic police misconduct that violates rights (Section 14141),<sup>116</sup> enforcement depends on DOJ discretion and resources, which may vary with the political climate and changes in administrations.<sup>117</sup> Second, there is often little scope for participation of community members in negotiations of consent decrees between DOJ and municipal officials.<sup>118</sup>

Consistent with principles of accountability and transparency under international law, the United States should ensure that there are mechanisms for external and community oversight of police conduct. Some communities have sought to create opportunities for civilian participation in external investigation procedures to accompany internal police department reviews. Others have advocated for the development of independent civilian review boards, whose duty it is to consider complaints against police departments and then recommend disciplinary actions.<sup>119</sup> While their forms may vary, mechanisms for community involvement and civilian oversight possess enormous potential to improve transparency and accountability of police. Judges, prosecutors, and civilian review boards all play an essential role in ensuring access to justice for victims and their families. Access to information is a prerequisite for meaningful public participation in the design, implementation and oversight of police policies, training, and accountability mechanisms. Expounding the right to freedom of expression provided in the American Declaration, the Inter-American Declaration of Principles on Freedom of Expression, states that access to public information is a fundamental right,<sup>120</sup> which imposes a duty on the State not only to provide information in response to individual requests but also to proactively disclose information of public information.

## B. Recommendations

The authors of this submission respectfully ask this Commission to recommend that the United States take the following steps to comply with its obligations under international human rights law to prevent and redress the excessive and discriminatory use of force by police against Black Americans. The recommendations outlined below correspond to the sections of this written submission addressing: (I) the legal framework for the use of force in the United States; (II) police training; (III) police practices; and (IV) investigations and accountability.

These recommendations are grounded in the rights to life and to security of the person, the rights to be free from arbitrary detention, torture, cruel, inhuman or degrading treatment, and the rights to equal treatment under law and freedom from discrimination. The proposed actions outlined below draw on a variety of sources, including relevant concluding observations by human rights monitoring bodies, reports of U.N. human rights experts, civil society groups, and the President's Task Force on 21st Century Policing. The list is by no means exhaustive; the authors have intentionally limited the scope of these recommendations to the obligations of the United States under international human rights law. The recommendations do not aim to present a roadmap to implementation; the authors defer to the expertise of

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<sup>116</sup> 42 U.S.C. § 14141.

<sup>117</sup> See Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. Crim. L. & Criminology 489, 518–19 (2008).

<sup>118</sup> *Id.*

<sup>119</sup> *Alternative Models for Police Disciplinary Procedures*, U.S. Comm. On Civil Rights, <http://www.usccr.gov/pubs/sac/wv0104/ch4.htm> (last visited Oct. 11, 2015).

<sup>120</sup> Inter-American Declaration of Principles on Freedom of Expression, adopted at the 108<sup>th</sup> regular sessions of the Inter-American Commission on Human Rights (Oct. 2000), <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=26>.

civil society organizations, government agencies, and the political process to devise strategies for implementing measures necessary to give effect to the rights guaranteed under international law and to prevent and remedy excessive and discriminatory use of force by police. Reform efforts must be guided by the demands of Black communities across the United States experiencing the impacts of discriminatory police violence. The individuals most affected, and the human rights defenders within the movement for Black lives and other community organizations that have brought ongoing injustices to light, must have meaningful opportunities to shape decisions about how the State responds and what measures it adopts to better respect and protect human rights. The authors respectfully request this Commission to remind the United States that while methods of implementation may vary at the local, state, and federal levels, domestic law does not excuse the State from complying with its binding obligations under international law.

## **Legal Framework**

States have a duty under international human rights law to adopt legislation and regulations, and to take other necessary steps, to give effect to the rights recognized in international human rights treaties to which they are signatory and in customary international law. Individuals have a right to be informed of the laws that govern the State, including the conduct of State agents, such as police officers. Moreover, a clear and predictable legal framework regulating police activity is necessary to ensure that the use of force is not arbitrary. To that end, the United States should:

1. Implement laws, policies, operational procedures, training programs and practices that conform to the standards set forth in the U.N. Basic Principles on the Use of Force and Firearms and the U.N. Code of Conduct for Law Enforcement Officials, at local, state and federal levels.
2. Bring the legal framework governing the use of force into line with the requirements of international human rights law, by ensuring that it prioritizes the protection of life, differentiates between lethal and non-lethal force, and permits the use of lethal force only where necessary to protect against an imminent threat of death or serious injury, and only as a last resort after exhaustion of non-violent means and non-lethal force.
3. Bring the Fourth Amendment reasonableness inquiry into line with international human rights law by focusing the analysis on whether the use of force was absolutely necessary and proportionate, taking into account the planning and precautions undertaken prior to the use of force.
4. Mandate that all laws and regulations at the local, state, and federal levels clearly prohibit the use of lethal force merely to apprehend criminal suspects or maintain law and order.
5. Strengthen the legal prohibitions against and available legal remedies for *de facto* discrimination at the local, state, and federal levels so that domestic standards align with international human rights law, which prohibits both *de jure* and *de facto* discrimination and guarantees the right to substantive equality.

## **Police Training**

As agents of the State, police officers are bound by international human rights law. They therefore must be aware of their obligations and equipped with the means to respect, protect, and fulfill the human rights of all individuals in the communities they serve. Those human rights obligations include not only the duty to respect and protect civilian life and physical integrity, but to refrain from and protect individuals against discrimination on the basis of race or other protected classes. In addition, as individuals to whom the State owes duties, police officers have the right to adequate training and resources in order to carry out their professional responsibilities in a safe and effective manner. Sound training and healthy working conditions for police officers may help reduce instances of excessive use of force and discrimination, and

help prevent recurrence of violations. While this document calls for human rights-compliant training of police, the call to improve training must not simply become an excuse to increase police budgets, thereby contributing to more policing in already over-policed communities. To ensure police officers receive the training that the State is required to provide, and to which officers are entitled, the United States should:

1. Establish uniform, minimum training standards for police officers, in line with international human rights law, to be implemented by local, state and federal law enforcement agencies with a special emphasis on the lawful and non-discriminatory use of force.
2. Ensure all police officers receive adequate and ongoing training on the proportionate use of force, including techniques for de-escalation and alternatives to the use of force.
3. Require mandatory training on the proper use and risks of electrical discharge weapons (Tasers).
4. Mandate officer training in non-discrimination principles and techniques, including, but not limited to, implicit bias training, cultural competence training, and education on the history and contemporary manifestations of racial inequality in the United States.
5. Incorporate specialized training in techniques for interacting with persons suffering from mental illness.
6. Require regular and accessible public disclosure of information regarding the content of police officer recruitment and training programs and policies.
7. Increase the opportunities for civil society and the public to participate in the design and review of training standards, at the local, state, and federal levels.
8. Ensure selection processes for hiring police officers and periodic reviews of officers' fitness to perform their duties include psychological screening.
9. Mandate that the training programs of police departments incorporate behavior management and stress reduction techniques for officers.
10. Require police departments to make counseling services available to police officers to assist them in coping with stress in the course of their duties.

## **Police Practices**

International human rights law prohibits both de jure and de facto discrimination. Policing tactics and methods that disproportionately target and/or disparately affect Black Americans violate international human rights law. In all circumstances, the use of force by police must be proportionate in relation to the threat posed and must constitute a last resort, after non-violent means have been exhausted. Furthermore, the misuse of weapons and control substances for purposes of intimidation, coercion or discrimination of any kind can constitute torture or ill-treatment, prohibited under international law. In light of evidence indicating the abusive and discriminatory impact of current policing practices, the United States should:

1. Heed the demands of Black communities calling for divestment from current policing practices that reflect and entrench anti-Black discrimination, and investment in community-controlled programs.
2. Pass legislation, such as the End Racial Profiling Act of 2015, designed to bring an end to all police methods that target individuals on the basis of race.
3. Deprioritize “broken windows” policing practices and similar strategies that emphasize enforcement of non-violent drug offenses and other low-level infractions, to reduce the frequency of civilian encounters with the police and the probability of disproportionate use of force.
4. Strengthen regulations regarding the acquisition of military-grade equipment by local police departments and adopt clear, transparent limitations on the use of such equipment.

5. Restrict the use of SWAT-like tactics in non-crisis situations and in any operations where suspects are unarmed or are accused of nonviolent offenses.
6. Strengthen regulations regarding the use of electrical discharge weapons (Tasers), including by, inter alia, expressly prohibiting their use against certain categories of persons, such as children or pregnant women.

## **Accountability**

International human rights law guarantees individuals the right to an effective remedy for human rights violations. The State bears a corresponding duty to provide access to such remedy. In accordance with the principles of transparency, accountability, and participation, grounded in human rights law, the State must not only ensure that civilians have the opportunity to raise grievances and petition independent tribunals for the enforcement of their rights, but also provide mechanisms for civilian participation in monitoring and oversight of public functions at the local, state, and federal levels. To guarantee these rights, the United States should:

1. Ensure that all killings of civilians by police trigger an immediate, mandatory, independent, impartial, and transparent investigation and that, when appropriate, prosecution or other legal action is taken against those responsible, in accordance with domestic and international law.
2. Ensure that effective remedies are available to parties harmed by law enforcement officers, including but not limited to compensation, and that officers who violate local, state, and federal regulations face appropriate civil sanctions and criminal penalties, after fair and impartial proceedings.
3. Mandate prompt, transparent, uniform, and accessible public reporting by all police departments of information regarding incidents involving the use of force, including details regarding the circumstances in which force was used and demographic data on the victims and officers involved, as well as the outcomes of all internal, civil and criminal police misconduct proceedings, with appropriate measures to protect the identity and respect the privacy of victims.
4. Mandate standard psychological evaluations of officers following use of force incidents.
5. Provide rehabilitation and re-training for officers who violate local, state, and federal regulations, to help prevent recurrence, and ensure that police departments in which such violations recur undergo reforms in order to bring their practices in line with international human rights law.
6. Mandate that all police departments provide an accessible channel and a clear procedure not only for citizen complaints but also for input on police activities.
7. Increase opportunities for civilian participation in police oversight and accountability mechanisms.

# I. Pervasive and Disproportionate Police Violence against Black Americans

State violence against Black people in the United States has deep historical roots and persists today in multiple forms, including through the excessive use of force by the police. The incidence of police violence in the United States far outstrips the rate in other developed countries,<sup>121</sup> and disproportionately takes the lives of Black Americans.<sup>122</sup> Statistical data, collected by third parties in the absence of comprehensive official figures, reveal that police kill Black Americans at rates that grossly exceed their share of the national population.

Several factors contribute to an environment ripe for the improper and excessive use of force by police: the insufficient legal framework regulating the use of force in the United States, the lack of adequate police training programs, inappropriate policing methods, and the failure of accountability mechanisms. The philosophy common among some police departments that it is “better to be judged by twelve than carried by six”<sup>123</sup> reflects a culture, both formal and informal, that encourages the use of deadly force as a first resort. When engaging Black Americans in particular, police officers all too often employ force before attempting to use nonviolent methods of policing. As a result, officers often show little or no restraint or proportionality in using force, make insufficient attempts to minimize damage, and too quickly resort to the use of deadly force against Black Americans.<sup>124</sup>

For years, killings of Black Americans by the police have elicited inadequate responses from policymakers and the public. Investigations and prosecutions of police killings and excessive use of force rarely result in legal accountability for police misconduct. Prosecutors who rely on good relations with the police to perform their jobs effectively are reluctant to bring charges. And when they do bring charges, prosecutors often use flawed grand jury processes, offer advantageous plea deals, and propose lenient sentencing recommendations to shield police from full accountability.<sup>125</sup> In the thousands of police-involved killings between 2005 and April 2015, only fifty-four police officers have faced criminal charges.<sup>126</sup> Experience suggests that for an officer to be charged, the facts must be exceptional and the evidence incontrovertible: “a victim shot in the back, a video recording of the incident, incriminating testimony from other officers or allegations of a cover-up.”<sup>127</sup> Even in exceptional cases, however, the majority of officers charged are not convicted.<sup>128</sup> In the rare instances where officers are found guilty, they tend to receive much lighter sentences than are typical for such convictions—four years on average, but sometimes only weeks.<sup>129</sup> This impunity lies at the heart of a cycle of violence and discrimination against people of color, and Black Americans in particular.

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<sup>121</sup> James Lartey, *By the numbers: US police kill more in days than other countries do in years*, The Guardian (Jun. 9, 2015), <http://www.theguardian.com/us-news/2015/jun/09/the-counted-police-killings-us-vs-other-countries>.

<sup>122</sup> See *Guardian Database*, *supra* note 1; *Washington Post Database*, *supra* note 1.

<sup>123</sup> This saying refers to the relative merits of being judged by twelve jurors in a criminal trial versus being carried by six pallbearers at one’s own funeral. Seth Stoughton, *How Police Training Contributes to Avoidable Deaths*, The Atlantic (Dec. 12, 2014), <http://www.theatlantic.com/national/archive/2014/12/police-gun-shooting-training-ferguson/383681/>.

<sup>124</sup> See, e.g., Steve Almasy & Jacqueline Hurtado, *Attorney: Autopsy shows unarmed man shot from behind by police in Washington state*, CNN (Feb. 26, 2015), <http://www.cnn.com/2015/02/26/us/washington-police-shooting/> (killed for throwing rocks at cars); Matthew Casey, *Video shows suspect ramming Scottsdale police before shooting*, The Republic (Jan. 16, 2015) <http://www.azcentral.com/story/news/local/scottsdale/2015/01/16/scottsdale-officer-involved-shooting-surveillance-video-abrk/21881221/> (killed for suspected credit card fraud).

<sup>125</sup> See, e.g., Kimberly Kindy & Kimbriell Kelly, *Thousands dead, few prosecuted*, Wash. Post (Apr. 11, 2015) <http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/>.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

The disproportionate impact of police violence on Black Americans also compounds discrimination based on poverty, gender, sexual orientation and gender identity, and mental health status. At the international level, the treatment of Black people in the United States has consistently come under scrutiny by human rights bodies, investigators, and non-governmental organizations. This section reviews the data on police violence against Black Americans and situates this issue among a constellation of associated problems that characterize the Black experience in the United States.

### **A. Growing statistical evidence reveals the disproportionate impact of police violence on Black Americans**

No entity of the U.S. government collects comprehensive nationwide statistics on civilian deaths at the hands of police. Media outlets and activists have begun to collate this information in the wake of high-profile police killings in the past three years, utilizing a combination of news reports, public government records, and original research to paint a more complete (and previously unavailable) picture of police violence in the United States.

The oldest such database, “Killed by Police,” publishes data on deaths caused by police officers, regardless of circumstance or fault.<sup>130</sup> This online database displays information going back to May 2013, with each death documented by a news article. Two major newspapers, the *Washington Post* and the *Guardian*, began publishing information on police killings in the United States in January 2015. The *Washington Post*’s database publishes information on police shootings resulting in death,<sup>131</sup> while the *Guardian*’s has information on all types of deaths caused by police.<sup>132</sup> Both outlets allow visitors to sort the data by race, gender, age, and whether the victim was armed. The *Washington Post* also includes data on whether the victim displayed signs of mental illness, and the *Guardian* includes data on the circumstances of the victim’s death.

These filtering criteria help to expose the differential treatment of Black Americans by police. The U.S. Census Bureau estimated that Black Americans constituted 13.2% of the country’s population in 2014.<sup>133</sup> The proportion of individuals killed by police in 2015 who were Black, however is far higher: At the end of 2015, the *Guardian* counted 1139 people killed by law enforcement that year, of whom 302, or 26.5%, were Black.<sup>134</sup> Among unarmed victims, the discrepancy is even greater: Of the 223 unarmed people killed by the police during the same period, 75, or 33.6%, were Black.<sup>135</sup> The *Washington Post* reported similar numbers: As of December 22, 2015, the newspaper counted 954 people fatally *shot* by the police in 2015, of whom 242, or 25.4%, were Black.<sup>136</sup> Among the 88 unarmed people shot dead by police, 34 were Black: 38.6% of the total.<sup>137</sup> All except one of these unarmed Black victims were men.<sup>138</sup>

While police violence affects Black women as well as men,<sup>139</sup> the figures regarding the rates of killing of

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<sup>130</sup> *Killed By Police 2015*, Killed By Police, <http://www.killedbypolice.net/> (last accessed December 25, 2015).

<sup>131</sup> *Wash. Post Database*, *supra* note 1,

<sup>132</sup> *Guardian Database*, *supra* note 1.

<sup>133</sup> *State and County QuickFacts*, United States Census Bureau (Sept. 30, 2015), <http://quickfacts.census.gov/qfd/states/00000.html>.

<sup>134</sup> *Guardian Database*, *supra* note 1.

<sup>135</sup> *Id.*

<sup>136</sup> *Washington Post Database*, *supra* note 1.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> See, e.g., #SayHerName, *Resisting Police Brutality Against Black Women* (July 16, 2015), <http://www.aapf.org/sayhername-report/>; Jessie J. Holland, *Police Brutality Against Black Women Comes Into National Spotlight*, Associated Press (Oct. 31, 2015), <http://www.huffingtonpost.com/entry/police-brutality-against-black-women-comes-into->

Black men are particularly stark: Although Black men constituted approximately 6% of the national population according to 2013 figures,<sup>140</sup> they made up 25.5% of all victims of police violence in 2015 (according to the *Guardian*<sup>141</sup>), and 24.4% of those fatally shot by police in 2015 as of December 22 (according to the *Washington Post*<sup>142</sup>)—a rate roughly four times their share of the national population.

These national disparities are mirrored in some state-level data as well. According to statistics released by the state attorney general's office in California, the country's most populous state, there were 984 individuals killed by police in California between 2005 and 2014.<sup>143</sup> Nearly two hundred of these people (196 individuals, or 19.9% of the total) were Black. By contrast, only 5.8% of California's overall population is Black.<sup>144</sup> The rate at which Black men are killed by California police officers is nearly eight times their proportion of the state's population.<sup>145</sup> No other racial or ethnic group was so “notably overrepresented” among victims of police violence.<sup>146</sup>

## **B. Police violence against Black Americans compounds multiple forms of discrimination**

While this submission analyzes the issue of excessive force through a racial lens, it is critical from the outset to note that police violence, which disproportionately affects Black Americans, also intersects with discrimination based on socio-economic status, gender, mental health, and sexual orientation and gender identity, among other factors. Accordingly, a comprehensive solution to police violence must take into consideration all of these issues.

The cities where some of the highest-profile police killings have occurred in the past two years—including Ferguson, Missouri (where Michael Brown was shot dead by a police officer) and Baltimore, Maryland (where Freddie Gray died in police custody)—are marked by long histories of economic inequality drawn along racial lines.<sup>147</sup> These persistent inequalities stem from both explicit government policies and implicit social dynamics—dynamics that fueled tensions after Michael Brown and Freddie Gray were killed.<sup>148</sup> Black people interact with the police more often than do their counterparts in other racial or ethnic groups, in part because of greater police presence or activity in low-income urban neighborhoods, disproportionately inhabited by Black residents. This increases the statistical likelihood

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national-spotlight\_us\_5634b4e9e4b0c66bae5ca657 (discussing, among others, the cases of the schoolgirl assaulted by a police officer in Spring Valley High School in South Carolina and Sandra Bland in Texas).

<sup>140</sup> See U.S. Census Bureau, Bureau of the Census for the Bureau of Labor Statistics, *Current Population Survey, 2013 Annual Social and Economic (ASEC) Supplement*, Appendix C: Table 1: Population by Age, Race, Sex, Origin and Population Status (March 2013), <https://www.census.gov/prod/techdoc/cps/cpsmar13.pdf>; see also *The Black Alone Population in the United States: 2012*, U.S. Census Bureau, <http://www.census.gov/population/race/data/ppl-ba12.html> (indicating that Black men made up just under 6% of the national population in 2012).

<sup>141</sup> *Guardian Database*, *supra* note 1.

<sup>142</sup> *Washington Post Database*, *supra* note 1.

<sup>143</sup> *Death in Custody, Arrest Related*, Open Justice California, <http://openjustice.doj.ca.gov/death-in-custody/arrest-related> (last visited October 15, 2015).

<sup>144</sup> *Id.*

<sup>145</sup> *California police killings database reveals 'clear racial disparities'*, *The Guardian* (Sept. 7, 2015), <http://www.theguardian.com/us-news/2015/sep/07/california-police-shootings-database-racial-disparity>.

<sup>146</sup> *Id.*

<sup>147</sup> See, e.g., *The economic and racial inequality problem in Baltimore exists in many US cities*, *Business Insider* (May 3, 2015), <http://www.businessinsider.com/income-and-racial-inequality-maps-2015-5>; *How Racism Doomed Baltimore*, *N.Y. Times* (May 9, 2015), <http://www.nytimes.com/2015/05/10/opinion/sunday/how-racism-doomed-baltimore.html>; *Baltimore: The divided city where Freddie Gray lived and died*, *Al Jazeera America* (Apr. 29, 2015), <http://america.aljazeera.com/articles/2015/4/29/baltimore-protests-race-and-poverty-freddie-gray.html>.

<sup>148</sup> See, e.g., Terrance Heath, *Police violence against Blacks has an economic context*, *Campaign for America's Future* (June 10, 2015) <https://ourfuture.org/20150610/police-violence-against-blacks-has-an-economic-context>.

of a fatal encounter.<sup>149</sup>

Police violence differently affects people based on their gender as well. As noted above, men make up the vast majority of victims of deadly police violence. Black men in particular have been killed in numbers grossly disproportionate to their presence in the population. Black women are also victims of police brutality, in the form of sexual harassment, abuse, and killing, both during arrest and while in custody. Their stories, however, are often overlooked by the media.<sup>150</sup>

Although approximately 7 to 10% of all police contacts with civilians involve persons with mental illnesses,<sup>151</sup> at least 25% of all people fatally shot by the police in 2015 displayed signs of mental illness, according to some statistics.<sup>152</sup> These lopsided figures expose the inadequacy of police training programs in equipping officers to manage encounters with mentally ill individuals in a way that respects and protects human rights.<sup>153</sup> Although many departments have implemented crisis intervention programs and sensitivity trainings,<sup>154</sup> there is no federal mandate requiring the institution of such programs, and many communities—perhaps even the majority—have not done so.<sup>155</sup>

Absent adequate training, police officers are often unable to recognize signs and symptoms of mental illnesses, and when they do, they rely on negative stereotypes to guide their interactions. Studies have found that “the two most common misperceptions held by the police about persons with mental illnesses are that they are all incapable of reasoning and are violent.”<sup>156</sup> Training is needed to combat these and other stereotypes. In reality, “persons with mental illnesses are *four times more likely* to be killed by the police than the reverse.”<sup>157</sup> At least 198 people displaying signs of mental illness were shot dead by the

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<sup>149</sup> See, e.g., Sendhil Mullainathan, *Police killings of Blacks: here is what the data say*, N.Y. Times (Oct. 16, 2015) <http://www.nytimes.com/2015/10/18/upshot/police-killings-of-blacks-what-the-data-says.html>; Zaid Jilani, *95% of Police Killings in 2015 Occurred in Neighborhoods with Incomes Under \$100,000*, AlterNet (July 24, 2015) <http://www.alternet.org/civil-liberties/95-police-killings-2015-occurred-neighborhoods-incomes-under-100000>.

<sup>150</sup> See, e.g., Charlotte Alter, *Sandra Bland's Not the First Black Woman to Experience Police Violence*, Time (July 22, 2015), <http://time.com/3965032/sandra-bland-arrest-video-police-violence/>; #SayHerName: Resisting Police Brutality Against Black Women, #SayHerName, <http://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/555e2412e4b0bd5f4da5d3a4/1432232978932/SAYHERNAME+Social+Media+Guide.compressed.pdf>.

<sup>151</sup> Risdon N. Slate, Jacqueline K. Buffington-Vollum, & W. Wesley Johnson, *The Criminalization of Mental Illness: Crisis and Opportunity for the Justice System* 183 (2d ed. 2013) (citing three studies).

<sup>152</sup> Welsey Lowery, Kimberly Kindy, & Keith L. Alexander, *Distraught People, Deadly Results*, Wash. Post (June 30, 2015), <http://www.washingtonpost.com/sf/investigative/2015/06/30/distraught-people-deadly-results>. See generally *Special Issue: Police Responses to Persons with a Mental Illness: International Perspectives*, 37 Int'l J. L. & Psychol. 321 (2014), <http://www.sciencedirect.com/science/journal/01602527/37/4>.

<sup>153</sup> See Slate, Buffington-Vollum, & Johnson, *supra* note 152, at 181 (describing how “the traditional tactics used by law enforcement officers to quell disturbances . . . may instead escalate police encounters with persons with mental illness, sometimes resulting in tragedy”); see also “Preventable Tragedies Database,” Treatment Advocacy Center (Arlington, VA), n.d., <http://treatmentadvocacycenter.org/problem/preventable-tragedies-database>.

<sup>154</sup> See, e.g., the “Memphis Model,” an intervention and sensitivity training program originally developed by the Memphis Police Department, designed to train officers how to de-escalate and manage situations with individuals with mental illness. *Memphis PD Initiatives*, Memphis Police Dep’t, <http://www.memphispolice.org/initiatives.asp>.

<sup>155</sup> Although there are Crisis Intervention Training (CIT) programs in 45 states, “[m]ost states only have CIT programs in one or two counties.” Megan Pauly, *How Police Officers Are (Or Aren't) Trained in Mental Health*, The Atlantic (Oct. 11, 2013), <http://www.theatlantic.com/health/archive/2013/10/how-police-officers-are-or-aren-t-trained-in-mental-health/280485>.

<sup>156</sup> Risdon N. Slate, Jacqueline K. Buffington-Vollum, & W. Wesley Johnson, *The Criminalization of Mental Illness: Crisis and Opportunity for the Justice System* 184 (2d ed. 2013); see also Matthew Epperson, Op-Ed, *Where Police Violence Encounters Mental Illness*, N.Y. Times (Jan. 13, 2016), [http://www.nytimes.com/2016/01/13/opinion/where-police-violence-encounters-mental-illness.html?smid=tw-share&\\_r=0](http://www.nytimes.com/2016/01/13/opinion/where-police-violence-encounters-mental-illness.html?smid=tw-share&_r=0).

<sup>157</sup> Risdon N. Slate, Jacqueline K. Buffington-Vollum, & W. Wesley Johnson, *The Criminalization of Mental Illness: Crisis and Opportunity for the Justice System* 185 (2d ed. 2013) (emphasis added).



police in the first ten months of 2015, alone.<sup>158</sup> The U.S. Department of Justice has repeatedly found that police departments in cities across the country routinely mistreat individuals with mental illnesses.<sup>159</sup>

Finally, discrimination based on sexual orientation and gender identity intersects with racially discriminatory police violence in devastating ways. Amnesty International reported in 2007 that homophobia and transphobia underlie police brutality across the country.<sup>160</sup> The organization found not only that police officers are sometimes perpetrators of violence against lesbian, bisexual, gay, transgender, and queer (“LGBTQ”) individuals, but also that some officers routinely harass, ignore, or abuse those victims who attempt to register their treatment as a hate crime.<sup>161</sup> According to an extensive 2011 national survey, 60% of all Black transgender individuals who had interacted with the police reported harassment or physical or sexual assault.<sup>162</sup> In contrast, 24% of white transgender individuals reported the same.<sup>163</sup> Within police custody, transgender people are frequently subjected to searches, placement among inappropriate gender inmates, and solitary confinement,<sup>164</sup> despite protections written into some patrol guides.<sup>165</sup> Police inaction<sup>166</sup> or fear to call the police<sup>167</sup> may also contribute to deaths among LGBTQ individuals.<sup>168</sup>

### **C. The treatment of Black Americans has been repeatedly condemned by international bodies**

The United States has come under consistent scrutiny by international bodies and independent investigators at the United Nations for the treatment of Black Americans. In the past five years alone, the Committee on the Elimination of Racial Discrimination,<sup>169</sup> the Human Rights Committee,<sup>170</sup> the U.N. Human Rights Council (in its Universal Periodic Review),<sup>171</sup> the Committee Against Torture,<sup>172</sup> and the U.N. Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, have all addressed the persistence of racial discrimination against Black Americans in the United States.<sup>173</sup>

### **D. Police killings are a uniquely urgent problem**

Since 2014, this Commission has expressed its serious concern over discriminatory police violence in the United States. The Commission noted that the killings of Eric Garner in New York and Michael Brown in Ferguson “represent the continuation of a disturbing pattern of excessive force on the part of police officers towards Black Americans and other persons of color” and urged the United States “to give *renewed attention* to the possible links between these cases and past cases that demonstrated a pattern of use of excessive force against persons of color.”<sup>174</sup>

This submission focuses in particular on the killing of Black Americans by the police, examining the structural and legal deficiencies that both underlie and feed this disproportionate violence. Although excessive force by the police takes many forms—including force not resulting in death and mistreatment by the police while in custody—the issue of excessive force resulting in death is uniquely urgent. Unjustified and unlawful killings implicate many human rights, as do other forms of excessive force.

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<sup>158</sup> Welsey Lowery, Kimberly Kindy, & Keith L. Alexander, *Distraught People, Deadly Results*, Wash. Post (June 30, 2015), <http://www.washingtonpost.com/sf/investigative/2015/06/30/distraught-people-deadly-results> .

<sup>159</sup> See, e.g., Letter from Jocelyn Samuels, Acting Asst. Att’y Gen., DOJ Civil Rights Division, to Richard J. Berry, Mayor, City of Albuquerque (Apr. 10, 2014), <http://www.justice.gov/sites/default/files/usao-nm/legacy/2015/01/20/140410%20DOJ-APD%20Findings%20Letter.pdf> ; Letter from Vanita Gupta, Acting Asst. Gen., DOJ Civil Rights Division, to Frank G. Jackson, Mayor, City of Cleveland, (Dec. 4, 2014), [http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/04/cleveland\\_division\\_of\\_police\\_findings\\_letter.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/04/cleveland_division_of_police_findings_letter.pdf) ; Letter from Thomas E. Perez, Asst. Att’y Gen., DOJ Civil Rights Division, to Sam Adams, Mayor, City of Portland (Sept. 12, 2012), [http://www.justice.gov/sites/default/files/crt/legacy/2012/09/17/ppb\\_findings\\_9-12-12.pdf](http://www.justice.gov/sites/default/files/crt/legacy/2012/09/17/ppb_findings_9-12-12.pdf) .

Killings, however, violate the human right to life, without which other human rights carry no meaning.<sup>175</sup> This Commission has described the right to life “as the supreme right of the human being, respect for which the enjoyment of all other rights depends.”<sup>176</sup> The importance of the right to life, which cannot be overstated, is reflected in its incorporation into every key international human rights instrument<sup>177</sup> and its status as a *jus cogens* norm under customary international law.<sup>178</sup> Not only are the consequences of police killings irreversible for the victim whose life is taken, but they also have profound and lasting effects on

<sup>160</sup> Walter Armstrong, *Brutality in Blue*, Amnesty Int’l Mag. (Mar. 27, 2007) <http://www.amnestyusa.org/node/87367>

<sup>161</sup> *Id.*

<sup>162</sup> More than half of these individuals reported discomfort in seeking police assistance. See National Center for Transgender Equality, et al., *Injustice at Every Turn: A Look at Black Respondents in the National Transgender Discrimination Survey*, 4 (2011) [http://endtransdiscrimination.org/PDFs/BlackTransFactsheetFINAL\\_090811.pdf](http://endtransdiscrimination.org/PDFs/BlackTransFactsheetFINAL_090811.pdf).

<sup>163</sup> While 24% is certainly still significant and deeply problematic, the contrast between this rate and the reported harassment and assault by Black transgender individuals reveals a pattern racially motivated discrimination on behalf of police. National Center for Transgender Equality & National Gay and Lesbian Task Force, *Executive Summary: Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, 5 (2011) [http://endtransdiscrimination.org/PDFs/NTDS\\_Exec\\_Summary.pdf](http://endtransdiscrimination.org/PDFs/NTDS_Exec_Summary.pdf).

<sup>164</sup> African American Policy Forum, *Say Her Name: Resisting Police Brutality Against Black Women*, at 22 (May 20, 2015) <http://www.aapf.org/sayhernamereport/> (“police often punish actual or perceived sexual or gender nonconformity with physical and sexual violence...Black transgender women and gender-nonconforming women are also routinely subjected to transphobic verbal harassment and abuse, unlawful and degrading searches to assign gender based on anatomical features, and dangerous placement in police custody.”); see also Noah Remnick, *Activists Say Police Abuse of Transgender People Persists Despite Reforms*, N.Y. Times (Sept. 6, 2015) [http://www.nytimes.com/2015/09/07/nyregion/activists-say-police-abuse-of-transgender-people-persists-despite-reforms.html?\\_r=0](http://www.nytimes.com/2015/09/07/nyregion/activists-say-police-abuse-of-transgender-people-persists-despite-reforms.html?_r=0) (describing the experience of Shagasyia Diamond, 37, a Black transwoman’s, experience with the NYPD); see also Anna North, *In NYPD Custody, Trans People Get Chained to Fences and Poles*, Jezebel (Feb. 2, 2012) <http://www.advocate.com/news/daily-news/2012/02/02/does-nypd-have-endemic-problem-trans-people>; Amy Goodman & Chase Strangio, “A State of Emergency”: At Least 17 Transgender Women Have Been Murdered This Year, Democracy Now (Aug. 18, 2015) [http://www.democracynow.org/2015/8/18/a\\_state\\_of\\_emergency\\_at\\_least](http://www.democracynow.org/2015/8/18/a_state_of_emergency_at_least) (commenting on the use of solitary confinement)

<sup>165</sup> See, e.g., NYCLU, *NYPD Patrol Guide Changes Respect Rights of Transgender New Yorkers* (June 12, 2015), <http://www.nyclu.org/news/nypd-patrol-guide-changes-respect-rights-of-transgender-new-yorkers>

<sup>166</sup> Amy Goodman & Chase Strangio, “A State of Emergency”: At Least 17 Transgender Women Have Been Murdered This Year, Democracy Now (Aug. 18, 2015) [http://www.democracynow.org/2015/8/18/a\\_state\\_of\\_emergency\\_at\\_least](http://www.democracynow.org/2015/8/18/a_state_of_emergency_at_least)

<sup>167</sup> (51% of Black transgender people reported discomfort seeking police assistance).

<sup>168</sup> In particular, note that transwomen of color have a life expectancy of 35 years. Black Lives Matter, *About the Black Lives Matter Network* <http://blacklivesmatter.com/about/> (last accessed Nov. 10, 2015).

<sup>169</sup> Comm. on the Elimination of Racial Discrimination, *Concluding Observations on the combined seventh to ninth periodic reports of the United States of America*, U.N. Doc. CERD/C/USA/CO/7-9, ¶ 17(b) (Aug. 29th 2014).

<sup>170</sup> Human Rights Comm., *Concluding observations on the fourth periodic report of the United States of America*, U.N. Doc. CCPR/C/USA/CO/4, ¶¶ 6–8, 11 (Apr. 23, 2014).

<sup>171</sup> Human Rights Council, *Draft report of the Working Group on the Universal Periodic Review: U.S.*, U.N. Doc. A/HRC/WG.6/22/L.10 (May 21, 2015).

<sup>172</sup> Comm. Against Torture, *Concluding observations on the combined third to fifth periodic reports of the United States of America*, U.N. Doc. CAT/C/USA/CO/3-5, ¶ 26 (Dec. 14, 2014).

<sup>173</sup> Special Rapporteur on Racism, *Report on contemporary forms of racism, racial discrimination, xenophobia and related intolerance*, Human Rights Council, U.N. Doc. A/HRC/29/46 (Apr. 20, 2015) (by Mutuma Ruteere).

<sup>174</sup> Press Release No. 90/14, Inter-Am. Comm’n H.R., *IACHR Expresses Concern over Police Killings of African-American Persons in the United States* (Aug. 22, 2014) (emphasis added).

<sup>175</sup> See, e.g., Case of Children’s Rehabilitation, Merits, Reparation, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 112, ¶ 156 (Sept. 2, 2004) (observing that all other rights vanish when the right to life is not respected).

<sup>176</sup> Graham v. United States, Case 11.193, Inter-Am. Comm’n H.R., Report 97/03, ¶ 26 (2003); Domingues v. United States, Case 12.285, Inter-Am. Comm’n H.R., Report No. 62/02, ¶ 38 (2002).

<sup>177</sup> See, e.g., UDHR, *supra* note 10, at 71, art. 6; ICCPR, *supra* note 11, art. 6; Council of Europe, European Convention on Human Rights and Fundamental Freedoms art. 2, Apr. 11 1950, C.E.T.S. No. 005; Organization of African Unity, African Charter on Human and Peoples’ Rights art. 4, June 27, 1981, OAU Doc. CAB/LEG/67/3.

<sup>178</sup> Gonzalez v. Mexico, Cases 12.496-12.498, Inter-Am. Comm’n H.R., Report No. 28/07, ¶¶ 251–252 (Mar. 9, 2007); Access to Justice for Women Victims of Violence in the Americas, Inter-Am. Comm’n H.R., OEA/Ser. L/V/II. doc.68, ¶¶ 195-197 (Jan. 20, 2007); Inter-Am. Comm’n H.R., *Violence and Discrimination against Women in the Armed Conflict in Colombia*, OEA/Ser/L/V/II. 124/Doc.6, ¶¶ 102–106 (Oct. 18, 2006); Inter-Am. Comm’n H.R., *Report on the Rights of Women in Haiti to be Free from Violence and Discrimination*, OEA/Ser.L/V/II, Doc. 64, ¶ 90 (Mar. 10, 2009).

the wellbeing of victims' family members and communities.

## II. Legal Framework Regulating the Use of Force by Police

In any society, law enforcement agents, including police officers, will inevitably confront situations in which they must decide whether to use force and how much force is appropriate.<sup>179</sup> As discussed above, there is considerable evidence that the unlawful use of force by police officers in the United States disproportionately harms Black Americans. Excessive and discriminatory use of force by police implicates multiple internationally protected human rights, including, among others, the right to life,<sup>180</sup> the right to freedom from torture and ill-treatment,<sup>181</sup> the rights to freedom from discrimination and to equality before the law,<sup>182</sup> and the right to due process.<sup>183</sup>

The obligations of the United States to respect these and other human rights flow from several regional and international treaties. At the regional level, the United States belongs to the Organization of American States (“OAS”), and as such is bound by the OAS Charter.<sup>184</sup> The American Declaration on the Rights and Duties of Man outlines a wide variety of rights that emerge from the Charter. This Commission considers the American Declaration to be binding on OAS member states,<sup>185</sup> including the United States,<sup>186</sup> even though the United States considers it a non-binding set of principles.<sup>187</sup> In interpreting the Declaration, the Inter-American Court of Human Rights has found it necessary to take into account the entire legal system prevailing at the time of the interpretation, including “the Inter-American System of today in the light of the evolution it has undergone since the adoption of the Declaration.”<sup>188</sup>

This Commission has likewise consistently adopted this principle in relation to its own interpretation of the American Declaration. For example, in the *Villareal* case, this Commission noted that:

in interpreting and applying the American Declaration, it is necessary to consider its provisions in the context of developments in the field of international human rights law

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<sup>179</sup> U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, ¶47, submitted to the Human Rights Council pursuant to G.A. Res. 17/5, U.N. Doc. A/HRC/26/36 (April 1, 2014) (by Christof Heyns).

<sup>180</sup> ICCPR, *supra* note 11, art. 6; American Declaration, *supra* note 9, art. 1.

<sup>181</sup> ICCPR, *supra* note 11, art. 7; UDHR, *supra* note 10, art. 5; CAT, *supra* note 13, art. 2.

<sup>182</sup> ICCPR, *supra* note 11, art. 16; UDHR, *supra* note 10, art. 6; American Declaration, *supra* note 9, art. 2.

<sup>183</sup> ICCPR, *supra* note 11, art. 14; UDHR, *supra* note 10, art. 10.

<sup>184</sup> Organization of American States (OAS), Charter of the Organization of American States, Apr. 30, 1948, *ratified by the United States*, Dec. 13, 1951, T.I.A.S. No. 2361, 119 U.N.T.S. 3 [hereinafter OAS Charter].

<sup>185</sup> This conclusion was drawn in accordance with “well-established and long-standing jurisprudence” of the broader Inter-American Human Rights system. Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/90, Inter-Am. Ct. H.R. (ser. A) No. 10, ¶45 (1989).

<sup>186</sup> See *Roach & Pinkerton v. United States*, Case 9647, Inter-Am. Comm’n H.R., Report No. 3/87, OEA/Ser.L/V/II.71, doc. 9 rev. 1, ¶¶46–49 (1987) (finding the American Declaration of the Rights and Duties of Man to have binding force); see also Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/90, Inter-Am. Ct. H.R. (ser. A) No. 10, ¶45 (1989) (The Court held that “for the member states of the Organization, the Declaration is the text that defines the human rights referred to in the Charter”).

<sup>187</sup> *Basic Documents Pertaining to Human Rights in the Inter-American system*, Inter-Am. Comm’n H.R. (June 30, 2010) <http://www.cidh.oas.org/basicos/english/Basic1.1%20Intro.htm> (“Both the Commission and the Court have established that despite having been adopted as a declaration and not as a treaty, today the American Declaration constitutes a source of international obligations for the Member States of the OAS.”); see also Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/90, Inter-Am. Ct. H.R. (ser. A) No. 10, ¶35–45 (1989); *Gonzales v. the United States*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, ¶115 (2007); *Roach & Pinkerton v. United States*, Case 9647, Inter-Am. Comm’n H.R., Report No. 3/87, OEA/Ser.L/V/II.71, doc. 9 rev. 1, ¶49 (1987).

<sup>188</sup> *Roach & Pinkerton v. United States*, Case 9647, Inter-Am. Comm’n H.R., Report No. 3/87, OEA/Ser.L/V/II.71, doc. 9 rev. 1, ¶37 (1987)).

since the Declaration was first composed and with due regard to other relevant rules of international law applicable to member states against which the complaints of violations of the Declaration are properly lodged. Developments in the corpus of international human rights law relevant in interpreting and applying the American Declaration may in turn be drawn from the provisions of other prevailing international and regional human rights instruments.<sup>189</sup>

Following this approach, this Commission has looked to numerous international and regional human rights treaties and instruments as well as decisions of international courts and other bodies to interpret rights protected under the American Declaration.<sup>190</sup>

The United States has signed and ratified various international human rights instruments that enshrine many of the same rights protected within the Inter-American system, including: the United Nations Charter, the Charter of the Organization of American States, the Universal Declaration of Human Rights (“UDHR”), the American Declaration on the Rights and Duties of Man, the International Covenant on Civil and Political Rights (“ICCPR”), the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (“CAT”), and the International Convention on the Elimination of all forms of Racial Discrimination (“ICERD”). As a signatory and State Party to these declarations and treaties, the United States has a duty to respect, protect, and fulfill the rights they guarantee.

The United States has failed to implement, however, the international standards contained in the two U.N. documents that provide authoritative guidance on internationally accepted methods of policing and the use of force:<sup>191</sup> the U.N. Code of Conduct for Law Enforcement Officials (“U.N. Code of Conduct”)<sup>192</sup>, adopted by the U.N. General Assembly in 1979, and the U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (“U.N. Basic Principles”),<sup>193</sup> developed at a U.N. conference on crime prevention and the treatment of offenders in 1990.<sup>194</sup> Together, these two documents require law enforcement to “apply nonviolent means before resorting to the use of force.”<sup>195</sup> If force is “unavoidable,” police must “exercise restraint in such use and act in proportion to the seriousness of the offence.”<sup>196</sup> In all circumstances, when using force police should “minimize damage ... and respect and preserve human life”<sup>197</sup> and dignity;<sup>198</sup> “intentional lethal use of firearms may only be made when strictly

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<sup>189</sup> Villareal v. United States, Case 11.753, Inter-Am. Comm’n H.R., Report No. 52/02, doc. 5 rev. 1 at 821, ¶ 60 (2002) (citing Garza v. United States, Case 12.243, Inter-Am. Comm’n H.R., Report No. 52/01, OEA/Ser.L/V/II.111, doc. 20 rev. at 1255, ¶¶ 88–89 (2000)).

<sup>190</sup> See, e.g., *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.106, doc. 40 rev., ¶¶ 28, 159, 165 (Feb. 28, 2000) (referencing the U. N. Convention on the Rights of the Child to interpret Canada’s responsibilities to asylum seekers under the American Declaration and the OAS Charter); *Maya Indigenous Community v. Belize*, Case 12.053, Inter-Am. Comm’n H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 at 727 ¶¶ 112–120, 163, 174 (2004) (referencing the American Convention, jurisprudence of the Inter-American Court, and the International Convention on the Elimination of Racial Discrimination (ICERD) to interpret the rights to property, equality before the law, and judicial protection for indigenous peoples contained in the American Declaration).

<sup>191</sup> See, e.g., *International Human Rights Standards*, HUMAN RIGHTS WATCH, <https://www.hrw.org/legacy/reports98/police/uspo38.htm> (“While [the U.N. Code of Conduct] is not binding, it does provide authoritative guidance for interpreting international human rights law regarding policing.”); *10 Basic Human Rights Standards for Law Enforcement Officials*, AMNESTY INT’L, Dec. 1998 (citing the U.N. Code of Conduct and the U.N. Basic Principles as authoritative sources on policing standards).

<sup>192</sup> U.N. Code of Conduct, *supra* note 32.

<sup>193</sup> U.N. Basic Principles, *supra* note 33.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*, princ. 4.

<sup>196</sup> *Id.*, princ.5.

<sup>197</sup> *Id.*

<sup>198</sup> U.N. Code of Conduct, *supra* note 32, art. 2.

unavoidable in order to protect life.”<sup>199</sup>

The legal framework for the use of force in the United States, training practices and policing methods do not clearly and systematically reflect and uphold these international standards. According to a study by Amnesty International, not a single state law in the United States governing the use of lethal force by the police complies with international standards, and even the federal constitutional standard falls short of what international human rights law requires.<sup>200</sup> Several states do not even have a law on the books regarding lethal force, and many that do fail to meet the constitutional standard, let alone that set by international law.<sup>201</sup> The federal criminal statute<sup>202</sup> that enforces constitutional limits on the use of force by police officers is also largely inadequate to address the majority of police killings because of the extraordinarily high legal standard for bringing charges.

The Inter-American Court has consistently relied on these U.N. documents in analyzing policing standards and practices.<sup>203</sup> This Commission similarly has held that States have an obligation to “be clear when defining domestic policies on the use of force and *pursue strategies to implement the [U.N. Basic Principles]*.”<sup>204</sup>

As the United Nations Special Rapporteur on extrajudicial, summary, or arbitrary executions has observed regarding the Code of Conduct and the Basic Principles:

Each of these instruments has played a central role in defining the limits to the use of force by law enforcement officials. 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.<sup>205</sup>

Furthermore, the Special Rapporteur noted that:

... [S]ome 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.<sup>206</sup>

With these rights and duties in mind, this section compares the legal framework governing the lethal use of force by police in the United States to the requirements of international human rights law and relevant international legal standards. The lethal use of force by law enforcement officers encompasses both the

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<sup>199</sup> U.N. Basic Principles, *supra* note 33, princ. 9.

<sup>200</sup> Amnesty Int’l, *Deadly Force: Police Use of Lethal Force in the United States*, (2015) [https://www.amnestyusa.org/sites/default/files/aiusa\\_deadlyforcereportjune2015.pdf](https://www.amnestyusa.org/sites/default/files/aiusa_deadlyforcereportjune2015.pdf).

<sup>201</sup> *Id.*

<sup>202</sup> 18 U.S.C. § 242

<sup>203</sup> See, e.g., *Dorzema v. Dominican Republic*, Merits, Reparation, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 251, ¶ 82 (Oct. 24, 2012) (holding that training on the human rights of migrants, the use of force, and the principle of non-discrimination for law enforcement personnel must be implemented); see also *Finca “La Exacta” v. Guatemala*, Case 11.382, Inter-Am. Comm’n H.R., Report No. 57/02, doc. 5 rev. 1, ¶ 40 (2002).

<sup>204</sup> *Hinojosa v. Ecuador*, Case 11.442, Inter-Am. Comm’n H.R., Report No. XX/14 at 38, ¶ 169 (2014) (emphasis added).

<sup>205</sup> United Nations Special Rapporteur on Extrajudicial and Summary Executions Interim report on the worldwide situation in regard to extrajudicial, summary or arbitrary executions, U.N. Doc. A/61/311 ¶ 35 (2006) (by Philip Alston).

<sup>206</sup> *Id.*

use of weapons designed to kill, such as firearms, and the use of force that is not inherently deadly but which results in death.<sup>207</sup>

While much of the discussion below focuses on the constitutional standard for the use of force in the United States, as elaborated by the U.S. Supreme Court and lower federal courts, the executive and legislative branches of the federal government also play a crucial role in setting national standards regulating the use of force by police. The Department of Justice has been particularly active in issuing recommendations regarding the use of force by law enforcement agents.<sup>208</sup> In addition, bills on the use of force are currently pending before the U.S. Congress.<sup>209</sup>

Moreover, the task of implementing and enforcing legal standards for policing falls most heavily on state governments, which bear primary responsibility for maintaining and regulating local police forces. Policing authority is one of many types of administrative authority that the federal system in the United States devolves from the national government to state and local governments.<sup>210</sup> This division of responsibility within the country, however, has no bearing under international human rights law on the State's ultimate responsibility for the actions or inactions of all levels of its government<sup>211</sup>—the assertions of the United States to the contrary notwithstanding. In response to recommendations or observations made by international human rights bodies regarding U.S. human rights obligations, the United States frequently invokes the country's federal system of government in order to absolve the State, in some measure, of responsibility to implement or enforce its international obligations.<sup>212</sup> To be sure, the United States federal government is indeed limited in many ways in its ability to impose top-down changes of law and policy on lower levels of government. Under international law, however, all levels of government possess a duty to respect, protect, and fulfill the international human rights obligations of the United States.<sup>213</sup> That means state- and local-level governments and their agents are bound by the United States' human rights obligations in the same way as the federal government.

### **A. International human rights law defines parameters for the use of force by police**

The Inter-American Court has observed that when the right to life is not respected, all other rights vanish,

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<sup>207</sup> *Id.*, ¶ 60.

<sup>208</sup> See, e.g., U.S. Dep't of Justice, COPS, *After Action Assessment of the Police Response to the August 2014 Demonstrations in Ferguson, Missouri*, 41; Att'y Gen, Principles for Promoting Police Integrity, 3 (2001).

<sup>209</sup> See, e.g., Excessive Use of Force Prevention Act of 2015, H.R. Res. 2052, 114th Cong. (2015).

<sup>210</sup> *Federalism*, Legal Information Inst., <https://www.law.cornell.edu/wex/federalism>.

<sup>211</sup> *Id.*

<sup>212</sup> See, e.g., *Addendum of the United States of America to the Report of the Working Group on its Universal Periodic Review* (Aug. 31, 2015), <https://geneva.usmission.gov/2015/09/01/addendum-of-the-united-states-of-america-to-the-report-of-the-working-group-on-its-universal-periodic-review> (“Some recommendations . . . request action not entirely within the power of our Federal Executive Branch, e.g., adopt legislation, ratify treaties, or act at the state level. . . . [W]e recognize, realistically, that the United States may never completely accomplish what is described in these recommendations’ literal terms.”). However, this approach contrasts with the State response to the Committee on the Elimination of Racial Discrimination, which details state- and local-level responses to issues of racial discrimination. Comm. on the Elimination of Racial Discrimination, *One-Year Follow-up Response of the U.S. to Priority Recommendations in its Concluding Observations*, (Sept. 21, 2015) [http://www.ushrnetwork.org/sites/ushrnetwork.org/files/us\\_1-year\\_cerd\\_report\\_2015.pdf](http://www.ushrnetwork.org/sites/ushrnetwork.org/files/us_1-year_cerd_report_2015.pdf).

<sup>213</sup> U.N. Human Rights Council, *Role of local government in the promotion and protection of human rights*, U.N. Doc. A/HRC/30/49, ¶¶ 4, 21 (Aug. 7, 2015) (“But, while the State remains free to determine its internal structure and functions through its own law and practice, for the purposes of international responsibility the conduct of its institutions, administrative divisions performing public functions and exercising public powers is attributable to the State, even if those institutions are regarded, in domestic law, as autonomous and/or independent of the central executive government . . . . Local authorities are obliged to comply, within their local competences, with their duties stemming from the international human rights obligations of the State.”).

since the bearer of these rights ceases to exist.<sup>214</sup> In order to ensure “the conditions required for the full enjoyment and exercise of the right to life”<sup>215</sup> the lethal use of force must be adequately regulated.

The Inter-American Court has held that States have a duty to adapt their national laws and to ensure that “security forces, which are entitled to use legitimate force, respect the right to life of the individuals under their jurisdiction.”<sup>216</sup> The U.N. Human Rights Committee has described situations in which the use of force by authorities of the State has the capacity to deprive life as being of the “utmost gravity” and has stressed that “the law must strictly control and limit the circumstances in which a person may be deprived of his or her life.”<sup>217</sup> This Commission (drawing on the jurisprudence of the Inter-American Court, on the U.N. Basic Principles, and on the U.N. Code of Conduct) has emphasized that where State agents use lethal force they must demonstrate that less lethal means of intervention proved futile and that the lethal use of force was necessary and proportionate in light of the threat posed by the victim.<sup>218</sup> In the context of the use of firearms, this Commission has restated that lethal force may be used only if it is strictly unavoidable in order to protect life<sup>219</sup> in accordance with the duty to minimize damage and injury.<sup>220</sup> This Commission has further observed that in order to respect and ensure the free and full exercise of human rights of all persons, implementation of rights must be carried out without discrimination of any type.<sup>221</sup>

In sum, the duty to adequately regulate the lethal use of force requires a State to establish clear limitations, to implement a graduated, progressive scale of permissible degrees of force, to respect the principle of proportionality and to avoid discrimination.

The discussion that follows highlights a number of areas where the U.S. legal standard on the lethal use of force does not align with international standards. First, it explains how the U.S. standard falls short of providing the clarity, specificity, and predictability required under international human rights law. The reasonableness test applied to the use of force in the United States does not differentiate between lethal and non-lethal force. As a result, it broadens the circumstances under which police may resort to lethal force, leading to variations in interpretation by law enforcement officials, reviewing courts, and state legislatures.

Second, the absence of a legal standard specific to the lethal use of force gives rise to a discrepancy between U.S. and international law with regard to what constitutes a legitimate objective justifying the lethal use of force. Although the language of the U.S. standard regarding legitimate objectives for the use

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<sup>214</sup> Case of Children’s Rehabilitation, Merits, Reparation, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 112, ¶ 156 (Sept. 2, 2004).

<sup>215</sup> *Id.*; Paquiyauri v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am Ct. H.R. (ser. C) No. 110, ¶ 128 (July 8, 2004); Chang v. Guatemala, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 152 (Nov. 25, 2003).

<sup>216</sup> Dorzema v. Dominican Republic, Merits, Reparation, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 251, ¶ 80 (Oct. 24, 2012); Aranguren v. Venezuela, Merits, Reparations and Costs, Judgment, Inter-Am Ct. H.R. (ser. C) No. 150, ¶ 66 (July 5, 2006).

<sup>217</sup> Human Rights Comm, *Gen. Comment No. 6; art. 6, (right to life)*, U.N. Doc. HRI/GEN/1/Rev.1, ¶ 3 (1994).

<sup>218</sup> See Hinojosa v. Ecuador, Case 11.442, Inter-Am. Comm’n H.R., Report No. XX/14 at 38, ¶¶ 181–82 (2014); see also Sánchez v. Colombia, Case 12.009, Inter-Am. Comm’n H.R., Report No. 43/08, ¶ 58 (2008).

<sup>219</sup> U.N. Basic Principles, *supra* note 33, princs. 9–10; Hinojosa v. Ecuador, Case 11.442, Inter-Am. Comm’n H.R., Report No. XX/14 at 38, ¶ 182; Sánchez v. Colombia, Case 12.009, Inter-Am. Comm’n H.R., Report No. 43/08, ¶¶ 54–59 (2008).

<sup>220</sup> Sánchez v. Colombia, Case 12.009, Inter-Am. Comm’n H.R., Report No. 43/08, ¶ 58 (2008).

<sup>221</sup> See *Report on the Situation of Human Rights Defenders in the Americas*, *supra* note 104, ¶ 122. ICERD, art. 5(b) obliges State Parties to “respect and protect the right to security of person and protection by the State Party against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.” ICERD art. 2(1)(a) obliges State Parties to “take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination” and take “concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them.” See ICERD, *supra* note 12, arts. 2(1)(a), 5(b).



of force does not deviate significantly from the international standard, U.S. law does not prioritize the right to life as required by international law.

Third, the U.S. standard on the lethal use of force does not comport with the requirement under international law that officers exhaust non-violent means before resorting to force and minimize the potential for harm in all circumstances. Together, these shortcomings in the federal standard foster undue deference to what law enforcement officials deem to be reasonable.

The failure of the United States to provide adequate legal protections to prevent the arbitrary deprivation of life disproportionately affects Black Americans. The absence of robust legal mechanisms to identify and prevent the discriminatory application of force by the police is incompatible with international law, which requires the State to ensure equal protection under the law.

## **B. The U.S. legal standard for the use of force lacks the clarity, specificity, and predictability required under international human rights law**

### *i. International human rights law requires establishment of a clear standard governing the use of force*

As stated above, this Commission has interpreted the right to life under Article I of the American Declaration in light of the wider corpus of human rights law. Article 6(1) of the ICCPR provides that “every human being has the inherent right to life [which] right shall be protected *by law*. No one shall be arbitrarily deprived of his life.”<sup>222</sup> Within the Inter-American system, the Inter-American Court has held that States must adopt the necessary measures to create an adequate regulatory framework to deter any threat to the right to life.<sup>223</sup> In *Nadege Dorzema et al. v. Dominican Republic*,<sup>224</sup> the Court held that States “must be clear when defining domestic policies on the use of force and pursue strategies to implement the [U.N.] Principles on the Use of Force and the [U.N.] Code of Conduct.”<sup>225</sup>

Quoting the European Court of Human Rights, this Commission has warned of the dangers presented by the lack of a clear standard, noting that law enforcement officers should not be

left in a vacuum when performing their duties, whether in the context of a prepared operation or a spontaneous chase of a person perceived to be dangerous: [instead] a legal and administrative framework should define the limited circumstances in which ... officials may use force and firearms, in the light of the international standards which have been developed in this respect.<sup>226</sup>

The failure of the United States to establish a clear standard has placed law enforcement officers, in the performance of their duties, in the very vacuum of which the European Court of Human Rights and this Commission have warned.

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<sup>222</sup> ICCPR, *supra* note 11, art. 6 (*emphasis added*).

<sup>223</sup> *Zambrano-Vélez v. Ecuador*, Merits, Reparations and Costs, Judgment, Inter-Am Ct. H.R. (ser. C) No. 166 ¶ 81 (July 4, 2007); *Aranguren v. Venezuela*, Merits, Reparations and Costs, Judgment, Inter-Am Ct. H.R. (ser. C) No. 150, ¶ 66 (July 5, 2006).

<sup>224</sup> *Dorzema v. Dominican Republic*, Merits, Reparation, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 251 (Oct. 24, 2012).

<sup>225</sup> *Id.* ¶ 80.

<sup>226</sup> *Hinojosa v. Ecuador*, Case 11.442, Inter-Am. Comm’n H.R., Report No. XX/14 at 38, ¶ 153 (2014) (quoting *Makaratzis v. Greece*, 41 Eur. Ct. H.R. 49, ¶ 59 (2004)).

- ii. *Under international human rights law, police are permitted to use force, but force must be necessary to achieve a legitimate objective and proportionate to the threat posed.*

In *Corumbiara v. Brazil*, this Commission held that for the use of force to be legitimate, it must be “both necessary and proportionate to the situation, ... exercised with moderation and in proportion to the legitimate objective pursued, and in an effort to reduce to a minimum any personal injury and loss of human lives.”<sup>227</sup>

The Inter-American Court has recognized that, to avoid designation as excessive, “the level of force must be in keeping with the level of resistance offered.”<sup>228</sup> An agent of the state must therefore “apply criteria of differentiated and progressive use of force, determining the degree of cooperation, resistance or violence of the subject against whom the intervention is intended and, on this basis, employ negotiating tactics, control, or use of force, as required.”<sup>229</sup>

In the context of the lethal use of force, under international law, a strict proportionality test applies.<sup>230</sup> When police officers employ force that has the capacity to cause death, it is considered proportionate only if exercised to save “life or limb.”<sup>231</sup> A range of weapons and methods often utilized by police officers, such as Tasers and chokeholds, do not pose the same risk to life as firearms but nonetheless may be employed to the same effect.<sup>232</sup> Accordingly, they fall under the same strict proportionality principle as firearms. The use of force to intentionally cause death (“intentional lethal use of force”) is only permitted when “strictly unavoidable in order to protect life.”<sup>233</sup> This strict proportionality test dictates that if the lethal use of force is applied in furtherance of any objectives other than to save life or limb, it will be regarded as excessive.<sup>234</sup>

When framing the legally permissible circumstances for the lethal use of firearms, this Commission has quoted the U.N. Basic Principles, which state:

Law enforcement officials shall not use firearms against persons except in self-defense or defense 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

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<sup>227</sup> *Corumbiara v. Brazil*, Case 11.556, Inter-Am Comm’n H.R., Report No. 77/98, ¶ 174 (March 11, 2004); *see also* *Finca “La Exacta” v. Guatemala*, Case 11.382, Inter-Am. Comm’n H.R., Report No. 57/02, doc. 5 rev. 1, ¶ 40 (2002).

<sup>228</sup> U.N. Basic Principles, *supra* note 33, princs. 5, 9; *Dorzema v. Dominican Republic*, Merits, Reparation, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 251, ¶ 85 (Oct. 24, 2012).

<sup>229</sup> U.N. Basic Principles, *supra* note 33, princs. 5, 9.

<sup>230</sup> U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, ¶ 67, submitted to the Human Rights Council pursuant to G.A. Res. 17/5, U.N. Doc. A/HRC/26/36 (April 1, 2014) (by Christof Heyns) (“Special considerations apply when (potentially) lethal force is used. In the context of such use of force, the requirement of proportionality can be met only if such force is applied in order to save life or limb. What is required in respect of lethal force is thus not ordinary proportionality but strict proportionality.”)

<sup>231</sup> U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, ¶ 67, submitted to the Human Rights Council pursuant to G.A. Res. 17/5, U.N. Doc. A/HRC/26/36 (April 1, 2014) (by Christof Heyns).

<sup>232</sup> Amnesty Int’l, *Deadly Force: Police Use of Lethal Force in the United States*, 3 (2015) [https://www.amnestyusa.org/sites/default/files/aiusa\\_deadlyforcereportjune2015.pdf](https://www.amnestyusa.org/sites/default/files/aiusa_deadlyforcereportjune2015.pdf); *see also* Al Baker, David Goodman, & Benjamin Mueller, *Beyond the Chokehold, The Path To Eric Garner’s Death*, N.Y. Times (June 13, 2015), <http://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html>.

<sup>233</sup> U.N. Basic Principles, *supra* note 33, princs. 5, 9; *see also* U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, ¶ 70–71, submitted to the Human Rights Council pursuant to G.A. Res. 17/5, U.N. Doc. A/HRC/26/36 (April 1, 2014) (by Christof Heyns).

<sup>234</sup> U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, ¶ 67, submitted to the Human Rights Council pursuant to G.A. Res. 17/5, U.N. Doc. A/HRC/26/36 (April 1, 2014) (by Christof Heyns).

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.

In the circumstances provided for under the above principle, 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.<sup>235</sup>

The above provisions require that the use of force be adequately defined and regulated by law. Moreover, the lethal use of force must be further circumscribed, confined to specific circumstances and in pursuit of strictly limited objectives.

iii. *The constitutional “reasonableness” standard governing the use of force in the United States does not provide the clarity required under international law*

Numerous monitoring bodies of international human rights treaties to which the United States is party have repeatedly observed that the legal framework regulating the use of force in the United States does not conform to international standards. In 1995, the U.N. Human Rights Committee recommended that the United States, in order to comply with its duties under the ICCPR, “take all necessary measures to prevent any excessive use of force by the police [and ensure] that rules and regulations governing the use of weapons by the police and security forces be in full conformity with the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.”<sup>236</sup> This recommendation reappears in the Human Rights Committee’s concluding observations regarding U.S. compliance with the ICCPR in 2006<sup>237</sup> and again in 2014.<sup>238</sup> In 2014, the Committee on the Elimination of Racial Discrimination called upon the United States to “[i]ntensify its efforts to prevent the excessive use of force by law enforcement officials by ensuring compliance with the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.”<sup>239</sup> The treaty bodies’ repeated calls for the United States to align its standards on the use of force with international law make it clear that the current legal framework governing the use of force is deficient.

In the United States, the standard for the lawful use of force does not distinguish between different degrees or types of force, which precludes the application of a strict proportionality test for the lethal use of force. The Fourth Amendment of the U.S. Constitution, which guarantees the right of the people to be free from unreasonable seizure of their persons, is the primary lens through which courts analyze the use of force by the police.<sup>240</sup> The U.S. Supreme Court has decided three central cases defining the scope of the reasonableness test for the use of force: *Tennessee v. Garner* (1985),<sup>241</sup> *Graham v. Connor* (1989),<sup>242</sup>

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<sup>235</sup> U.N. Basic Principles, *supra* note 33, princs. 9–10.

<sup>236</sup> Human Rights Comm., *Concluding Observations of the Human Rights Committee: United States of America*, U.N. Doc. CCPR/C/79/Add.50, A/50/40 ¶ 297 (1995).

<sup>237</sup> Human Rights Comm., *Concluding Observations of the Human Rights Committee: United States of America*, U.N. Doc. CCPR/C/USA/CO/3, ¶ 30 (Dec. 18, 2006).

<sup>238</sup> Human Rights Comm., *Concluding observations on the fourth periodic report of the United States of America*, U.N. Doc. CCPR/C/USA/CO/4, ¶ 11 (Apr. 23, 2014).

<sup>239</sup> Comm. Elimination of Racial Discrimination, *Concluding Observations on the combined seventh to ninth periodic reports of the United States of America*, U.N. Doc. CERD/C/USA/CO/7-9, ¶ 17(b) (Aug. 29th 2014).

<sup>240</sup> See U.S. Const. amend. IV.

<sup>241</sup> *Tennessee v. Garner*, 471 U.S. 1 (1985).

<sup>242</sup> *Graham v. Connor*, 490 U.S. 386 (1989).

and *Scott v. Harris* (2007).<sup>243</sup>

In *Tennessee v. Garner*, the Supreme Court established that a law enforcement officer's apprehension of a fleeing suspect through the use of deadly force constitutes seizure of the person and therefore should be subject to the Fourth Amendment's "reasonableness" requirement.<sup>244</sup> *Graham v. Connor* expanded the Fourth Amendment reasonableness test beyond deadly force to include all uses of force by law enforcement officials.<sup>245</sup> *Graham* also established that the reasonableness inquiry must focus on what was objectively reasonable under the circumstances and in the moment, without consideration of the officer's motives or intent.<sup>246</sup> The Fourth Amendment inquiry applied in *Graham* failed to differentiate between different types of force, let alone between lethal and non-lethal use of force. Moreover, the objective reasonableness standard established in *Graham* did not clearly identify the elements of necessity and legitimate objective required under international law to justify the use of force.<sup>247</sup> *Scott v. Harris*<sup>248</sup> addressed the fluidity of the Fourth Amendment reasonableness test, stating, "*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.'"<sup>249</sup> *Scott v. Harris* thus made explicit what was implicit in *Graham*—namely, that there is no distinct standard for the use of lethal versus non-lethal force—stating, "Whether or not Scott's actions constituted application of 'deadly force,' all that matters is whether Scott's actions were reasonable."<sup>250</sup>

The Supreme Court's singular focus in this trio of cases on the reasonableness of the actions under the circumstances stands in contrast with the Basic Principles' distinction between lethal force and other forms of force.<sup>251</sup> The applicable strict proportionality test elaborated by the U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions requires a distinct set of preconditions governing the use of lethal force, with the protection of life or limb as the baseline.<sup>252</sup>

Because the constitutional standard regarding the use of force does not treat lethal force as a separate category, permitted in only limited circumstances, there is no uniform floor or baseline for individual state definitions of the use of lethal force. Unsurprisingly, there exists considerable variation in how individual state statutes define lethal force and regulate the circumstances in which it may be used.<sup>253</sup> In fact, nine states and the District of Columbia currently have no laws on the lethal use of force by law enforcement officers.<sup>254</sup>

Because of its breadth and lack of specificity, the reasonableness standard fails to establish clear guidance regarding the circumstances under which different types of force are proportionate. As discussed below, the U.S. standard governing the use of force not only lacks the clarity required by international law, but fails to satisfy the requirements under international law that non-violent and non-lethal means be

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<sup>243</sup> See Tim Longo, *Defining Instrumentalities of Deadly Force*, 27 *Touro L. Rev.* 261, 261–62 (2011). *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014) arguably provides a fourth case, as it expanded on the reasoning of *Scott v. Harris*.

<sup>244</sup> *Graham v. Connor*, 490 U.S. 386 (1989).

<sup>245</sup> *Id.*, at 388.

<sup>246</sup> *Id.*, at 397.

<sup>247</sup> See *id.*, at 396 (1989) (stating that the reasonableness inquiry "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight").

<sup>248</sup> *Scott v. Harris*, 550 U.S. 372, 382 (2007).

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* at 383.

<sup>251</sup> U.N. Basic Principles, *supra* note 33, Principle 9.

<sup>252</sup> U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, ¶ 67, submitted to the Human Rights Council pursuant to Resolution 17/5, U.N. Doc. A/HRC/26/36 (April 1, 2014) (by Christof Heyns).

<sup>253</sup> Amnesty Int'l, *Deadly Force: Police Use of Lethal Force in the United States* 21 (2015), [https://www.amnestyusa.org/sites/default/files/aiusa\\_deadlyforcereportjune2015.pdf](https://www.amnestyusa.org/sites/default/files/aiusa_deadlyforcereportjune2015.pdf).

<sup>254</sup> *Id.*

exhausted before resorting to lethal force, that harm be minimized, and that the objectives justifying lethal force be narrowly defined.

**C. U.S. law does not require exhaustion of non-violent and less-than-lethal means before using lethal force only as last resort**

- i. *U.S. law does not take into account the planning and circumstances leading up to the moment when law enforcement officials apply lethal force, contrary to international law*

The reasonableness test defined by the Supreme Court does not consider the operational planning leading up to the point where force must be used. Under international law, however, the planning and precautions taken by law enforcement officers should be considered when determining whether the lethal use of force was excessive in a given instance.

In *Finca “La Exacta” v. Guatemala*, this Commission held that planning represents an important indicator of whether force used by police officers was excessive.<sup>255</sup> In so holding, this Commission relied on *McCann and Others v. United Kingdom*, in which the European Court of Human Rights held that the good faith, albeit erroneous, lethal use of force by soldiers who shot unarmed suspects while attempting to prevent the triggering of a bomb was not a violation of the right to life.<sup>256</sup> Nonetheless, the Court went on to hold that the lack of control and organization over the operation did constitute a violation.<sup>257</sup>

In *Nadege Dorzema et al. v. Dominican Republic*, the Inter-American Court observed that proper planning and precautions, such as traffic controls, barricades, speed bumps, tire puncturing devices, and/or cameras to record and identify those involved, could have resulted in less lethal means of stopping the vehicular flight of a group of suspects.<sup>258</sup> This hindsight consideration of measures that could have been taken to avert the use of force is in direct opposition to the reasoning of the U.S. Supreme Court in *Scott v. Harris*.<sup>259</sup> In *Scott*, the Court held that it was reasonable for an officer to terminate a high-speed pursuit of a person initially suspected only of speeding by applying a push bumper to the rear of the vehicle, causing it to leave the road and crash.<sup>260</sup> The Court did not examine or discuss structural or systemic issues regarding the range of tactics available to the officers in responding to the situation. Indeed, the only discussion of planning was the Court’s conclusion that ceasing pursuit, unlike ramming the vehicle, was not certain to eliminate the risk that the respondent posed to the public, and therefore officers were not required to use lesser means.<sup>261</sup>

More generally, a number of decisions by the U.S. Federal Courts of Appeals have held that the “reasonableness” inquiry should not take into consideration the events leading up to the moment at which force is applied. For instance, in *Carter v. Buscher*, the Seventh Circuit ruled that pre-seizure conduct by the police, in this case devising a ruse with plainclothes officers, should not be considered when conducting the Fourth Amendment reasonableness test.<sup>262</sup> Similarly, in *Harris v. Serpas*, the Fifth Circuit held that the excessive force inquiry was limited to whether “the [officer] was in danger at the moment of

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<sup>255</sup> *Finca “La Exacta” v. Guatemala*, Case 11.382, Inter-Am. Comm’n H.R., Report No. 57/02, doc. 5 rev. 1, ¶ 57 (2002).

<sup>256</sup> *McCann v. the United Kingdom*, 324 Eur. Ct. H.R. (ser. A) (1995).

<sup>257</sup> *Id.* at ¶ 212; *see also* U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, ¶ 64, submitted to the Human Rights Council pursuant to Resolution 17/5, U.N. Doc. A/HRC/26/36 (April 1, 2014) (by Christof Heyns).

<sup>258</sup> United Nations Special Rapporteur on Extrajudicial and Summary Executions Interim report on the worldwide situation in regard to extrajudicial, summary or arbitrary executions, U.N. Doc. A/61/311, ¶ 88, (2006).

<sup>259</sup> *Scott v. Harris*, 550 U.S. 372, at 372 (2007).

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at 387.

<sup>262</sup> *Carter v. Buscher*, 973 F.2d 1328, 1332 (7th Cir. 1992).

the threat that resulted in the [officer's] shooting [of the civilian].”<sup>263</sup> The Fifth Circuit did not consider any actions of the officer leading up to the shooting to be relevant when assessing the lawfulness of the force used.<sup>264</sup> This cabining of the excessive force inquiry meant that the court did not consider as relevant the fact that the officers had been called to a home to assist a suicidal person and responded by breaking down his bedroom door, shouting commands, and Tasing him before fatally shooting him.<sup>265</sup> The court ruled that because the victim had a knife raised over his head at the moment he was shot, the police officer acted reasonably.<sup>266</sup> International standards, in contrast, would require consideration of the lack of planning and the circumstances leading to the moment of the lethal use of force, particularly given the purpose for which the officers were called to the scene. In dissenting from the majority in *Mullinex v. Luna* (2015), U.S. Supreme Court Justice Sonia Sotomayor expressed concerns about the legal framework for use of force by police, which she suggests condones a dangerous policing culture: “By sanctioning a ‘shoot first, think later’ approach to policing, the Court renders the protections of the Fourth Amendment hollow.”<sup>267</sup>

- ii. *U.S. standards do not comply with international standards requiring the exhaustion of non-violent and less than lethal means and permitting lethal force only as a last resort.*

This Commission has drawn on the “authoritative and internationally accepted” standard within the U.N. Code of Conduct in holding that the resort to any force must be made only when strictly necessary in relation to the immediate threat posed.<sup>268</sup> Likewise, the U.N. Basic Principles stress that non-violent means, such as negotiation, must first be exhausted before any force is used, let alone lethal force.<sup>269</sup> Because all use of force must be graduated in relation to the threat posed, it follows logically that recourse to lethal force requires *absolute necessity* in light of the objective to preserve life.<sup>270</sup>

The jurisprudence of the United States does not comport with the duties under international law to exhaust non-violent means, and less than lethal means, before employing deadly force as a last resort.<sup>271</sup> For instance, the decision by the Fifth Circuit Court of Appeals in *Harris v. Serpas*<sup>272</sup> that officers were reasonable in shooting Mr. Harris after unsuccessfully attempting to Tase him failed to address whether officers could have used other non-violent or less-than-lethal means to deescalate the situation. The Fifth Circuit held that because the officers “reasonably feared for their safety at the moment of the fatal shooting,” the use of lethal force was not excessive.<sup>273</sup>

The recent shooting of Tamir Rice, a 12-year-old Black child, highlights the absence of a requirement to exhaust non-violent means under the legal framework governing the use of force in the United States. In this instance, the officer was dispatched in response to a report of a potentially armed adolescent in a park

<sup>263</sup> *Harris v. Serpas*, 745 F.3d 767, 772 (5th Cir.) cert. denied, 135 S. Ct. 137 (2014) (citing *Bazan ex rel. Bazan v. Hidalgo Cnty.*, 246 F.3d 481, 493 (5th Cir. 2001)).

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.* at 773.

<sup>267</sup> *Mullinex v. Luna*, 577 U.S. \_\_\_, 136 S. Ct. 305, 316 (2015) (Sotomayor, J., dissenting).

<sup>268</sup> *Leydi Dayán Sánchez v. Colombia*, Case 12.009, Inter-Am. Comm’n H.R., Report No. 43/08, ¶ 3 (2008).

<sup>269</sup> See U.N. Basic Principles, *supra* note 33, princ. 4.

<sup>270</sup> See *id.*; see also *Nadege Dorzema v. Dominican Republic*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) ¶ 85 (Oct. 24, 2012).

<sup>271</sup> Policies of many individual police departments likewise fail to adhere to international standards. An analysis of the “use of force” policies of 17 police departments in the largest cities in the United States found that less than half of them (7 of 17) required de-escalation, and officers in at least four departments (Chicago, Houston, Los Angeles, and San Antonio) are not required to give a verbal warning, when possible, before shooting at civilians. See Use of Force Policy Review, <http://useofforceproject.org/#review> (last visited Jan. 25, 2016).

<sup>272</sup> *Harris v. Serpas*, 745 F.3d 767, 772, 773 (5th Cir.), cert. denied, 135 S. Ct. 137 (2014).

<sup>273</sup> *Id.* at 773.

and fatally shot a child carrying a pellet gun seconds after arriving on the scene.<sup>274</sup> Two independent reports published in October 2015 validated the reasonableness of the act. One of the reports states that a requirement to give adequate warning carried no weight when it came to determining the constitutionality of the officer's actions.<sup>275</sup>

U.S. Department of Justice guidelines state that if non-deadly force is sufficient to accomplish a law enforcement purpose, then deadly force is unnecessary.<sup>276</sup> While these Guidelines represent an improvement upon the constitutional standard, they still set the baseline at non-deadly *force* rather than non-violent means of diffusing the situation. This approach is at odds with that set forth in the U.N. Code of Conduct to exhaust alternatives to force, as explicated by this Commission in *Leydi Dayán Sánchez*.<sup>277</sup>

iii. *U.S. standards do not comply with international requirements that actions be taken to minimize harm*

In *Corumbiara v. Brazil*, this Commission recognized that “the legitimate use of force implies ... an effort to reduce to a minimum any personal injury and loss of human lives.”<sup>278</sup> The U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions likewise observed that the necessity requirement gives rise to an obligation to minimize the level of force applied, regardless of whether a greater level of force would be proportionate in theory.<sup>279</sup> In *Montero-Aranguren*, the Inter-American Court considered in the first instance whether a violation could have been avoided with the use of less harmful measures, placing emphasis on the minimization of damage or injury.<sup>280</sup>

This emphasis on the minimization of harm in the Inter-American system contrasts with the Fourth Amendment reasonableness inquiry, which includes no such duty. For instance, in *Plumhoff v. Rickard*,<sup>281</sup> the Court held that a suspect's vehicular flight posed a deadly threat to others on the road and thus warranted fifteen shots fired by the pursuing officer.<sup>282</sup> In an expansion on the reasoning in *Scott*, the Court went on to say that the fifteen shots fired were not excessive because “if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended.”<sup>283</sup> This reasoning is emblematic of the lack of duty under U.S. law to minimize harm.

iv. *The absence of a duty to exhaust non-violent means and a duty to minimize harm under federal law is reflected in individual state regulations*

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<sup>274</sup> See Mitch Smith, *2 Outside Reviews Say Cleveland Officer Acted Reasonably in Shooting Tamir Rice*, 12, N.Y. Times (Oct. 10, 2015), [http://www.nytimes.com/2015/10/11/us/2-outside-reviews-say-cleveland-officer-acted-reasonably-in-shooting-tamir-rice-12.html?\\_r=0](http://www.nytimes.com/2015/10/11/us/2-outside-reviews-say-cleveland-officer-acted-reasonably-in-shooting-tamir-rice-12.html?_r=0) ; Afi Scruggs, *Tamir Rice shooting justified, say expert reports, as grand jury process continues*, Guardian (Oct. 11, 2015), <http://www.theguardian.com/us-news/2015/oct/11/tamir-rice-shooting-justified-say-expert-reports-as-grand-jury-process-continues> .

<sup>275</sup> Mitch Smith, *2 Outside Reviews Say Cleveland Officer Acted Reasonably in Shooting Tamir Rice*, 12, N.Y. Times, (Oct. 10, 2015), [http://www.nytimes.com/2015/10/11/us/2-outside-reviews-say-cleveland-officer-acted-reasonably-in-shooting-tamir-rice-12.html?\\_r=0](http://www.nytimes.com/2015/10/11/us/2-outside-reviews-say-cleveland-officer-acted-reasonably-in-shooting-tamir-rice-12.html?_r=0) .

<sup>276</sup> U.S. Dep't of Justice, *Principles for Promoting Police Integrity* (2001), <https://www.ncjrs.gov/pdffiles1/ojp/186189.pdf> .

<sup>277</sup> Leydi Dayán Sánchez v. Colombia, Case 12.009, Inter-Am. Comm'n H.R., Report No. 43/08, ¶ 54 (2008).

<sup>278</sup> Corumbiara v. Brazil, Case 11.556, Inter-Am. Comm'n H.R., Report No. 32/04, ¶ 174 (2004).

<sup>279</sup> UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, ¶ 41, submitted to the UN General Assembly pursuant to G.A. Res 59/197, U.N. Doc A/61/331 (Sept. 5, 2006) (by Philip Alston).

<sup>280</sup> Montero Aranguren v. Venezuela, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C), ¶ 68 (July 5, 2006).

<sup>281</sup> *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2022 (2014).

<sup>282</sup> *Id.* at 2016.

<sup>283</sup> *Id.*

As discussed above, there is no constitutional standard or federal statute prohibiting the use of lethal force except as a last resort in response to an imminent threat, or requiring that non-violent means be tried first. Perhaps unsurprisingly, no state statute in the United States prohibits the lethal use of force except as a last resort after non-violent and less harmful means have been exhausted.<sup>284</sup> Indeed, only four states—Delaware, Iowa, Rhode Island, and Tennessee—include any reference to the idea that other means should be attempted before applying lethal force.<sup>285</sup> In addition, only eight states require that, when feasible, officers issue a warning before using lethal force.<sup>286</sup> Finally, only three states—Delaware, Hawaii, and New Jersey—provide that officers should create “no substantial risk” to bystanders when using lethal force.<sup>287</sup> Therefore, much like the constitutional standard, the regulatory frameworks in the fifty states fall woefully short of the international duty to exhaust non-violent and non-lethal means and to minimize harm.

#### **D. U.S. law authorizes the use of force for objectives that would not be considered legitimate under international human rights law**

- i. *Unlike under international human rights law, under U.S. law past crimes or threats may justify the lethal use of force*

This Commission relies on the U.N. Basic Principles in identifying legitimate objectives for the lethal use of force by law enforcement. Citing Basic Principle 9, this Commission held in *Finca “La Exacta” v. Guatemala* that law enforcement officers who used firearms exercised force disproportionate to their stated objective of arresting citizens resisting eviction.<sup>288</sup> According to Principle 9, legitimate objectives for the use of firearms include: “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.”<sup>289</sup>

On its face, the standard established by the U.S. Supreme Court in *Tennessee v. Garner* is similar to the standard above in that it permits the use of deadly force when a suspect poses an immediate threat to the officer or others.<sup>290</sup> Unlike the reasoning of this Commission or the U.N. Basic Principles, however, the law set forth in *Garner* also allows for the use of deadly force to prevent an individual’s escape where “there is probable cause to believe that he *has committed* a crime involving the infliction or threatened infliction of serious physical harm.”<sup>291</sup> The backward-looking nature of the standard in *Garner*, allowing for the lethal use of force against someone suspected of a certain type of act in the past, is not in line with the international understanding of imminence.<sup>292</sup> Basic Principle 9 provides that deadly force may be used against an individual only when that person poses a threat of death or serious injury—that is, to prevent future loss of life or limb, not to respond to past threats to, or past loss of, life or limb.<sup>293</sup>

By incorporating suspicion of this Commission of a crime into the “reasonableness” test, the Supreme Court has allowed for weaker interpretations of the immediacy requirement by the Federal Courts of

<sup>284</sup> Amnesty Int’l, *Deadly Force: Police Use of Lethal Force in the United States* 21 (2015), [https://www.amnestyusa.org/sites/default/files/aiusa\\_deadlyforcereportjune2015.pdf](https://www.amnestyusa.org/sites/default/files/aiusa_deadlyforcereportjune2015.pdf).

<sup>285</sup> *Id.*

<sup>286</sup> *Id.* at 4.

<sup>287</sup> *Id.*

<sup>288</sup> *Finca “La Exacta” v. Guatemala*, Case 11.382, Inter-Am. Comm’n H.R., Report No. 57/02, doc. 5 rev. 1, ¶ 40 (2002)

<sup>289</sup> U.N. Basic Principles, *supra* note 33, princ. 9.

<sup>290</sup> *Tennessee v. Garner*, 471 U.S. 1, 8 (1985).

<sup>291</sup> *Id.* at 11.

<sup>292</sup> See U.N. Basic Principles, *supra* note 33, princ. 9.

<sup>293</sup> *Id.*



Appeals. For example, in *Estate of Morgan v. Cook*,<sup>294</sup> the court ruled that it was reasonable for an officer to fatally shoot a suspect whose knife remained at his side, but who lifted his leg as if to take a step toward the police.<sup>295</sup> The facts of this case, however, suggest that the requirement of immediacy was not met: the suspect was some distance from the officer, did not have his weapon in a striking position, and was not approaching the officers at anything resembling a rapid pace.<sup>296</sup> The victim's status as a suspect in a domestic violence case, however, influenced the court's assessment of what level of force was appropriate to bring him into custody.<sup>297</sup> In another Federal Court of Appeals case, *Henning v. O'Leary*,<sup>298</sup> the court established that officers may be allowed to shoot a resisting suspect before it is even clear the suspect has a grip on a weapon.<sup>299</sup>

ii. *Unlike under international human rights law, under U.S. law maintenance of law and order may justify the lethal use of force*

This Commission has held “the use of lethal force merely to carry out orders of arrest ... unnecessary and disproportionate.”<sup>300</sup> In so holding, this Commission relied on the principle that the intentional use of firearms could not be justified absent a threat to life.<sup>301</sup> Similarly, according to the U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions, the “protect life” principle dictates that lethal force cannot be employed “merely to protect law and order” or to serve “other similar interests,” for example, to disperse protests, arrest a suspected criminal, or safeguard property.<sup>302</sup> Instead “[t]he primary aim must be to save life.”<sup>303</sup>

The U.S. constitutional standard is at odds with this international principle. U.S. case law illustrates that even when a suspect is unarmed and the primary objective is to apprehend the person, lethal use of force may be deemed reasonable.<sup>304</sup> For instance, in *McKenney v. Harrison*, the Court of Appeals for the Eighth Circuit ruled that an officer's fatal Tasing of an unarmed person suspected of a misdemeanor as he lunged toward an open window was a reasonable use of force because the individual's sudden movement could be interpreted as an attempt to flee, only a single Taser shock was used, the officer was in a position of having to make a split second decision, and some form of warning was given.<sup>305</sup> There was no evidence that the suspect posed an imminent threat to the life or limb of the law enforcement officers or bystanders. The officer's only apparent objective was bringing this individual into custody. Permitting the prioritization of law and order over preservation of life does not comport with international human rights law.<sup>306</sup>

<sup>294</sup> See *Estate of Morgan v. Cook*, 686 F.3d 494 (8th Cir. 2012).

<sup>295</sup> *Id.* at 496.

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

<sup>298</sup> See *Henning v. O'Leary*, 477 F.3d 492 (7th Cir. 2007).

<sup>299</sup> *Id.* at 496.

<sup>300</sup> Finca “La Exacta” v. Guatemala, Case 11.382, Inter-Am. Comm’n H.R., Report No. 57/02, doc. 5 rev. 1, ¶ 41 (2002)

<sup>301</sup> *Id.* at ¶ 42.

<sup>302</sup> UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, ¶ 72, submitted to the Human Rights Council pursuant to Resolution 17/5, U.N. Doc. A/HRC/26/36 (April 1, 2014) (by Christof Heyns).

<sup>303</sup> *Id.*

<sup>304</sup> See, e.g., *Glenn v. City of Columbus, Ga.*, 375 F. App'x 928, 928 (11th Cir. 2010) (ruling that the lethal use of a beanbag gun while attempting to bring a mentally ill veteran into custody was reasonable).

<sup>305</sup> *McKenney v. Harrison*, 635 F.3d 354, 360 (8th Cir. 2011).

<sup>306</sup> U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, ¶ 73, submitted to the Human Rights Council pursuant to Resolution 17/5, U.N. Doc. A/HRC/26/36 (April 1, 2014) (by Christof Heyns).

- iii. *Individual state regulations similarly permit the lethal use of force merely to protect law and order*

No state strictly limits the use of lethal force to the objective of protecting against an imminent threat to life or serious injury to the officer or to others.<sup>307</sup> For example, the state of Missouri permits deadly force in the instance where an officer reasonably believes that such use of deadly force is immediately necessary to effect an arrest and also reasonably believes that the person to be arrested has committed or attempted to commit a felony, without the additional requirement of a threat to life or of serious injury.<sup>308</sup> Likewise, the state of Mississippi permits the “killing of a human being” in instances where “necessarily committed in attempting by lawful ways and means to apprehend any person for any felony committed.”<sup>309</sup>

**E. The consequence of inadequate regulation of the use of force in the United States and the lack of clear standards regarding lethal force is undue deference to the subjective view of officers, despite a nominally objective “reasonableness” test**

On its face, the “reasonableness” test posits an objective standard. As stated in *Graham*: “[T]he ‘reasonableness’ inquiry in an excessive force case is an objective one: the question is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.”<sup>310</sup> The lack of clear parameters for the use of force deprives courts of meaningful guidelines to determine what is objectively reasonable in a given situation—that is, what a reasonable officer in those circumstances would have known was permissible under law. The practical consequence is that courts often display considerable deference to the subjective experience of the officer who felt the lethal use of force was reasonable. There is slippage even in the language of *Graham* itself, where the Court conceded that, “The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”<sup>311</sup> This language highlights the unique and fact-bound nature of every reasonableness inquiry. Without ignoring the particularities of different circumstances, such a case-by-case inquiry could be more consistent and predictable if there were clear regulations identifying specific factors to consider, such as: requirements that officers engage in planning, exhaust non-violent means, take steps to minimize harm, and limitation of the legitimate objectives for which lethal force may be used to the imminent threat of (future) loss of life or serious injury.

As it stands, however, the lack of clarity in the legal standard encourages reliance on officer views. In many cases, however, that reliance may amount to deference to implicit biases harbored by those officers, possibly including racial biases. Implicit bias affects perception. When an officer makes the decision to use lethal force, he or she may not be cognizant that his or her perception of the threat may be influenced by the race of the suspect involved. To the extent that courts rely on an officer’s stated perception of a given situation when determining the reasonableness of the officer’s actions, they may well be permitting an officer’s biases to define the parameters of lawful use of force. Implicit bias is discussed in further detail below in Section IV.

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<sup>307</sup> Amnesty Int’l, *Deadly Force: Police Use of Lethal Force in the United States*, 4 (2015), [https://www.amnestyusa.org/sites/default/files/aiusa\\_deadlyforcereportjune2015.pdf](https://www.amnestyusa.org/sites/default/files/aiusa_deadlyforcereportjune2015.pdf).

<sup>308</sup> *Id.* at 66 (quoting Missouri’s law, 563.046. Law enforcement officer’s use of force in making an arrest, V.A.M.S. 563.046).

<sup>309</sup> *Id.* at 64 (quoting Mississippi’s law, § 97-3-15. Justifiable homicide, Miss. Code Ann. § 97-3-15).

<sup>310</sup> *Graham v. Connor*, 490 U.S. 386, 396 (1989) at 396–97.

<sup>311</sup> *Id.*

### III. Police Training

International human rights law requires the United States to ensure that all law enforcement agents, including police officers, are properly trained in the lawful use of force and non-discrimination to prevent human rights abuses resulting from the excessive and discriminatory use of force. Training programs should reflect State obligations and standards under international law related to the use of force and non-discrimination. As agents of the State, police officers should be informed of their international human rights law obligations with respect to the use of force and non-discrimination, and trained on how to conduct themselves in a manner that fulfills those obligations, respects and protects the rights of the individuals with whom they interact.

Consistent with its international obligations, the United States should verify that police training programs are consistent with international human rights law, particularly in areas in which there have been documented shortcomings or deficiencies. Where training programs are found to be consistent with human rights standards, the United States should conduct further inquiries to determine whether actual police behavior is in line with the training, especially in regions where excessive use of force against Black Americans remains a persistent problem.

To be sure, the problem of discriminatory police violence is not simply one of inadequate training. All too often, officers display appropriate policing habits when operating in wealthy, white neighborhoods, suggesting that they have the knowledge to police humanely—they just choose not to apply that knowledge in low-income, Black communities. Addressing the systemic, institutionalized racism that undergirds disparate policing practices requires not just changes in policies, but in culture, too. Efforts to end the disproportionate victimization of Black Americans by police therefore must not be limited to reform of training programs. Nor should the call for improved training become a premise for increasing police budgets and thereby contributing to heightened police presence or militarization in the very communities suffering from excessive use of force today. But ensuring that police are trained to uphold human rights is one part of the solution.

The lack of uniformity across police departments and the lack of transparency regarding police training policies and practices in the United States impede meaningful evaluation of whether officer training complies with international human rights law. Policing is decentralized in the United States; instead of a national police force, there are approximately 18,000 separate local and state law enforcement agencies, including more than 12,500 police departments across the country and over 800,000 police officers.<sup>312</sup>

There is a dearth of publicly available information regarding the training policies and practices of the thousands of police departments. What information is available regarding police training often comes to light in the wake of scandals over excessive and/or discriminatory use of force that expose deficiencies in police training and may prompt police departments to reform their training programs. The Committee Against Torture has expressed concern about the availability of information regarding law enforcement officers' training in the United States.<sup>313</sup> Although one cannot generalize from the limited information

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<sup>312</sup> The last census of law enforcement occurred in 2008. See Brian A. Reeves, *Census Of State And Local Law Enforcement Agencies*, 2008, NCJ 233982, Bureau of Justice Statistics (July 26, 2011); see also, Sunil Dutta, *We should get rid of local policing: Ferguson shows why the system just doesn't work*, Wash. Post (Nov. 25, 2014), <https://www.washingtonpost.com/posteverything/wp/2014/11/25/we-should-get-rid-of-local-policing-ferguson-shows-why-the-system-just-doesnt-work> (noting that the United States employs 765,246 sworn officers).

<sup>313</sup> Comm. Against Torture, *Conclusions and recommendations of the Committee Against Torture: United States of America*, U.N. Doc. CAT/C/USA/CO/2, ¶ 23 (July 25, 2006) (expressing concerns about the lack of transparency in anti-torture trainings and recommending regular evaluation of the training, including independent monitoring of their conduct.); Comm. Against

accessible, the lack of information calls into question the adequacy of existing training programs and impedes improvements.

The absence of publicly available information about police training in localities where abuses have been documented presents a human rights problem unto itself (discussed in detail below in Section V), rendering it difficult to identify underlying causes of violations and to prevent their recurrence.<sup>314</sup> According to *The Guardian's* database of police killings, the U.S. cities with the most police killings in 2015 were Los Angeles, Houston, Phoenix, Indianapolis, and Chicago, as of October 22, 2015.<sup>315</sup> Research into the police departments in these cities revealed little publicly available information on their training practices and policies. While the police department manuals for several of these cities are posted online, they are not uniformly available and there is little public information regarding the content of police training programs.<sup>316</sup>

The websites of the LAPD and the Indianapolis Police Department contain some general information about police training, but the majority of the information covers only the broad topics of training and the contact information for the training officials.<sup>317</sup> There are no substantive details regarding training programs and policies on any of the websites of the police departments in any of the five cities with the highest incidence of police violence against civilians. To be sure, disclosure of training manuals and policies is insufficient on its own to ensure that police conduct respects rights. But the lack of transparency surrounding what police are and are not being taught impedes efforts to identify the causes of abusive conduct and to design effective solutions.

The sections that follow elaborate several key elements that an international human rights law-compliant police training program must include, to ensure respect for and protection of the rights to life and freedom from cruel, inhuman and degrading treatment or torture, and non-discrimination. These elements are essential to satisfy the international standards of legality, necessity, proportionality and non-discrimination in the use of force: (1) a clear definition of force and lawful use of force; (2) strategies to assess the need for force and to de-escalate situations, so as to ensure that force is used only when necessary; (3) alternatives to lethal force, such as protective equipment and use of less-than-lethal tactics and weapons; (4) instruction on discrimination law and implicit bias.

Because there is no uniform federal police force or training standard, this section examines how well

Torture, *Concluding observations on the combined third to fifth periodic reports of the United States of America*, U.N. Doc. CAT/C/USA/CO/3-5, ¶ 28 (Dec. 14, 2014) (reiterating concern about the lack of information, especially regarding the impact and effectiveness of the training).

<sup>314</sup> See e.g., Comm. on the Elimination of Racial Discrimination, *General Recommendation XIII on the training of law enforcement officials in the protection of human rights*, Rep. on Forty-second session, U.N. Doc. A/48/18, ¶ 3 (1993) (calling on State parties to continuously improve and disclose information about training of police officers to ensure that the Code of Conduct for Law Enforcement Officials (1979) and standards set forth in treaty obligations, are fully implemented).

<sup>315</sup> *Guardian* database, *supra* note 1.

<sup>316</sup> Compare *Department Manual*, Los Angeles Police Dep't, [http://www.lapdonline.org/lapd\\_manual/](http://www.lapdonline.org/lapd_manual/) (last visited Dec. 22, 2015), *Department Manual*, Las Vegas Metropolitan Police Department, <http://www.lvpmisa.org/Forms/Dept.%20Man%207-14-07.pdf> (last visited Dec. 22, 2015), and *Operations Order Manual*, Phoenix Police Department (<http://azcommonlaw.com/wp-content/uploads/2014/07/phoenix-police-department.pdf> (last visited Dec. 22, 2015)), with *Houston Police Department*, City of Houston, <http://www.houstonpolice.org/go/doc/2133/289249/> (last visited Oct. 14, 2015), *Indianapolis Metropolitan Police Department*, Indianapolis, <http://www.indy.gov/eGov/City/DPS/IMPDPages/home.aspx> (last visited Oct. 14, 2015).

<sup>317</sup> LAPD, *Training Division Mission Statement and Overview*, [http://www.lapdonline.org/training\\_division/content\\_basic\\_view/6375](http://www.lapdonline.org/training_division/content_basic_view/6375) (last visited Oct. 14, 2015); Indianapolis *Training Academy: Indianapolis Metropolitan Police Department*, <http://www.indy.gov/eGov/City/DPS/IMPDP/Employment/Sworn/Pages/training.aspx> (last visited Oct. 14, 2015); Indianapolis, *Field Training Program: Indianapolis Metropolitan Police Department*, <http://www.indy.gov/eGov/City/DPS/IMPDP/Employment/Sworn/Pages/field-training.aspx> (last visited Oct. 14, 2015).

these elements are reflected in the training practices of several police departments around the country. These departments are not representative of the entire country, but were chosen based on readily available public information and reports of discriminatory excessive use of force. In particular, this section highlights the New York Police Department (“NYPD”). NYPD is the largest police department in the United States, with approximately 50,000 officers.<sup>318</sup> In contrast, over half of the police departments in the United States employ fewer than 10 officers<sup>319</sup> and the average size of local police forces is 50 officers.<sup>320</sup> Due to its size and notoriety, the NYPD is often under scrutiny from the public, the media, and the courts.

#### **A. Proper training of police officers is an obligation under international human rights law**

As agents of the State, police officers bear the burden to protect and ensure the rights to life, to freedom from torture and ill-treatment, and to freedom from discrimination, among others.<sup>321</sup> Violations of these rights are often attributable to inadequate police training.<sup>322</sup> To ensure that police officers are equipped to perform their jobs without putting themselves at risk or violating others’ rights, they must be adequately trained, and their training must fulfill minimum essential components required by international standards and domestic laws designed to safeguard human rights.<sup>323</sup> The Inter-American Court considers international standards to encompass international guidelines and principles,<sup>324</sup> including the Code of Conduct and the Basic Principles.

In the words of the Committee on the Elimination of Racial Discrimination, “[l]aw enforcement officials should receive intensive training to ensure that in the performance of their duties they respect as well as protect human dignity and maintain and uphold the human rights of all persons without distinction as to race, color or national or ethnic origin.”<sup>325</sup>

##### *i. International human rights law requires States to train police to give effect to the right to life*

The United States has an obligation to protect the right to life.<sup>326</sup> Death resulting from the excessive use

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<sup>318</sup> Federal Bureau of Investigations, *2014 Crime in the United States – Police Employment Data, Table 78 (New York)* (2014) [https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-78/table-78-by-state/Table\\_78\\_Full\\_time\\_Law\\_Enforcement\\_Employees\\_New\\_York\\_by\\_Cities\\_2014.xls](https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-78/table-78-by-state/Table_78_Full_time_Law_Enforcement_Employees_New_York_by_Cities_2014.xls).

<sup>319</sup> Brian A. Reeves, Bureau of Justice Statistics, *Census Of State And Local Law Enforcement Agencies*, 2008, Rep. No. NCJ 233982 (July 26, 2011) <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=2216> (“About half (49%) of all agencies employed fewer than 10 full-time officers. Nearly two-thirds (64%) of sworn personnel worked for agencies that employed 100 or more officers”).

<sup>320</sup> Peter Waldman, *Expert: U.S. Police Training in Use of Deadly Force Woefully Inadequate*, American Prospect (Aug. 27, 2014), <http://prospect.org/article/expert-us-police-training-use-deadly-force-woefully-inadequate> (interviewing Maria Haberfeld, an expert in police training at John Jay College of Criminal Justice).

<sup>321</sup> See *supra* section II: Legal Framework Regulating the Use of Force by Police.

<sup>322</sup> See *Rep. on Citizen Security and Human Rights*, *supra* note 105, ¶ 134..

<sup>323</sup> Domestic laws must also be in compliance with the international human rights law standards. For more discussion on the compliance of U.S. domestic law on the use of force with international human rights law standards, see the section of this submission regarding the legal standards.

<sup>324</sup> See *Nadege Dorzema et al. v. Dominican Republic, Merits, Reparations and Costs, Judgment, Inter-Am Ct. H.R. (Ser C) No. 251 ¶ 82* (Oct. 24, 2012) (holding that training on the human rights of migrants, the use of force, and the principle of non-discrimination for law enforcement personnel must be implemented); see also *Finca “La Exacta” v. Guatemala*, Case 11.382, Inter-Am. Comm’n H.R., Report No. 57/02, doc. 5 rev. 1, ¶ 40 (2002).

<sup>325</sup> Comm. on the Elimination of Racial Discrimination, *General Recommendation XIII on the training of law enforcement officials in the protection of human rights*, Rep. on Forty-second session, U.N. Doc. A/48/18, ¶ 2 (1993).

<sup>326</sup> American Declaration, *supra* note 9, art. I; ICCPR, *supra* note 11, art. 6; see also UN High Comm’r for Human Rights (UNHCR), *Human Rights and Law Enforcement: A Manual on Human Rights Training for the Police, Professional Training*

of force by police officers violates the right to life. Under both the American Declaration<sup>327</sup> and the ICCPR, the United States must *give effect* to the right to life.<sup>328</sup> The Inter-American Court has interpreted the ACHR “gives effect” and “right to life” clauses to impose on States both the obligation to eliminate norms and practices that violate the Convention (negative obligation) and the duty to enact norms and implement practices leading to the effective observance of said guarantees (positive obligation).<sup>329</sup> The positive obligation includes mandatory training.<sup>330</sup> Therefore, in order to give effect to the “right to life” under the Declaration and the ICCPR, the United States must ensure that its law enforcement officers, including police officers, are adequately trained.<sup>331</sup>

ii. *International human rights law requires States to train police to prevent CIDT*

International human rights law bans all forms of torture and cruel, inhuman or degrading treatment (“CIDT”) universally and without exception.<sup>332</sup> ICCPR Article 7 provides, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Article 1 of CAT defines torture as any act which consists of 1) the intentional infliction of severe pain and suffering (physical or mental), 2) involving a public official, either directly or indirectly, and 3) for a specific purpose (gaining a confession, obtaining information, punishing, intimidating, or discriminating).<sup>333</sup> Article 1 must be read in conjunction with Article 16 of CAT,<sup>334</sup> which elaborates on conduct that does not amount to torture but nonetheless constitutes CIDT.<sup>335</sup> While this Commission has emphasized the severity of harm in distinguishing CIDT and torture, the line between the two also turns on the perpetrator’s intent.<sup>336</sup> When police use “*non-excessive* force for a *lawful* purpose, then even the deliberate infliction of severe pain or suffering simply does not reach the threshold of CIDT.”<sup>337</sup>

While lawful use of force by police may not constitute torture or CIDT,<sup>338</sup> excessive and unlawful use of

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*Series No. 5*, U.N. Doc. HR/P/PT/5, ¶ 879, 88 (1997) (“[R]espect for human rights by police, in addition to be a legal and ethical imperative, is also a practical requirement for law enforcement.”).

<sup>327</sup> ACHR, *supra* note 59, arts. 2 & 4.

<sup>328</sup> ICCPR, *supra* note 11, art. 2. (“[w]here not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, ... to adopt such laws or other measures as may be necessary to *give effect* to the rights recognized in the present Covenant”) (emphasis added).

<sup>329</sup> *Nadege Dorzema v. Dominican Republic*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) ¶ 82 (Inter-Am. Ct. H.R. Oct. 24, 2012).

<sup>330</sup> *Id.* ¶ 81.

<sup>331</sup> *Montero Aranguren et al. (Detention Center of Catia) v. Venezuela*, Merits, Reparations and Costs, Judgment, Inter-Am Ct. H.R. (Ser C) No. 150 ¶ 147 (July 5, 2006).

<sup>332</sup> CAT, *supra* note 13, art. 1; ACHR, *supra* note 59, art. 5(2); IACPPT, *supra* note 63, art. 2.

<sup>333</sup> CAT, *supra* note 13, art. 1. “[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as...punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind..., when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”

<sup>334</sup> CAT, *supra* note 13, art. 16 (State parties are prevented from “other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1”)

<sup>335</sup> *Gayle v. Jamaica*, Case 12.418, Inter-Am. Comm’n H.R., Report No. 92/05, ¶ 62 (2005) (stating that the Commission and the European Court of Human Rights has found the essential criterion between CIDT and torture, “‘primarily results from the intensity of the suffering inflicted’”).

<sup>336</sup> Manfred Nowak & Elizabeth McArthur, *The distinction between torture and cruel, inhuman or degrading treatment*, *Torture* Vol. 16, No. 3, 148 (2006).

<sup>337</sup> *Id.* at 149 (emphasis added).

<sup>338</sup> CAT, *supra* note 13, art. 1 (“...[CIDT] does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”).

force by police officers could.<sup>339</sup> First, force may amount to torture if it is intentionally inflicted, causing severe pain or suffering, for the purposes of interrogation, punishment or intimidation.<sup>340</sup> Second, force may amount to torture if it is used in a discriminatory manner.<sup>341</sup> Moreover, even if not inflicted for an unlawful purpose, police use of force may constitute ill-treatment, in violation of both of CAT and Article 7 of the ICCPR, when it violates the proportionality principle.<sup>342</sup> Recent incidents throughout the United States, in which officers have used lethal force, disproportionately against Black Americans suspected of committing a crime may constitute CIDT.<sup>343</sup>

Under CAT, the United States has an obligation to train police forces to avoid CIDT.<sup>344</sup> Proper anti-CIDT training should be held regularly and should make police officers aware of all provisions of the Convention, including the criminal liability to which they are exposed, as well as relevant provisions of U.S. domestic law.<sup>345</sup> In appropriate anti-torture training, all police officers should get specific training as outlined by the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Istanbul Protocol”).<sup>346</sup> Trainings should emphasize the non-derogable nature of the prohibition on CIDT, even in times of civil unrest like uprisings.<sup>347</sup>

The Committee Against Torture has expressed concerns about anti-CIDT training on multiple occasions, and has emphasized that training must be evaluated for impact and effectiveness.<sup>348</sup> In its 2006 conclusions and recommendations to the United States on the review of its second periodic report, the Committee expressed concern “that information, education and training provided to the State party’s law enforcement or military personnel are not adequate and do not focus on all provisions of the Convention,

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<sup>339</sup> See, e.g., *Gayle v. Jamaica*, Case 12.418, Inter-Am. Comm’n H.R., Report No. 92/05, ¶ 63 (2005) (finding that the excessive use of force by police for the purpose of the criminal justice was CIDT); see also *Finca “La Exacta” v. Guatemala*, Case 11.382, Inter-Am. Comm’n H.R., Report No. 57/02, doc. 5 rev. 1, ¶ 41 (2002).

<sup>340</sup> CAT, *supra* note 13, art. 1 (“the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person...””) (emphasis added); see also IACPPT, *supra* note 63, art. 2 (“any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation...”).

<sup>341</sup> CAT, *supra* note 13, art. 1. (“the term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person ... for any reason based on discrimination of any kind.”) (emphasis added).

<sup>342</sup> See Manfred Nowak & Elizabeth McArthur, *The distinction between torture and cruel, inhuman or degrading treatment*, 16 *Torture* 147, 150 n.7 (2006).

<sup>343</sup> See e.g. Family of Michael Brown, HandsUpUnited, Organization for Black Struggle (OBS), & Missourians Organization for Reform and Empowerment *Written Statement on the Police Shooting of Michael Brown and Ensuing Police Violence Against Protesters in Ferguson, Missouri, to the Committee Against Torture*, at 7 (2014).  
[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCAT%2fCSS%2fUSA%2f18534&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCAT%2fCSS%2fUSA%2f18534&Lang=en) (linking the deaths of unarmed black men to the CAT).

<sup>344</sup> CAT, *supra* note 13, arts. 10.1 & 16.1 (mandating anti-torture training in art. 10.1 “[e]ach State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel,” and, by virtue of art. 16.1, training must include the prohibition against cruel, inhuman or degrading treatment).

<sup>345</sup> Manfred Nowak & Elizabeth McArthur, *Article 10 Training of Personnel*, *The United Nations Convention Against Torture: A Commentary*, 390 (Oxford: Oxford University Press, 2008).

<sup>346</sup> UNHRC, *Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. HR/P/PT/Rev.1, ¶ 10(f) (2004); see also Comm. Against Torture, *Concluding observations of the Committee against Torture: Syrian Arab Republic*, U.N. Doc. CAT/C/SYR/CO/1, ¶ 20 (May 25, 2010).

<sup>347</sup> See CAT, *supra* note 13, art. 2.2; see also Family of Michael Brown, HandsUpUnited, Organization for Black Struggle (OBS), & Missourians Organization for Reform and Empowerment *Written Statement on the Police Shooting of Michael Brown and Ensuing Police Violence Against Protesters in Ferguson, Missouri, to the Committee Against Torture*, at 7 (2014). at 7 (concluding the behavior of the police during protests in Ferguson should be considered cruel, inhuman and degrading treatment under Article 16).

<sup>348</sup> See, e.g., Comm. Against Torture, *Concluding observations of the Committee against Torture: Moldova*, U.N. Doc. CAT/C/MDA/CO/2, ¶ 17 (Mar. 29, 2010); see also, Comm. Against Torture, *Concluding observations of the Committee against Torture: Cambodia*, U.N. Doc. CAT/C/KHM/CO/2, ¶ 25 (Jan. 20, 2011); see also, Comm. Against Torture, *Concluding observations of the Committee against Torture: Kenya*, U.N. Doc. CAT/C/KEN/CO/1, ¶ 22 (Jan. 19, 2009).

in particular on the non-derogable nature of the prohibition of torture and the prevention of cruel, inhuman and degrading treatment or punishment.”<sup>349</sup> The Committee further specified its concerns about police brutality in the United States and excessive force against vulnerable groups, in particular racial minorities.<sup>350</sup>

In response to those concerns, the United States’ third through fifth periodic report to the CAT, submitted in 2014, states that training of law enforcement officers has been “stepped up” with a “view to combating prejudice that may lead to violence.”<sup>351</sup> The enhanced training efforts to which the United States refers, however, do not involve local police departments nor are they programs designed to reduce racial discrimination by police officers against Black Americans, specifically. Rather, in support of its statement, the United States cites initiatives within the Department of Justice and the Department of Homeland Security, designed to address treatment of Muslims and persons who are, or who are perceived to be, of Arab descent, and programs limited to federal agents.<sup>352</sup>

iii. *International human rights law requires States to train police to ensure non-discrimination*

International human rights law prohibits discrimination and demands equality before the law.<sup>353</sup> The United States has a binding obligation to eliminate racial discrimination.<sup>354</sup> Under ICERD, States must ensure that their public authorities act in conformity with this obligation,<sup>355</sup> including through equal treatment by police of all persons.<sup>356</sup> States should pursue this duty through training police on their obligations to respect and protect human dignity and the human rights of all, without regard to race.<sup>357</sup>

The Committee on the Elimination of Racial Discrimination has recommended member States “take all

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<sup>349</sup> Comm. Against Torture, *Conclusions and recommendations: U.S.*, U.N. Doc. CAT/C/USA/CO/2, ¶ 23 (July 25, 2006) (expressing concerns about the lack of transparency in anti-torture trainings and recommending regular evaluation of the training, including independent monitoring of their conduct.) at ¶ 23.

<sup>350</sup> *Id.* at ¶ 37.

<sup>351</sup> Comm. Against Torture, *Periodic Report of the U.S.*, U.N. Doc. CAT/C/USA/3-5, ¶¶ 3–5 (Aug. 12, 2013).

<sup>352</sup> See Human Rights Comm., *Fourth Periodic Report of the U.S.*, U.N. Doc. CCPR/C/USA/4, ¶ 661 (Dec. 30, 2011).

<sup>353</sup> UN Charter, art. 3.1; American Declaration, *supra* note 9, art. II; ACHR, *supra* note 59, arts. 1, 24; ICCPR, *supra* note 11, arts. 2(1), 26; ICERD, *supra* note 12, arts. 2, 5(a); see also *Nadege Dorzema et al. v. Dominican Republic*. Merits, Reparations and Costs. Judgment, Inter-Am Ct. H.R. (Ser C) No. 251 ¶ 224 (Oct. 24, 2012) (“there is an indissoluble connection between the obligation to respect and ensure human rights and the principle of equality and non-discrimination.”).

<sup>354</sup> ICERD, *supra* note 12, art. 2. (defining racial discrimination as, “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”); ICCPR, *supra* note 11, art. 26 (“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”); see also *Nadege Dorzema et al. v. Dominican Republic*. Merits, Reparations and Costs. Judgment, Inter-Am Ct. H.R. (Ser C) No. 251 ¶ 231 (Oct. 24, 2012) (relying on the ICERD definition of racial discrimination).

<sup>355</sup> ICERD, *supra* note 12, art. 2(a).

<sup>356</sup> ICERD, *supra* note 12, art. 5(a) (“In compliance with the fundamental obligations laid down in article 2 ... States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: (a) The right to equal treatment before the tribunals and all other organs administering justice”).

<sup>357</sup> See Comm. on the Elimination of Racial Discrimination, General Recommendation XXXI, on the prevention of racial discrimination in the administration and functioning of the criminal justice system, § I.B.5(b), Rep. on Sixty-sixth–Sixty-seventh sessions, U.N. Doc. A/60/18, at 101 (2005); see also Comm. on the Elimination of Racial Discrimination, *General Recommendation XIII on the training of law enforcement officials in the protection of human rights*, Rep. on Forty-second session, U.N. Doc. A/48/18, at ¶ 2 (1993) (“The fulfilment [sic] of these obligations very much depends upon national law enforcement officials who exercise police powers, especially the powers of detention or arrest, and upon whether they are properly informed about the obligations their State has entered into under the Convention.”).



the necessary measures to combat racially motivated violence by police officers firmly and effectively,” by enhancing police training programs and evaluating their effectiveness.<sup>358</sup> Beyond police violence, the Committee has expressed concern with discriminatory conduct and disparate impact of police tactics in general, like racial profiling.<sup>359</sup> The Human Rights Committee has similarly criticized persistent discriminatory practices by police, recommending that the United States “intensify its efforts to put an end to racial profiling used by federal as well as state law enforcement officials.”<sup>360</sup> In response to such concerns, CERD recommends States provide or intensify “meaningful and mandatory human rights training to police and other law enforcement officials, including in initial training and throughout their careers.”<sup>361</sup>

## **B. Police officers have a right to proper training<sup>362</sup>**

Inadequate training does not just jeopardize the rights of civilians; it also violates the rights of police officers. Although police officers perform a State function and thus have a duty to respect the rights of civilians, they do not thereby lose their status as rights-holders.<sup>363</sup> Like all individuals, officers possess the rights to life, health, and safe working conditions, among other rights. As private citizens and public employees, police officers have a right to be prepared for the tasks that they must perform. Under international human rights law,<sup>364</sup> police officers are entitled to adequate, continuous and updated training<sup>365</sup> as part of their right to be prepared to manage their professional responsibilities, including the psychological impacts of policing.<sup>366</sup> The IACHR has underscored the importance of providing police

<sup>358</sup> Comm. on the Elimination of Racial Discrimination, *Concluding observations on the sixteenth to nineteenth periodic reports of Belgium*, U.N. Doc. CERD/C/BEL/CO/16-19, ¶ 12(d) (Mar. 14, 2014).

<sup>359</sup> Comm. on the Elimination of Racial Discrimination, *Concluding observations on the combined seventh to ninth periodic reports of the United States of America*, U.N. Doc. CERD/C/USA/CO/7-9, ¶ 8 (Sep. 25, 2014).

<sup>360</sup> Human Rights Comm., *Concluding observations of the Human Rights Committee: United States of America*, U.N. Doc. CCPR/C/USA/CO/3/Rev.1, ¶ 24 (Dec. 18, 2006).

<sup>361</sup> Comm. on the Elimination of Racial Discrimination, *Concluding observations on the twentieth to the twenty-second periodic reports of the Russian Federation, adopted by the Committee at its eighty-second session (11 February–1 March 2013)*, U.N. Doc. CERD/C/RUS/CO/20-22, ¶ 14(b) (Apr. 17, 2013); *see also* Comm. on the Elimination of Racial Discrimination, *Concluding observations on the eighteenth to twentieth periodic reports of Austria, adopted by the Committee at its eighty-first session (6-13 August 2012)*, U.N. Doc. CERD/C/AUT/CO/18-20, ¶ 13(d) (Oct. 23, 2013); *see also* Comm. on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Portugal*, U.N. Doc. CERD/C/PRT/CO/12-14, ¶ 15 (Apr. 13, 2012).

<sup>362</sup> This discussion of the rights of police officers does *not* refer to the police officers’ “bills of rights” that several states have established in recent years to protect law enforcement officers against investigation and prosecution for actions taken in the course of duty. *See, e.g.*, Paul Butler, Opinion Pages, *The Police Officers Bill of Rights Creates a Double Standard*, N.Y. Times (June 27, 2015), <http://www.nytimes.com/roomfordebate/2015/04/29/baltimore-and-bolstering-a-police-officers-right-to-remain-silent/the-police-officers-bill-of-rights-creates-a-double-standard>; Adam May, *Maryland police lawyer: Officers' Bill of Rights is not wrong*, Aljazeera America (May 3, 2015 6:00PM ET), <http://america.aljazeera.com/watch/shows/america-tonight/articles/2015/5/3/maryland-police-lawyer-officers-bill-of-rights-is-not-wrong.html>.

<sup>363</sup> United Nations Office of the High Commissioner for Human Rights, Professional Training Series No. 5/Add.3, *Human Rights Standards and Practice for the Police, Expanded Pocket Book on Human Rights for the Police* 21 (2004), <http://www.ohchr.org/Documents/Publications/training5Add3en.pdf>.

<sup>364</sup> American Declaration, *supra* note 9, art. xiv (“Every person has the right to work, under proper conditions, and to follow his vocation freely, insofar as existing conditions of employment permit.”); *cf.* ICERD, *supra* note 12, art. 5(e)(i) (States parties must guarantee non-discrimination in the enjoyment of “[t]he rights ... to just and favourable conditions of work...”).

<sup>365</sup> *See Rep. on Citizen Security and Human Rights*, *supra* note 105, ¶ 92 (describing the entitlement to “constant training that enables the police officer to perform his or her functions” (quoting Domínguez Vial, Andrés Policía y Derechos Humanos, Policía de Investigaciones de Chile/IIDH, Santiago, 1996)). The Report specifies: “The men and women who serve on the police force must receive ongoing instruction and practical training in human rights, and thorough training and instruction in the area of tactical danger assessment, so that they are able to determine, in every situation, whether the use of force, including lethal force, is proportionate, necessary and lawful.” *Id.*

<sup>366</sup> *See id.*; *see also Rep. on the Situation of Human Rights in Mexico*, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.100, doc. 7 rev. 1, ¶ 391 (Sept. 24, 1998) [hereinafter *Rep. on the Situation of Human Rights in Mexico*] (commenting on the conditions of employment of the police).

with good working conditions, including proper training, highlighting the adverse impact that poor conditions can have on police conduct.<sup>367</sup> Thus, in addition to being a duty owed to the civilians whom police officers are charged with protecting, training also should be considered an obligation owed to police officers. Those officers are entitled to the tools and psychological preparation that will enable them to respond safely and appropriately to situations in which their own safety is at risk and to handle the “the constant stress of the job.”<sup>368</sup>

The Final Report of the President’s Task Force on 21<sup>st</sup> Century Policing, a government-initiated multipartite body, underscored the importance of adequate training and respect for officers’ rights as an essential part of efforts to limit police violence and protect public safety. In the words of the Task Force: “The ‘bulletproof cop’ does not exist. The officers who protect us must also be protected—against incapacitating physical, mental, and emotional health problems as well as against the hazards of their job. Their wellness and safety are crucial for them, their colleagues, and their agencies, as well as the well-being of the communities they serve.”<sup>369</sup> Some groups representing law enforcement officers, such as the National Association of Police Organizations, have echoed the call for improvements in officer training, with an emphasis on training to identify and respond to mental health issues in the communities they serve.<sup>370</sup>

### **C. To comply with international human rights law, police training must clearly define what constitutes “force” and the parameters of its use**

Trainings on the use of force must address the principle of legality, meaning that the permissible purposes for which police may use force must be defined in law.<sup>371</sup> This Commission has stressed the vital role that police play in society.<sup>372</sup> As stated by this Commission, “an honest police force that is professional in its approach, well trained and efficient is essential for gaining the confidence of citizens.”<sup>373</sup> Yet society has given police the power to use force only to achieve legitimate objectives. There must be clear understandings both of what constitutes “force” and of what constitutes “legitimate objectives” of its use, so that both the public and the police know what is expected from law enforcement.<sup>374</sup> Accordingly,

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<sup>367</sup> See *Report on the Situation of Human Rights in Mexico*, *supra* note 366, ¶¶ 391–92. The Report highlights that “[t]he physical conditions under which [police officers] work are also not good, and some other aspects of their working conditions are deplorable. Salaries are also very low [...] The lack of adequate physical resources and the low salaries result in glaring inefficiencies and create incentives for corruption to take place in the day-to-day tasks performed by the agents and to become the rule rather than the exception.” *Id.* at ¶ 391.

<sup>368</sup> *Id.*, ¶¶ 391–92 (commenting on the conditions of employment of the police and the need for better training).

<sup>369</sup> Task Force Report, [http://www.cops.usdoj.gov/pdf/taskforce/taskforce\\_finalreport.pdf](http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf), at 62. The Report clarifies that “a large proportion of officer injuries and deaths are not the result of interaction with criminal offenders but the outcome of poor physical health due to poor nutrition, lack of exercise, sleep deprivation, and substance abuse,” underscoring the need for better training and care for officers. *Id.* at 61. Moreover, the Report states, these fatalities include vehicular accidents for exhaustion and suicide: “Mortality Surveillance found that police died from suicide 2.4 times as often as from homicides. And though depression resulting from traumatic experiences is often the cause, routine work and life stressors—serving hostile communities, working long shifts, lack of family or departmental support—are frequent motivators too.” *Id.*

<sup>370</sup> National Association of Police Organizations, *Representing America’s Finest, Legislative Priorities 114th Congress*, p. 27. [http://www.napo.org/files/8614/2652/0101/Legislative\\_Priorities\\_Booklet\\_-\\_114th\\_Congress\\_-\\_Website.pdf](http://www.napo.org/files/8614/2652/0101/Legislative_Priorities_Booklet_-_114th_Congress_-_Website.pdf).

<sup>371</sup> See the section “Legal Framework Regulating the Use of Force by Police”; U.N. Basic Principles, *supra* note 33, princs. 1, 11(a); see also *Dorzema v. Dominican Republic*, Merits, Reparation, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 251, ¶ 85 (Oct. 24, 2012) (“Legality: the use of force must be addressed at achieving a legitimate goal... The law and training should establish how to act in [a] situation”).

<sup>372</sup> See, e.g., Rep. on the Situation of Human Rights in Venezuela, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.118, doc. 4 rev. 2, (2003).

<sup>373</sup> *Rep. on the Situation of Human Rights in Mexico*, *supra* note 366, ¶ 392.

<sup>374</sup> See UNHCR, *Rights and Law Enforcement: A Trainer’s Guide on Human Rights for the Police*, U.N. Doc. HR/P/PT/5/Add. 2, at 17 (2002); see also *Rep. on the Situation of Human Rights in Mexico*, *supra* note 366, ¶ 390 (“The lack of proper training means that not only do they not have a clear idea of the importance of the law but also makes it difficult for them to operate

police training must ensure that officers understand what constitutes force and when to use it.<sup>375</sup>

Studies of police use of force in the United States, however, reveal no single, accepted definition of force among the researchers, analysts, or the police.<sup>376</sup> A 2012 National Institute of Justice study found “enormous amount of variation in existence when it comes to force policy,” with “[m]any different agencies are using many different approaches.”<sup>377</sup> A survey of the use of force policies of police departments in 17 major cities showed considerable variation in their contents.<sup>378</sup> A 2015 report by Amnesty International, *Deadly Force: Police Use of Lethal Force in the United States*, finds that all 50 states and Washington, D.C., lack adequate definitions of or standards regarding the use of lethal force to comply with international human rights law.<sup>379</sup> Moreover, as noted above in section II, nine states and Washington, D.C., “currently have no laws on use of lethal force by law enforcement officers.”<sup>380</sup> The gaps and shortcomings in existing laws regulating the use of force make it less likely that police departments adequately train their officers on the use of force.

There are not only variations in the ways that force is define across states and agencies, but also indications that some individual police departments fail to properly define force at all in their own internal guidelines, central to police training. For example, on October 1, 2015, the Office of the Inspector General (“OIG”) of the NYPD released a report, *Police Use of Force in New York City: Findings and Recommendation on NYPD’s Policies and Practices* (“NYPD Report”), which identified failures of NYPD’s police training program and included recommendations regarding the proper training of NYPD officers in the use of force.<sup>381</sup> It found that the NYPD Patrol Guide does not contain definitions of “force,” “excessive force,” and “deadly physical force.”<sup>382</sup> The absence of clear definitions gives officers “few clear-cut rules when determining whether their actions constitute force.”<sup>383</sup> Based on the findings set forth in its report, the Office of the Inspector General of the NYPD recommended that the NYPD’s use of force policy be updated to clarify each of these three missing terms.<sup>384</sup>

Moreover, to satisfy international human rights law standards, police trainings should clearly explain how to *prioritize* the right life, as required under binding treaty obligations of the United States. For example, two LAPD officers fatally shot Ezell Ford, a mentally disabled Black man, twice in the back. His killing was deemed justified, but the Police Commission, a civilian panel that oversees police actions in Los Angeles, noted the tactics were flawed.<sup>385</sup> In the wake of the killing, the LAPD instituted a five-hour-

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within its framework.”); *see also* Makaratzis v. Greece, 41 Eur. Ct. H.R. 49, ¶ 5 (2004) (stating that “[p]olice officers should not be left in a vacuum when performing their duties ... a legal and administrative framework should define the limited circumstances in which law-enforcement officials may use force and firearms.”).

<sup>375</sup> U.N. Basic Principles, *supra* note 33, princ.19.

<sup>376</sup> *See Use of Force*, Community Oriented Policing Solutions (COPS), U.S. Dep’t of Justice <http://www.cops.usdoj.gov/default.asp?Item=1374> (last visited Oct. 9, 2015).

<sup>377</sup> William Terrill, Eugene A. Paoline, & Jason Ingram, *Assessing Police Use of Force Policy and Outcomes*, at 27, 33 (2011) <http://www.nij.gov/publications/pages/publication-detail.aspx?ncjnumber=237794>.

<sup>378</sup> *See Use of Force Policy Review*, <http://useofforceproject.org/#review> (last visited Jan. 25, 2016).

<sup>379</sup> Amnesty Int’l, *United States of America Submission to The United Nations Committee Against Torture*, U.N. Doc. AMR 51/049/2014, at 31 (Oct. 2014) [http://www.amnestyusa.org/sites/default/files/amr\\_510492014.pdf](http://www.amnestyusa.org/sites/default/files/amr_510492014.pdf).

<sup>380</sup> *Id.*

<sup>381</sup> Mark G. Peters & Philip K. Eure, Office of the Inspector Gen., *Police Use of Force in New York City: Findings and Recommendations on NYPD’s Policies and Practices* 3 (2015), [http://www.nyc.gov/html/oignypd/assets/downloads/pdf/oig\\_nypd\\_use\\_of\\_force\\_report\\_-\\_oct\\_1\\_2015.pdf](http://www.nyc.gov/html/oignypd/assets/downloads/pdf/oig_nypd_use_of_force_report_-_oct_1_2015.pdf) [hereinafter *Findings & Recommendations*].

<sup>382</sup> *Id.*

<sup>383</sup> *Id.*

<sup>384</sup> *Id.* at 58.

<sup>385</sup> Kate Mather & Joel Rubin, *L.A. Police Commission faults officers in Ezell Ford shooting*, L.A. Times (Oct. 22, 2015), <http://www.latimes.com/local/lanow/la-me-ln-ezell-ford-lapd-police-commission-decision-20150609-story.html>.

long training session for all officers on the “preservation of life.”<sup>386</sup> The LAPD police chief described the purpose of the course: “[W]e’ve always said that preservation of life is the number one thing in policing and we want to make sure that everybody understands that.”<sup>387</sup> The new training attempts to shift the mentality of the officers to “one that emphasizes protection over suppression, patience instead of zero tolerance.”<sup>388</sup> According to an officer who went through the training, however, it did not introduce anything new: “It’s a refresher, it’s a reminder of everything we’ve been trained to do already.”<sup>389</sup> The LAPD manual already enshrines the department’s mission to protect and preserve life.<sup>390</sup> To respond to the requirements of international human rights law and prevent recurrence of incidents such as Ford’s death, trainings must do more than reiterate principles. In some cases, they may need to incorporate a revised use of force policy. In all cases, trainings must ensure that officers understand what types of force are permissible, in what circumstances, and are familiar with tactics and tools that help preserve life, such as de-escalation measures and alternatives to deadly force, which are discussed further below.

Finally, in addition to providing pre-service training, States must continue to perform in-service trainings throughout officers’ careers. Departments should continually train their officers and their reserve personnel on new methods in light of new data, research, and developments in best practices.<sup>391</sup> Recent incidents involving the use of deadly force by individuals who were not active-duty officers have underscored the importance of continual training. For example, a reserve agent, Robert Bates, shot and killed Eric Harris, an unarmed Black man, in Tulsa, Oklahoma on April 14, 2015, claiming he mistakenly grabbed his gun rather than his Taser.<sup>392</sup> The incident prompted the LAPD to investigate their reserve officer training.<sup>393</sup> The report produced subsequently revealed that reserve officers were not required to receive re-training and did not re-test frequently because they were assumed to be qualified to use firearms based on their years of service.<sup>394</sup> In order to comply with international human rights law standards, police departments should train continually<sup>395</sup> and afford “every opportunity to attend refresher courses.”<sup>396</sup>

#### **D. To comply with international human rights law, police training must address de-escalation.**

Under international human rights law, the use of force by police officers must be necessary to achieve a

<sup>386</sup> John Cádiz Klemack, *LAPD Focuses on Use of Force in New Training Series*, NBC Los Angeles (July 13, 2015), <http://www.nbclosangeles.com/news/local/LAPD-Focuses-on-Use-of-Force-in-New-Training-Series-314801891.html>; see also Hillary Jackson, *LAPD holds officer training to focus on ‘preservation of life’*, Mynews1a.com (July 13, 2015), <http://mynews1a.com/crime/2015/07/13/lapd-holds-officer-training-to-focus-on-preservation-of-life/>

<sup>387</sup> Klemack, *supra* note 386.

<sup>388</sup> Kate Mather, *LAPD urges officers to be community guardians, not warriors on crime*, L.A. Times (Aug. 21, 2015), <http://www.latimes.com/local/crime/la-me-warrior-guardians-20150821-story.html>.

<sup>389</sup> Klemack, *supra* note 386.

<sup>390</sup> LAPD Manual, Vol. 1, § 115 [http://www.lapdonline.org/lapd\\_manual/](http://www.lapdonline.org/lapd_manual/) (last visited Oct. 10, 2015).

<sup>391</sup> U.N. Basic Principles, *supra* note 33, princ. 18; see also Gorovenky and Bugara v. Ukraine, Eur. Ct. H.R., ¶ 39 (2012) (finding that in addition to training, States must also scrutinize the selection of officers before arming them).

<sup>392</sup> Lindsey Bever & Sarah Larimer, *Tulsa reserve deputy who fatally mistook gun for a Taser turns himself in*, Wash. Post (Apr. 14, 2015) <http://www.washingtonpost.com/news/morning-mix/wp/2015/04/13/the-73-year-old-reserve-cop-who-mistook-his-gun-for-a-taser/>.

<sup>393</sup> Holly Yan, Ed Lavandra & Catherine E. Shoichet, Report: *Tulsa sheriff’s employees were told to forge Bates’ training records*, CNN (Apr. 17, 2015 2:48 AM) <http://www.cnn.com/2015/04/16/us/tulsa-shooting-robert-bates-training/>; Kate Mather, *LAPD watchdog raises concerns over training and oversight of reserve officers*, L.A. Times (Sep. 11, 2015 3:52 PM), <http://www.latimes.com/local/lanow/la-me-ln-lapd-reserves-20150911-story.html>

<sup>394</sup> Alexander A. Bustamante, *Review of Department’s Reserve Officer Program*, Office of the Inspector General, at 5 (Sep. 15, 2015) <http://documents.latimes.com/los-angeles-police-commission-review-departments-reserve-police-officer-program/> (last visited Sep. 28 7:29 PM).

<sup>395</sup> *Rep. on Citizen Security and Human Rights*, *supra* note 105, ¶¶ 80, 92.

<sup>396</sup> *Id.* at ¶ 94.

legitimate law enforcement objective, and in the case of lethal force, strictly necessary as a last resort to prevent death or serious injury.<sup>397</sup> Whether such necessity exists depends on whether there are other means available, aside from force, to protect life and the safety of others.<sup>398</sup> It follows that adherence to the principle of necessity under international law requires training officers on de-escalation tactics: “the strategic slowing down of an incident in a manner that allows officers more time, distance, space and tactical flexibility during dynamic situations on the street.”<sup>399</sup> If officers cannot de-escalate a situation to avoid using force, they must be able to demonstrate that the situation met the principle of necessity.

There is no comprehensive data available on the numbers of police departments in the United States that conduct de-escalation training for officers or otherwise require exhaustion of non-violent or less-than-lethal force. Studies of individual departments, however, have revealed inadequate attention to de-escalation, and a corresponding failure by officers to use non-violent alternatives to force. The Department of Justice Report on Ferguson, Missouri found that officers had not been trained to use de-escalation techniques.<sup>400</sup> The NYPD Report, discussed above, found not only that NYPD officers rarely use de-escalation tactics, but also that they have in fact escalated situations.<sup>401</sup> The NYPD Report recommends that the NYPD Patrol Guide require “officers to de-escalate all encounters where appropriate.”<sup>402</sup>

In the aftermath of the killing of Michael Brown by a police officer in Ferguson, Missouri, many Missouri cities have reportedly been reexamining their use of force policies. These reforms represent important steps toward bringing police training practices in line with international human rights law. In 2015, the Kansas City Police Department (“KCPD”) and the St. Louis Police Department (“SLPD”) have been instituting a policy called “tactical disengagement” or “tactical retreat.” The new policy aims to change the way police approach citizen interactions: “Instead of responding to a threatening suspect, officers are being trained to create a protective distance up to 30 feet, communicate with the suspect and think about the proper way to proceed; for instance, calling for backup.”<sup>403</sup> The police chief of the KCPD posted on his blog: “[T]hroughout the history of law enforcement, we’ve had the idea of ‘never back down, never retreat.’”<sup>404</sup> According to the chief, the purpose of the training changes is to allow officers to overcome

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<sup>397</sup> U.N. Basic Principles, *supra* note 33, princ. 9 (“In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.”); *see also* Dorzema v. Dominican Republic, Merits, Reparation, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 251, ¶ 85 (Oct. 24, 2012) (“Absolute necessity: it must be verified whether other means are available to protect the life and safety of the person or situation that it is sought to protect”).

<sup>398</sup> U.N. Basic Principles, *supra* note 33, princ. 4 (Police “may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.”).

<sup>399</sup> Office of Public Affairs, *Justice Department Applauds Adoption of Police Department-Wide Tactical De-escalation Training Program in Seattle*, U.S. Dep’t of Justice (Apr. 16, 2015), <http://www.justice.gov/opa/pr/justice-department-applauds-adoption-police-department-wide-tactical-de-escalation-training>; *see also* Christopher Hoffman, *Former New Haven Officer Gives Police Training In De-Escalation*, The Courant (Oct. 21, 2015).

<http://www.courant.com/news/connecticut/hc-wethersfield-police-de-escalation-training-20150813-story.html> (describing what de-escalation mechanisms may entail, including enhanced communication and observation skills on the part of officers).

<sup>400</sup> U.S. Dep’t of Justice, *Investigation of the Ferguson Police Department* (Mar. 4, 2015)

[http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf).

<sup>401</sup> Findings & Recommendations, *supra* note 381, at 28–29, 33.

<sup>402</sup> *Id.* at 58.

<sup>403</sup> Peggy Lowe & Sam Zeff, *Kansas City Police Take New Approach Toward Suspects*, (Radio Program Transcript), KCUR 89.3 <http://kcur.org/post/kansas-city-police-take-new-approach-toward-suspects>; Christine Byers, *After Ferguson, police consider ‘tactical retreat’ instead of force in certain cases*, St. Louis Post-Dispatch (Jan. 24, 2015), [http://www.stltoday.com/news/local/crime-and-courts/after-ferguson-police-consider-tactical-retreat-instead-of-force-in/article\\_7fa34fed-9770-5860-ad10-4358b4523b76.html](http://www.stltoday.com/news/local/crime-and-courts/after-ferguson-police-consider-tactical-retreat-instead-of-force-in/article_7fa34fed-9770-5860-ad10-4358b4523b76.html).

<sup>404</sup> Darryl Forté, *We’re making changes to enhance community trust and officers’ well-being*, KCPD Chief’s Blog, (Apr. 29, 2015, 8:00 PM) [http://kcpdchief.blogspot.com/2015\\_04\\_01\\_archive.html](http://kcpdchief.blogspot.com/2015_04_01_archive.html).

the fear of being considered a “coward,” by requiring them to retreat.<sup>405</sup>

Moreover, some police officers recognize the need to make reforms in de-escalation training. For example, a former member of the New Haven police force emphasized the need to address de-escalation techniques in training: “We certainly have enough training in how to escalate .... We need more training in how to de-escalate.”<sup>406</sup>

Tactical disengagement and de-escalation are only some of the measures that help implement or ensure adherence to the requirement of absolute necessity. An officer may tactically disengage and de-escalate but eventually take someone’s life, and still not satisfy the requirements of absolute necessity under international human rights law. A proper training in absolute necessity should include a variety of tactics that “lead to peaceful settlements” and “limit[] the use of force,” to resolve conflicts with the minimum amount of violence.<sup>407</sup> As this Commission has previously stated, training of police must return to the central concept of peace: “The State must be ready and willing to deal with conflicts through peaceful means, as this is an axiom of citizen security which holds that differences arise between citizens who are to be protected, not between enemies one has to fight.”<sup>408</sup>

Additionally, prospective police officers must demonstrate the requisite capacity to employ de-escalation tactics. In its Occupational Outlook Handbook, the Bureau of Labor Statistics lists many typical prerequisites for entering a police academy.<sup>409</sup> The Handbook highlights important qualities for officers to possess in order to work well with communities.<sup>410</sup> While the Handbook contains typical background qualifications for the police and may not reflect the actual requirements for each individual police academy and department, it is possible to comment on what appears to be lacking. It is unclear, for example, whether police candidates are required to undergo a psychological examination to assess their aptitude to handle emotionally demanding situations. Moreover, there seems to be little emphasis on prospective officers’ prior experience with community work, activities involving vulnerable groups, or training in mental health issues or anti-bias practices.

#### **E. To comply with international human rights law, police training must instruct officers to exhaust alternatives to force and apply the principle of proportionality**

The international human rights law principle of proportionality requires police officers to use only the type and intensity of force, if force is justified at all, that is necessary to achieve a lawful purpose, and to

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<sup>405</sup> Kate Mather, *LAPD urges officers to be community guardians, not warriors on crime*, L.A. Times (Aug. 21, 2015) <http://www.latimes.com/local/crime/la-me-warrior-guardians-20150821-story.html>.

<sup>406</sup> Christopher Hoffman, *Former New Haven Officer Gives Police Training In De-Escalation*, The Courant (Oct. 21, 2015), <http://www.courant.com/news/connecticut/hc-wethersfield-police-de-escalation-training-20150813-story.html>. The former officer is running training courses on these issues to teach “how officers can de-escalate tense situations and avoid shootings.”

*Id.*

<sup>407</sup> U.N. Basic Principles, *supra* note 33, princ. 20; *see also* Miguel Castro-Castro Prison v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C), ¶ 410(h)(vii) (2006) (recommending that the state “develop educational policies and plans destined to training police ... on the peaceful solution of conflicts”).

<sup>408</sup> Rep. on Citizen Security and Human Rights, *supra* note 105, ¶ 105.

<sup>409</sup> Bureau of Labor Statistics, U.S. Department of Labor, *Police and Detectives, Occupational Outlook Handbook 2014-15 ed.* (Jan. 8, 2014) <http://www.bls.gov/ooh/protective-service/police-and-detectives.htm> (The requisites for a police officer include 21-years-old, a high school level of education (although some academies include some college coursework or degree), and U.S. citizenship. Applicants must pass physical exams of vision, hearing, strength, and agility, as well as written exams. Previous work or military experience is often seen as a plus. Finally, candidates typically go through a series of interviews and may be asked to take lie detector and drug tests, while a felony conviction may disqualify a candidate. The BLS establishes that requirements for federal law enforcement agencies, such as the FBI and Secret Service, are generally stricter.)

<sup>410</sup> *Id.* (including communication skills, empathy, good judgment, leadership skills, perceptiveness, physical stamina, and physical strength).

use lethal force only as a last resort to prevent loss of life or serious injury.<sup>411</sup> To ensure that officers adhere to the principle of proportionality, they must be trained in the use of alternatives to force and tools and tactics involving less than lethal force.

Today, Tasers, also known as conduct energy devices and electrical discharge weapons, are among the most common alternatives to firearms. Their use and overuse is a growing concern.<sup>412</sup> Tasers are considered “less lethal” devices than guns,<sup>413</sup> but they can lead to death and serious injuries. In its report to the Committee Against Torture regarding the United States, Amnesty International listed Tasers as the cause of 550 deaths since 2001.<sup>414</sup> They have been at the center of recent high profile cases.<sup>415</sup> Nonetheless, more than 18,000 state and local law enforcement agencies have purchased the devices, which are used an average of 900 times a day.<sup>416</sup>

Because Tasers can cause death, training on their use should adhere to the same international human rights law standards as training on the use of firearms.<sup>417</sup> The increased public attention to Tasers has prompted some police departments to provide more information on the training they provide in the use of Tasers, but the U.N. Committee Against Torture has emphasized the need for more stringent trainings.<sup>418</sup>

Evidence from the NYPD suggests that trainings regarding the use of Tasers continue to fall short of international standards. The NYPD Patrol Guide establishes that Tasers can be used “against persons who are actively physically resisting, exhibiting active physical aggression, or to prevent individuals from physically injuring themselves or other person(s) actually present.”<sup>419</sup> The only limitation on the use of

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<sup>411</sup> See the section “Legal Framework Regulating the Use of Force by Police”; U.N. Basic Principles, *supra* note 33, princs. 5, 9; see *Dorzema v. Dominican Republic*, Merits, Reparation, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 251, ¶ 85 (Oct. 24, 2012) (“Proportionality: The level of force used must be in keeping with the level of resistance offered. Thus, agents must apply the criteria of differentiated and progressive use of force, determining the degree of cooperation, resistance or violence of the subject against whom the intervention is intended and, on this basis, employ negotiating tactics, control or use of force, as required.”).

<sup>412</sup> Comm. Against Torture, *Periodic Report of the U.S.*, U.N. Doc. CAT/C/USA/3-5, ¶¶ 3–5 (Aug. 12, 2013), at ¶ 27.

<sup>413</sup> See, e.g., 2014 NYPD Patrol Guide, *Use of Force*, [Proc. No.] 212-17 (Effective Aug. 1, 2013) as reprinted in *App’x B*, Findings & Recommendations, *supra* note 381

<sup>414</sup> Amnesty Int’l, *United States of America Submission to The United Nations Committee Against Torture*, U.N. Doc. AMR 51/049/2014, at 31 (Oct. 2014) [http://www.amnestyusa.org/sites/default/files/amr\\_510492014.pdf](http://www.amnestyusa.org/sites/default/files/amr_510492014.pdf).

<sup>415</sup> See, e.g., Benjamin Miller, *Man Dies After Being Shocked With a Taser by a Hartford Police Officer*, N.Y. Times (Aug. 8, 2015) <http://www.nytimes.com/2015/08/09/nyregion/man-dies-after-being-shocked-with-a-taser-by-a-hartford-police-officer.html> (sharing the story of Matthew Russo, 26, died from a CED while police tried to subdue him); see also Tom Jackman & Justin Jovenal, *Fairfax jail inmate in Taser death was shackled*, Wash. Post (Apr. 11, 2015) [https://www.washingtonpost.com/local/crime/fairfax-jail-inmate-who-died-was-fully-restrained-when-tasered-four-times/2015/04/11/ede0957c-decd-11e4-be40-566e2653afe5\\_story.html](https://www.washingtonpost.com/local/crime/fairfax-jail-inmate-who-died-was-fully-restrained-when-tasered-four-times/2015/04/11/ede0957c-decd-11e4-be40-566e2653afe5_story.html) (reporting the story of Natasha McKenna, 37, a mentally ill woman who was killed in Fairfax, Virginia who was subjected to a CED while restrained); see also Bill Draper, *Teen critical from stun gun; FBI investigates case*, AP Big Story, (Sep. 17, 2014) <http://bigstory.ap.org/article/fbi-investigates-missouri-officers-stun-gun-use> (discussing the story of Bryce Masters, 17, going into a coma from a CED).

<sup>416</sup> See, e.g., Alan Blinder, Manny Fernandez & Benjamin Mueller, *Use of Tasers Is Scrutinized After Walter Scott Shooting*, N.Y. Times (May 31, 2015) <http://www.nytimes.com/2015/06/01/us/use-of-tasers-is-scrutinized-after-walter-scott-shooting.html>

<sup>417</sup> Human Rights Comm., *Concluding observations on the fourth periodic report of the United States of America*, U.N. Doc. CCPR/C/USA/CO/4, ¶ 11 (Apr. 23, 2014) at ¶ 30 (“The State party should ensure that EMDs and other restraint devices are only used in situations where greater or lethal force would otherwise have been justified.”).

<sup>418</sup> Comm. Against Torture, *Periodic Report of the U.S.*, U.N. Doc. CAT/C/USA/3-5, ¶¶ 3–5 (Aug. 12, 2013), at para 27; see also Rep. on the Human Rights of Persons Deprived of Liberty in The Americas, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II. doc. 64, ¶ 240 (Dec. 31, 2011) (“the Commission stresses that even non-lethal or incapacitating weapons such as rubber bullets or Tasers must be used in accordance with the Principles on necessity and proportionality, after first attempting to use other dissuasive methods.”).

<sup>419</sup> 2014 NYPD Patrol Guide, *Use of Force*, [Proc. No.] 212-17 (Effective Aug. 1, 2013) as reprinted in *App’x B*, Findings & Recommendations, *supra* note 381, at 212-117; see also Use of Force Project, <http://static1.squarespace.com/static/56996151cbced68b170389f4/t/569adbabbfe87383e5db6b3d/1452989363524/NYC+Use+of+Force.pdf>

Tasers is that “it is strictly prohibited to use [them] on persons as a form of coercion or punishment and on persons who passively resist.”<sup>420</sup> This limiting language is consistent with CAT, which prohibits the infliction of severe physical or mental pain or suffering for the purpose of punishment or coercion.<sup>421</sup> Given that the use of Tasers can lead to death, however, the circumstances in which the Patrol Guide permits their use are not sufficiently limited to ensure adherence to the proportionality principle under international human rights law.

Despite these shortcomings in the Patrol Guide, the NYPD Report does not recommend improved training on the use of Tasers. On the contrary, the NYPD announced in late 2015 that it will be rolling out 900 new Tasers, without any new or additional special training, for the police officers.<sup>422</sup>

Officers must not only have adequate training in the use of particular types of law enforcement tools and weapons, such as Tasers. To ensure respect for human rights, they must also have the appropriate mental character to avoid and prevent disproportionate use of force.<sup>423</sup> To that end, trainings must address the psychological nature of police work, including dispelling misperceptions and providing counseling.<sup>424</sup> The risk that officers will shoot out of fear presents a proportionality problem under international human rights law. As such, training programs must not only instruct officers on the elements of proportionality, but must proactively counteract the culture of fear prevalent among some officers, which present the risk of disproportionate responses.<sup>425</sup>

Reports suggest that many police officers perceive themselves to be under attack and fear a “war on cops,” despite little evidence to substantiate any heightened threat to police officers.<sup>426</sup> Police fatalities are at the lowest level in 20 years.<sup>427</sup> Officers are assaulted in 0.09% of all encounters with civilians, injured in 0.02% and killed in 0.00008% of such encounters.<sup>428</sup> A recent police trainee explains that the instructors at his rural police academy preached about “officers dying left and right.”<sup>429</sup> Training officers to believe that “every encounter, every individual is a potential threat”<sup>430</sup> may increase rather than decrease dangers for officers on the job, by fueling a mindset that they are under attack. This fear, coupled with the fact that many “officers are trained to shoot before a threat is fully realized, to not wait until the last minute because the last minute may be too late,”<sup>431</sup> could contribute to heightened incidence of police violence. Moreover, the perception that there is a “war on cops” increases the risk that not all individuals will receive equal treatment. From the perspective of many officers, Black men pose the

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<sup>420</sup> Findings & Recommendations, *supra* note 381, at 212-117

<sup>421</sup> CAT, *supra* note 13, art. 1.

<sup>422</sup> Al Baker & J. David Goodman, *New York Police Will Document Virtually All Instances of Force*, N.Y. Times (Oct. 1, 2015) <http://www.nytimes.com/2015/10/01/nyregion/new-york-police-will-document-virtually-all-instances-of-force.html>

<sup>423</sup> U.N. Basic Principles, *supra* note 33, princ. 18; *see also* UNHCR, *Rights and Law Enforcement: A Trainer’s Guide on Human Rights for the Police*, U.N. Doc. HR/P/PT/5/Add. 2, at 9 (2002) (noting that training should affect officers attitudes).

<sup>424</sup> U.N. Basic Principles, *supra* note 33, princ. 21.

<sup>425</sup> *Id.*, princ. 20.

<sup>426</sup> Radley Balko, *Once again: There is no ‘war on cops.’ And those who claim otherwise are playing a dangerous game*, Wash. Post (Sep. 10, 2015) <https://www.washingtonpost.com/news/the-watch/wp/2015/09/10/once-again-there-is-no-war-on-cops-and-those-who-claim-otherwise-are-playing-a-dangerous-game/> (showing the growth of the phrase ‘War on Cops’ in both Fox News sources, the Republican debates, and online commentary).

<sup>427</sup> *Id.*

<sup>428</sup> Seth Stoughton, *How Police Training Contributes to Avoidable Deaths*, Atlantic (Dec. 12, 2014) <http://www.theatlantic.com/national/archive/2014/12/police-gun-shooting-training-ferguson/383681/>

<sup>429</sup> Clayton Jenkins, *My Police Academy Teaches the ‘War on Cops’ Myth*, Daily Beast (Sep. 14, 2015), <http://www.thedailybeast.com/articles/2015/09/14/how-im-taught-about-the-war-on-cops-at-my-police-academy.html>.

<sup>430</sup> Stoughton, *supra* note 428.

<sup>431</sup> *Id.*



greatest risk to officer safety, and so officers will react more aggressively when confronting Black men.<sup>432</sup>

In preparing its report on the militarization of policing in the United States, the ACLU requested that hundreds of law enforcement agencies submit copies of SWAT training materials. One response from the Farmington, Missouri Special Response Team summarizes a presentation given at a conference of the International Association of Law Enforcement Firearms Instructors, stating “[b]y law, you the police officer are our Delta Force”; setting forth “‘4 Ds’ for Thwarting Terrorists’ Plans to Massacre Our School Children,” and telling officers: “Build the right mind-set in your troops.”<sup>433</sup> In another example in Cary, North Carolina, the SWAT team received training in the form of a PowerPoint sent by the National Tactical Officers Association that urges trainees to “Steel Your Battlemind,” and defines the “battlemind” as “a warrior’s inner strength to face fear and adversity during combat with courage. It is the will to persevere and win. It is resilience.”<sup>434</sup> These examples highlight the fact that existing training methods too often exacerbate rather than alleviate the “war on cops” mentality.

Arthur Rizer of West Virginia University College of Law also highlights the culture of militarization in police recruitment efforts. He writes:

Police recruitment videos far too often show the “use of force” parts of the job—the parts that should be considered a last resort for those rightly termed “peace officers.” A typical video will have adrenaline pumping music playing while clips of SWAT-attired officers firing assault rifles, kicking in doors, and tackling suspects play on screen.<sup>435</sup>

The approach reflected in these training materials and accounts of recruitment efforts illustrates the way in which police forces are encouraged to adopt a militarized mindset.

Instead of being geared-up for combat, police officers should be encouraged to develop mindsets compatible with the avoidance of violence. Part of such preparation includes access to adequate mental health services for police officers. Under international human rights law, agencies must provide counseling to those who use force.<sup>436</sup> While the Basic Principles do not elaborate on the purpose of such counseling, it may help prevent recurrence; by aiding officers to adjust psychologically after the use of force, counseling may help ensure that they do not overreact in the future.

#### **F. To comply with the requirements of equal treatment under international human rights law, police training must comprehensively address non-discrimination, including implicit bias**

Under its binding international obligations to ensure equal treatment for all and to guarantee non-discrimination, the United States must make sure that all police officers are properly trained in the areas of non-discrimination and implicit bias. Such training is essential to prevent the disproportionate use of force against individuals based on race.

Currently, the NYPD Report acknowledges the principle of non-discrimination when it states all

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<sup>432</sup> *Id.*

<sup>433</sup> ACLU, *War Comes Home*, ACLU.org (Jun. 2014), <https://www.aclu.org/report/war-comes-home-excessive-militarization-american-police>.

<sup>434</sup> *Id.*

<sup>435</sup> J. Berkeley Bentley and Arthur Rizer, *The Militarized Mentality of the Police (Part 2 of 3)*, The Huffington Post, (May 28, 2015), [http://www.huffingtonpost.com/arthur-rizer/the-militarized-mentality\\_b\\_7462878.html](http://www.huffingtonpost.com/arthur-rizer/the-militarized-mentality_b_7462878.html).

<sup>436</sup> U.N. Basic Principles, *supra* note 33, princ. 21.

“reasonable use of force ... requires *equal treatment of all individuals*.”<sup>437</sup> Yet, the Report is silent on how well the NYPD Patrol Guide and NYPD training prepares its officers to avoid discrimination. While Black people make up 22.6% of the citywide population,<sup>438</sup> the NYPD Report notes that 87.1% of individuals who submit complaints to the Civilian Complaint Review Board (“CCRB”) are people of color: 57.8% are Black and 30.3% are Hispanic.<sup>439</sup> These statistics do not conclusively show that NYPD improperly trains its officers in non-discrimination, but they call into question the efficacy of training programs to date.

As a result of a 2013 court ruling that declared “Stop and Frisk” unconstitutional and found that the NYPD had discriminated against communities of color,<sup>440</sup> an independent federal monitor revised the NYPD non-discrimination training in June 2015. The improvements focus on reminding officers not to discriminate and not to use slurs.<sup>441</sup> These reforms do not necessarily address officers’ unconscious biases, which pose many risks in police operations and are best addressed through targeted implicit bias training.<sup>442</sup> Police departments that have been subject to less scrutiny than the NYPD may face an even bigger task in reexamining their non-discrimination training programs to ensure that they comply with international standards, best practices, and domestic laws designed to safeguard against human rights violations, including discrimination. Ultimately, the efficacy of non-discrimination training must be gauged by its impacts on police officers’ conduct. If statistics continue to indicate that force is used against Black Americans at disproportionate rates, further efforts will be required to make training more effective at preventing discrimination.

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<sup>437</sup> Findings & Recommendations, *supra* note 381, at 1 (emphasis added).

<sup>438</sup> *Id.*, at 18.

<sup>439</sup> *Id.*, at 15–17.

<sup>440</sup> *Floyd v. City of New York*, 959 F.Supp.2d 540 (S.D.N.Y. 2013) (finding NYPD’s stop and frisk program—the momentary detention and search by the police without a search warrant—violating the Fourteenth Amendment non-discrimination protection and Fourth Amendment protection from unreasonable search and seizures).

<sup>441</sup> Stephen Rex Brown, *EXCLUSIVE: Proposed federal rules for NYPD training include Cop 101 advice like 'don't be racist'*, N.Y. Daily News (Apr. 21, 2015) <http://www.nydailynews.com/new-york/exclusive-new-fed-rules-nypd-training-101-article-1.2192488>.

<sup>442</sup> Tracey G. Gove, *Implicit Bias and Law Enforcement*, Police Chief, 45–56 (Oct. 2011), [http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display\\_arch&article\\_id=2499&issue\\_id=102011](http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=2499&issue_id=102011).

## IV. Aggressive and Discriminatory Police Practices

Aggressive police practices are rooted in a history of discrimination against Black Americans in the United States. Historians have documented how the United States’ “first modern-style police forces” were actually slave patrols in the pre-Civil War South.<sup>443</sup> Even after formal emancipation, police departments in the South—staffed by many former slave patrollers<sup>444</sup>—enforced Jim Crow laws.<sup>445</sup> As one academic has noted: “[t]he chain of racialized terror that spanned slavery, lynching, and police whippings remains unbroken as brutalization of blacks is routinely practiced in today’s criminal justice system.”<sup>446</sup>

This section highlights four interrelated trends in aggressive and discriminatory police practices that contribute to the excessive use of force by police against Black Americans in the United States: broken-windows policing practices, racial profiling, the militarization of police, and for-profit policing. The disparate treatment of Black Americans and the disproportionate use of the tactics and methods described in this section contravene international human rights law in several ways, detailed below.

### A. Aggressive police practices result in the disproportionate targeting of and excessive use of force against Black Americans

#### i. Broken windows policing

“Broken windows policing” is a law enforcement method based on the theory that aggressive policing of minor crimes prevents more serious crimes from flourishing. Under this criminological theory, “if a window in a building is broken and is left unrepaired, all the rest of the windows will soon be broken.”<sup>447</sup> The single unrepaired broken window is thought to indicate an atmosphere of disorder, which invites further mischief and increasingly more serious crime. Thus, broken windows policing targets petty crimes such as loitering, spitting, vandalism, trespassing, marijuana possession, and public consumption of alcohol, none of which in themselves pose a serious threat to public safety.

It is difficult to evaluate exactly how broadly police departments have used this method of law enforcement across the country, as the model has been applied in a variety of ways. As a result, it may be that some police departments “are not really using broken windows policing when they claim to be,” while others that do not so claim may in fact be implementing the method or its equivalent in practice.<sup>448</sup> New York City provides perhaps the most prominent example of the method’s adoption in recent times. In the early 1990s, New York Police Department Commissioner William Bratton declared war on petty

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<sup>443</sup> James Conser, Rebecca Paynich & Terry Gingerich, *Law Enforcement in the United States* 50 (3d ed. 2013).

<sup>444</sup> *Id.* (“[F]ollowing the Civil War, many slave patrollers moved to employment in city police departments throughout the South, bringing the culture and practice of racism with them.”). Despite policing’s origins, “[r]acism and discrimination were not confined to southern police; it was, and still is, a national problem.” *Id.*

<sup>445</sup> See generally Jerome H. Skolnick, *Racial Profiling—Then and Now*, 6 *Criminology & Pub. Pol’y* 65, 65–66 (Feb. 2007) (describing briefly the long history of racial profiling and biased policing in the United States); Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 *Colum. Hum. Rts. L. Rev.* 261, 263 (2007) (discussing how the origins of “mass incarceration, capital punishment, and police terror . . . can be traced to black enslavement and whose modern day survival radically contradicts liberal democratic ideals, placing the United States outside the norm of Western nations”).

<sup>446</sup> Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 *Colum. Hum. Rts. L. Rev.* 261, 263 (2007).

<sup>447</sup> James Q. Wilson & George L. Kelling, *Broken Windows*, *Atlantic Monthly* (Mar. 1982), <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465> (last accessed Sept. 27, 2015).

<sup>448</sup> *Broken Windows Policing*, Center for Evidence-Based Crime Policy, George Mason Univ., n.d., <http://cebcp.org/evidence-based-policing/what-works-in-policing/research-evidence-review/broken-windows-policing> (last accessed Oct. 21, 2015).

offenses in the hopes of decreasing violent crimes. Although violent crime rates in New York City did decline, crime rates were simultaneously dropping across the United States,<sup>449</sup> including in cities that did *not* implement broken windows methods.<sup>450</sup>

In recent years, research has shown that broken windows policing is not only ineffective,<sup>451</sup> but also “may have done more harm than good,” particularly in the way it has targeted communities of color.<sup>452</sup> In New York City in 1993—the year before broken windows was introduced—misdemeanor arrests for smoking marijuana in public were relatively low: each precinct made an average of ten arrests per year.<sup>453</sup> Between 1994 and 2000, however, such arrests increased by 2,670%, which, as multiple studies have shown, disproportionately targeted individuals of color.<sup>454</sup> The trend continued into the twenty-first century: between 2000 and 2003, Black Americans composed 52% of all marijuana arrestees, despite representing only about 25% of the New York City population.<sup>455</sup> In addition, scholars that have studied these trends found that “there is no good evidence that [increasing misdemeanor marijuana arrests] contributed to combating serious crime in the city,” and that “[i]f anything, it has had the reverse effect.”<sup>456</sup> The problem was not just limited to marijuana arrests. As one study found, in New York City in 2000, when broken windows policing was in its sixth year, “blacks and Hispanics comprised disproportionate percentages compared with whites in *all* arrest categories.”<sup>457</sup>

Evidence indicates that broken windows policing, which remains in effect in New York City today, leads to increased adversarial encounters between police officers and citizens, which in turn creates increased opportunities for friction and use of force. According to one count, in 2014, police officers killed more than 287 people who were involved in minor offenses.<sup>458</sup> One such victim was Eric Garner, an unarmed 43-year-old Black man who was killed on July 17, 2014, when several New York City police officers violently restrained him and put him in a chokehold during an arrest for selling individual untaxed cigarettes. Despite the fact that Garner shouted “I can’t breathe” at least eight times while in the

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<sup>449</sup> See Erin Fuchs, *It’s Incredible How Much Safer America Has Become in the Past 20 Years*, Business Insider (July 4, 2013), <http://www.businessinsider.com/america-has-gotten-much-safer-2013-7>; Richard A. Oppel, Jr., *Steady Decline in Major Crime Baffles Experts*, N.Y. Times (May 23, 2011), <http://www.nytimes.com/2011/05/24/us/24crime.html>.

<sup>450</sup> See Fox Butterfield, *Cities Reduce Crime and Conflict Without New York-Style Hardball*, N.Y. Times (Mar. 4, 2000), <http://www.nytimes.com/2000/03/04/nyregion/cities-reduce-crime-and-conflict-without-new-york-style-hardball.html>; Justin Peters, *Broken Windows Policing Doesn’t Work*, Slate (Dec. 3, 2014), [http://www.slate.com/articles/news\\_and\\_politics/crime/2014/12/broken\\_windows\\_policing\\_doesn\\_t\\_work\\_it\\_also\\_may\\_have\\_killed\\_eric\\_garner.html](http://www.slate.com/articles/news_and_politics/crime/2014/12/broken_windows_policing_doesn_t_work_it_also_may_have_killed_eric_garner.html) (last accessed Sept. 27, 2015) (“[D]eclines in violent crime in New York have been comparable to declines in cities that didn’t use ... broken windows [methods].”).

<sup>451</sup> See Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. Chi. L. Rev. 271, 316 (2006) (concluding that “there appears to be no good evidence that broken windows policing reduces crime, nor evidence that changing the desired intermediate output of broken windows policing—disorder itself is sufficient to affect changes in criminal behavior”).

<sup>452</sup> Christina Sterbenz, *How New York City Became Safe Again*, Business Insider (Dec. 2, 2014), <http://www.businessinsider.com/criticism-for-giulianis-broken-windows-theory-2014-12> (last accessed Sept. 27, 2015). See also Randall G. Shelden, “Assessing ‘Broken Windows’: A Brief Critique,” Center on Criminal and Civil Justice, n.d., 11, <http://www.cjcj.org/uploads/cjcj/documents/broken.pdf>.

<sup>453</sup> Bernard E. Harcourt & Jens Ludwig, *Reefer Madness: Broken Windows Policing and Misdemeanor Marijuana Arrests in New York City, 1989-2000*, 6 Criminology & Pub. Pol’y 165, 165–66 (2007), <http://ssrn.com/abstract=948753>.

<sup>454</sup> *Id.* at 165–66. See also Andrew Golub, Bruce D. Johnson & Eloise Dunlap, *The Race/Ethnicity Disparity in Misdemeanor Marijuana Arrests in New York City*, 6 Criminology & Pub. Pol’y 131 (Feb. 2007).

<sup>455</sup> Harcourt & Ludwig, *Reefer Madness*, *supra* note 453.

<sup>456</sup> See *id.* at 176 (discussing broken windows policing as representative of “an extremely poor trade-off of scarce law enforcement resources, imposing significant opportunity costs on society”). See also Harcourt & Ludwig, *Broken Windows*, *supra* note 451, at 316.

<sup>457</sup> Andrew Golub, Bruce D. Johnson & Eloise Dunlap, *The Race/Ethnicity Disparity in Misdemeanor Marijuana Arrests in New York City*, 6 Criminology & Pub. Pol’y 131 (Feb. 2007).

<sup>458</sup> *Broken Windows Policing*, Campaign Zero (2015), <http://www.joincampaignzero.org/brokenwindows> (last accessed Oct. 1, 2015).

chokehold, the arresting officer did not relent in his use of force.<sup>459</sup>

William Bratton's return to New York City as Police Commissioner after a stint as Los Angeles Police Commissioner represents "the return of broken windows policing" to the city.<sup>460</sup> As one commentator noted in the aftermath of Eric Garner's killing, "[c]urrent laws create too many situations that put police in conflict with citizens over consensual, nonviolent activities."<sup>461</sup>

## ii. Racial profiling

Hostile encounters between Black Americans and the police are often a result of racial profiling. Profiling is a problem for Black Americans in particular because stereotypes associated with Black Americans often link them to crime. Black Americans are more likely than members of other ethnic and racial groups to be stereotyped as violent criminals or drug abusers.<sup>462</sup> Although national surveys have demonstrated relatively similar rates of drug use among different racial groups, law enforcement has targeted Black Americans for drug crimes in grossly disproportionate numbers since the launch of the federal government's "war on drugs" in the 1980s.<sup>463</sup> The racial profiling of Black Americans is a self-perpetuating cycle. When Black Americans are arrested and jailed at grossly outsized rates, they are stereotyped as criminals. That stereotype later undergirds and justifies the profiling of Black individuals and communities, driving the rates of police encounters and arrests even higher.

According to updated guidelines issued by the Department of Justice in December 2014, federal law enforcement officers are absolutely forbidden from relying upon generalized stereotypes based on race, among other characteristics.<sup>464</sup> The articulation of such a prohibition is a positive step, but its effectiveness is yet unproven. The previous version of the federal guidelines was issued in 2003, after President Bush declared that racial and ethnic profiling was "wrong" and promised to "end it in America."<sup>465</sup> Despite such pronouncements, however, the guidelines failed to stem the tide of racial profiling, which continued to characterize encounters between Black Americans and the police for the next decade.<sup>466</sup>

In Los Angeles, California, between July 2003 and June 2004, for example, Black drivers of vehicles were vastly more likely to be stopped than white drivers by the Los Angeles Police Department:

For every 10,000 residents, about 3,400 more black people are stopped than whites .... Stopped

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<sup>459</sup> Melanie Eversley & Mike James, *No charges in NYC chokehold death; federal inquiry launched*, USA Today (Dec. 4, 2014), <http://www.usatoday.com/story/news/nation/2014/12/03/chokehold-grand-jury/19804577>.

<sup>460</sup> Justin Peters, *Broken Windows Policing Doesn't Work*, Slate (Dec. 3, 2014), [http://www.slate.com/articles/news\\_and\\_politics/crime/2014/12/broken\\_windows\\_](http://www.slate.com/articles/news_and_politics/crime/2014/12/broken_windows_).

<sup>461</sup> Lawrence J. McQuillan, *Commentary: Lessons from Eric Garner's Death and Cigarette Taxes*, Wash. Times (Sept. 12, 2014), <http://www.washingtontimes.com/news/2014/sep/12/mcquillan-the-real-lesson-from-eric-garners-death>. See also *id.* (discussing how current laws essentially "empower[] police to employ violence in the name of tax collection," and other initiatives unrelated to public safety).

<sup>462</sup> Kelly Welch, *Black Criminal Stereotypes and Racial Profiling*, 23 J. Contemporary Crim. Justice 276, 278 (2007).

<sup>463</sup> *Id.* at 279.

<sup>464</sup> *Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity*, U.S. Dep't of Justice, Dec. 2014, <http://www.justice.gov/sites/default/files/ag/pages/attachments/2014/12/08/use-of-race-policy.pdf>.

<sup>465</sup> *Justice Department Issues Policy Guidance to Ban Racial Profiling*, U.S. Dep't of Justice, June 17, 2003, [http://www.justice.gov/archive/opa/pr/2003/June/03\\_crt\\_355.htm](http://www.justice.gov/archive/opa/pr/2003/June/03_crt_355.htm).

<sup>466</sup> See, e.g., David Harris, *Driving while Black: Racial Profiling on our Nation's Highways*, ACLU, June 1999, <https://www.aclu.org/report/driving-while-black-racial-profiling-our-nations-highways>; Gina Castle Bell et al., *Exploring Black and White Accounts of 21st-Century Racial Profiling: Riding and Driving While Black*, 15 Qualitative Research Reports in Communication 1, Oct. 16, 2014, <http://www.tandfonline.com/doi/abs/10.1080/17459435.2014.955590>.

blacks are 127% more likely to be frisked ... than stopped whites. Stopped blacks are 76% more likely to be searched ... than stopped whites. Stopped blacks are 29% more likely to be arrested .... Now consider this: Although stopped blacks were 127% more likely to be frisked than stopped whites, they were 42.3% less likely to be found with a weapon after they were frisked, 25% less likely to be found with drugs and 33% less likely to be found with other contraband.<sup>467</sup>

The LAPD criticized the study, published in 2008, because it relied on older data<sup>468</sup>. There are no more recent studies, however, and more recent data on the racial breakdown of vehicular stops in Los Angeles are not publicly available. The problem appears to persist: in April 2015, Los Angeles County paid \$750,000 to victims of racial profiling by the county police.<sup>469</sup>

Racial profiling also plays a role in pedestrian stops. “Stop and frisk” is a policing tactic whereby law enforcement officers are authorized to stop citizens based on a reasonable suspicion of criminal activity. The officer may then frisk the person for weapons if he or she “reasonably” believes that the suspect may be dangerous.<sup>470</sup> Officers need not have probable cause for either the stop or the frisk, as is required under the Fourth Amendment for full searches and seizures.<sup>471</sup> While this process is intended to empower law enforcement officers with a flexible tool for dealing with emergent problems,<sup>472</sup> its implementation has been widely criticized as racist and intrusive.

When the Supreme Court authorized stop and frisk encounters based on less than probable cause, it nevertheless admitted that such “intrusion[s] upon cherished personal security . . . must surely be an annoying, frightening, and perhaps humiliating experience.”<sup>473</sup> For the many people of color who have been subjected to the practice, this surely rings true. In one study of Black American men’s experiences with law enforcement, participants complained that “police behaved as if their participation in crime was a foregone conclusion and that they merely needed to locate the supporting evidence to make an arrest.”<sup>474</sup> Likening the “frequent negative, involuntary police contacts” to harassment, they felt that “their neighborhoods [were] being besieged by police.”<sup>475</sup>

Since 2002, officers have conducted more than 5 million stops in New York City alone, with communities of color the “overwhelming target of these tactics.”<sup>476</sup> At the height of NYPD’s stop and frisk program in 2011, Black individuals made up 53% of those stopped,<sup>477</sup> despite only representing

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<sup>467</sup> Ian Ayres, *Racial profiling in L.A.: the numbers don’t lie*, L.A. Times (Oct. 23, 2008), <http://articles.latimes.com/2008/oct/23/opinion/oe-ayres23>.

<sup>468</sup> *Id.*

<sup>469</sup> *LA police to pay \$725,000 to racial profiling victims*, RT USA (Apr. 30, 2015), <https://www.rt.com/usa/254589-la-police-racial-profiling/>.

<sup>470</sup> See *Terry v. Ohio*, 392 U.S. 1, 20-27 (1968) (holding that the Fourth Amendment’s probable cause and warrant requirements do not apply to stops or frisks and that the police officer need only have reasonable suspicion).

<sup>471</sup> *Id.* See also U.S. Const. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

<sup>472</sup> 392 U.S. at 20 (noting that stop and frisk entails “necessarily swift action predicated upon the on-the-spot observations of the officer on the beat”).

<sup>473</sup> *Id.* at 25.

<sup>474</sup> Rod K. Brunson, “Police Don’t Like Black People”: *African-American Young Men’s Accumulated Police Experiences*, 6 *Criminology & Pub. Pol’y* 71, 85 (Feb. 2007). See also Leo Carroll & M. Lilliana Gonzalez, *Out of Place: Racial Stereotypes and the Ecology of Frisks and Searches Following Traffic Stops*, 51 *J. of Res. in Crime & Delinq.* (Aug. 2014), 559, 574–75 (finding that “Black drivers are more likely to be frisked and searched than are White drivers, and the disparity is greater with respect to frisks”).

<sup>475</sup> Brunson, *supra* note 474, at 85 ; see also Carroll & Gonzalez, *supra* note 474, at 559, 574–75.

<sup>476</sup> New York Civil Liberties Union, *Stop-and-Frisk Data*, <http://www.nyclu.org/content/stop-and-frisk-data> (last visited Oct. 2, 2015).

<sup>477</sup> *Id.* (combined data for stops involving black and Latino individuals).

approximately 25% of the city's population.<sup>478</sup> Two years later, in a case before the U.S. District Court for the Southern District of New York, Judge Shira Scheindlin rebuked the NYPD for its stop and frisk practices, holding the city liable for the violation of citizens' Fourth and Fourteenth Amendment rights.<sup>479</sup> Despite the policy's facial neutrality, Judge Scheindlin held that it had not only a discriminatory effect on citizens of color, but that officers were implementing it with racially discriminatory intent.<sup>480</sup>

Although stop and frisk has been curbed in New York City, the practice persists in other cities throughout the country. In the summer of 2014 in Chicago, the country's third largest city, there were over 250,000 stops that did not lead to an arrest.<sup>481</sup> Black Chicagoans were subjects of 72 percent of those stops, although they constitute just 32 percent of the city population.<sup>482</sup> This disproportionate rate held true even in majority white districts.<sup>483</sup> In Miami Gardens, a mid-sized city near Miami with slightly more than 110,000 residents, 80 percent of whom are Black,<sup>484</sup> police conducted nearly 100,000 stops from 2008 to 2013.<sup>485</sup> Police officers in Miami Gardens have reported through affidavits that the former police commander of operations instructed them to stop every black man they saw.<sup>486</sup>

Even without the added layer of discrimination, the practice of stop and frisk in and of itself creates opportunities for conflict with law enforcement officers, particularly if the stop leads to an arrest. Of the reported arrest-related deaths between 2003 and 2009, Black and Latino individuals constituted a combined 53% of those killed,<sup>487</sup> out of proportion with their percentage of the national population (approximately 30%).<sup>488</sup>

As discussed above in section III on training, Ezell Ford, a Black man, is one such victim, killed on August 11, 2014, during a stop initiated by two police officers in a neighborhood in Los Angeles, California the officers said was "known for gang and drug activity."<sup>489</sup> One officer claimed to have called out, "Hey you, I want to talk to you"<sup>490</sup> When Ford did not answer or stop walking, the two officers cornered him.<sup>491</sup> The officer then touched Ford's shoulder and then immediately attempted to handcuff him.<sup>492</sup> Ford, who was known by police to be mentally ill,<sup>493</sup> responded by tackling the officer. The

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<sup>478</sup> United States Census, State and County Quickfacts: New York (city), NY, <http://quickfacts.census.gov/qfd/states/36/3651000.html> (last visited Oct. 4, 2015).

<sup>479</sup> *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

<sup>480</sup> *Id.* at 667.

<sup>481</sup> ACLU of Illinois *Stop and Frisk in Chicago*, 3, (Mar. 2015), [http://www.aclu-il.org/wp-content/uploads/2015/03/ACLU\\_StopandFrisk\\_6.pdf](http://www.aclu-il.org/wp-content/uploads/2015/03/ACLU_StopandFrisk_6.pdf).

<sup>482</sup> *Id.* at 9.

<sup>483</sup> *Id.*

<sup>484</sup> Morgan Whitaker, *Police Sued for Alleged Racial Profiling, Stop and Frisk*, MSNBC.com (Dec. 6, 2013 2:01 PM), <http://www.msnbc.com/politicsnation/police-sued-alleged-racial-profiling>.

<sup>485</sup> Alice Brennan and Dan Lieberman, *Florida city's 'stop and frisk' nabs thousands of kids, finds 5-year-olds 'suspicious'*, Fusion, (May 9, 2014), <http://fusion.net/story/5568/florida-citys-stop-frisk-nabs-thousands-of-kids-finds-5-year-olds-suspicious/>; Conor Friedersdorf, *The City where Blacks Suffer Under 'Stop and Frisk on Steroids'*, The Atlantic (May 30, 2014), <http://www.theatlantic.com/national/archive/2014/05/where-blacks-suffer-under-stop-and-frisk-on-steroids/371869/>.

<sup>486</sup> Alice Brennan & Tamara Weston, *It's Not Just Ferguson: The Shocking Numbers Behind Miami Gardens Police*, Fusion (Mar. 6, 2015 7:04 AM), <http://fusion.net/list/59304/its-not-just-ferguson-the-shocking-numbers-behind-miami-gardens-police/>.

<sup>487</sup> *Arrest-Related Deaths, 2003-2009 - Statistical Tables*, Bureau of Justice Statistics, DOJ (Nov. 2011) 6, <http://www.bjs.gov/content/pub/pdf/ard0309st.pdf>.

<sup>488</sup> *2010 Demographic Profile Data*, U.S. Census Bureau, [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC\\_10\\_DP\\_DPDP1&src=pt](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_DP_DPDP1&src=pt).

<sup>489</sup> Ben Brumfield, *Los Angeles officers who killed Ezell Ford violated policy, civilian board finds*, CNN (June 10, 2015), <http://www.cnn.com/2015/06/10/us/los-angeles-ezell-ford-case>.

<sup>490</sup> *Id.*

<sup>491</sup> *Id.*

<sup>492</sup> *Id.*

officer's partner then shot Ford twice, and the arresting officer shot him once.<sup>494</sup> Ford died later that evening—no drugs or weapons were found on him.<sup>495</sup>

Following an investigation, the Los Angeles Police Commission concluded that the officers did not have reason to stop or detain Ford in the first place, and that the officer's inappropriate handling of the situation was "so flawed that it led to the fatal confrontation."<sup>496</sup> Ford's death is a tragic example of an illegal stop by police that escalated into an officer's use of the deadly force against a Black man.

### iii. Militarization of police

Several federal programs have contributed to the militarization of police departments. This militarization encompasses not only a more militarized ideology (the idea of fighting a "war" against crime), but also the enhanced access of federal, state, and local police departments to military grade equipment, as well as their establishment of large weaponry arsenals.

The Edward Byrne Memorial Justice Assistance Grant ("JAG") Program was created by Congress to provide state and local governments with funding to "improve their criminal justice system and to enforce drug laws."<sup>497</sup> While the program is for improvements to the broader criminal justice system, including courts, crime prevention, education, corrections, and drug treatment and enforcement,<sup>498</sup> the ACLU has documented that grantees spend most of their funding on law enforcement activities.<sup>499</sup> Between April 2012 and March 2013, JAG grantees spent 64% of their program funding on law enforcement in contrast to 9% on the court systems and 6% on crime prevention and education.<sup>500</sup> Further, 18% of the money allocated to law enforcement went towards the purchase of weapons, both lethal and less-lethal.<sup>501</sup>

The 1990 National Defense Authorization Act authorized the transfer of military equipment from the federal Department of Defense ("DOD") to law enforcement agencies for use in "counterdrug activities,"<sup>502</sup> ostensibly to aid in the "war on drugs."<sup>503</sup> Under the authority of this Act, in 1997, President Bill Clinton created the "1033 program" (previously known as the "1028 program") which has allowed the DOD to transfer, without charge, military equipment to state and local law enforcement agencies.<sup>504</sup> The 1033 program increased the scope from previous supply transfers from the DOD to include surplus military equipment for use in counternarcotics operations, counterterrorism operations,

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<sup>493</sup> Ruben Vives, Kate Mather & Richard Winton, *Parents of man slain by LAPD say his mental illness was well known*, L.A. Times (Aug. 13, 2014), <http://www.latimes.com/local/lanow/la-me-ln-lapd-shooting-man-mental-illness-20140813-story.html>.

<sup>494</sup> Ben Brumfield, *Los Angeles officers who killed Ezell Ford violated policy, civilian board finds*, CNN (June 10, 2015), <http://www.cnn.com/2015/06/10/us/los-angeles-ezell-ford-case>.

<sup>495</sup> *Id.*

<sup>496</sup> Kate Mather & Joel Rubin, *Ezell Ford's shooting violated LAPD policy, police commission rules*, L.A. Times (June 9, 2015), <http://www.latimes.com/local/crime/la-me-ezell-ford-20150610-story.html>. The Commission ruled that Wampler's use of deadly force violated department policy, but that Villegas' two shots were permissible in light of the encounter that ensued. *See Id.*

<sup>497</sup> ACLU, *War Comes Home*, (Jun. 2014), <https://www.aclu.org/report/war-comes-home-excessive-militarization-american-police>.

<sup>498</sup> *Id.*

<sup>499</sup> *Id.*

<sup>500</sup> *Id.*

<sup>501</sup> *Id.* Less-lethal weapons are those that pose a risk of causing lethal injuries but can also cause serious bodily injury over death. Factors that can influence whether a weapon is categorized as lethal or less-lethal are mass, velocity and payload. Dave Young, *Definition and Explanation of Less-Lethal*, policeone.com (November 28, 2004), <http://www.policeone.com/CERT/articles/94021-Definition-and-explanation-of-less-lethal/>.

<sup>502</sup> Bret McCabe, *Does the Militarization of American police help them serve and protect*, hub.jhu.edu (Spring 2015), <http://hub.jhu.edu/magazine/2015/spring/aclu-militarization-of-police>.

<sup>503</sup> *Id.*

<sup>504</sup> *Id.* Justnet, *The 1033 Program*, justnet.org, [https://www.justnet.org/other/1033\\_program.html](https://www.justnet.org/other/1033_program.html) (last visited Oct. 11, 2015).



and to enhance officer safety,<sup>505</sup> including aircraft, watercraft, armored vehicles, armored personnel carriers, and military-grade firearms including M16 and M14 rifles.<sup>506</sup>

Since 1990, this DOD program has provided \$5 billion in equipment to law enforcement agencies.<sup>507</sup> Of that funding, \$1.4 billion went toward weaponry and tactical equipment in the course of 203,000 transfers to 7,500 different law enforcement agencies.<sup>508</sup> Despite public outcry, following the militarized police response to public protests in the wake of the killing of Michael Brown, Jr., in Ferguson,<sup>509</sup> the 1033 program facilitated the transfer of equipment worth \$28 million to police departments across the country in just three months.<sup>510</sup>

Additionally Department of Homeland Security (“DHS”) funds the Homeland Security Grant Program (“HSGP”), which has two components: the State Homeland Security Program (“SHSP”) and the Urban Areas Security Initiative (“UASI”).<sup>511</sup> In order to take advantage of the DHS program recipients are required to dedicate at least 25% of their DHS funding to “terrorism prevention-related law enforcement activities.”<sup>512</sup> However, the DHS has also stated that their funding program has a larger mission, which is to support ordinary law enforcement activities.<sup>513</sup> Additionally, in 2010 the DHS launched an “anticrime campaign” which gives funds to state and local law enforcement agencies without many of the terrorist prevention activity caveats.<sup>514</sup>

Absent the terrorism prevention activity requirement, DHS funding can be used to purchase military grade weaponry and equipment for use in the course of routine law enforcement activities.<sup>515</sup> All of the above programs, which equip the police with military grade weapons and equipment, will see their grant-funded purchases used outside of terrorism-related policing.<sup>516</sup> As experience has shown, this equipment can be—and has been—turned against everyday citizens, especially those of color.

The trends toward militarization of policing are evidenced most clearly through the militarization of Special Weapons and Tactics (“SWAT”) teams. According to the President of the National Association for Civilian Oversight of Law Enforcement, the militarization of police began in 1960s with the rise of SWAT teams, first made prominent by the LAPD and their reaction to the Watts Riots; police departments across the country began to create their own SWAT teams and it is from there that many argue that militarization trends began to exponentially increase.<sup>517</sup> In 1980, 20% of small towns had

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<sup>505</sup> Bret McCabe, *Does the Militarization of American police help them serve and protect*, hub.jhu.edu (Spring 2015), <http://hub.jhu.edu/magazine/2015/spring/aclu-militarization-of-police>.

<sup>506</sup> DLA, *1033 Program FAQ*, dispositionsservices.dla.mil, <http://www.dispositionsservices.dla.mil/leso/pages/1033programfaqs.aspx> (last visited Oct. 11, 2015).

<sup>507</sup> Shawn Musgrave, *The Pentagon Finally Details its Weapons-for-Cops Giveaway*, themarshallproject.org (Dec. 3, 2014), <https://www.themarshallproject.org/2014/12/03/the-pentagon-finally-details-its-weapons-for-cops-giveaway>.

<sup>508</sup> *Id.*

<sup>509</sup> See, e.g., Paul Shinkman, *Ferguson and the Militarization of Police*, U.S. News (Aug. 14, 2014 10:13 AM), <http://www.usnews.com/news/articles/2014/08/14/ferguson-and-the-shocking-nature-of-us-police-militarization>.

<sup>510</sup> Shawn Musgrave, *The Pentagon Finally Details its Weapons-for-Cops Giveaway*, themarshallproject.org (Dec. 3, 2014), <https://www.themarshallproject.org/2014/12/03/the-pentagon-finally-details-its-weapons-for-cops-giveaway>.

<sup>511</sup> ACLU, *War Comes Home*, (Jun. 2014), <https://www.aclu.org/report/war-comes-home-excessive-militarization-american-police>.

<sup>512</sup> *Id.*

<sup>513</sup> *Id.*

<sup>514</sup> *Id.*

<sup>515</sup> *Id.*

<sup>516</sup> *Id.*

<sup>517</sup> Lauren Carroll, *Rand Paul says federal program incentivizes police militarization*, Politifact (Aug. 21, 2014), <http://www.politifact.com/truth-o-meter/statements/2014/aug/21/rand-paul/rand-paul-says-federal-program-incentivizes-police/>.

SWAT teams; by 2005, this number reached 80%.<sup>518</sup> In the 1980s, SWAT teams were active with 3,000 deployments; in 2007, that number swelled to 45,000.<sup>519</sup>

SWAT units are law enforcement special operations units.<sup>520</sup> In theory, SWAT teams carry out high risk operations that would “normally be outside of the regular law agency’s capabilities.”<sup>521</sup> Situations that warrant a SWAT response include active shooters, barricaded suspects, hostage rescue, counterterrorism, riots, and high-risk arrests and searches.<sup>522</sup> In practice, the duties of a given SWAT unit are defined by the law enforcement agency of which it is a division.<sup>523</sup>

Today, military weapons and tactics ordinarily used on the battlefield are reportedly used by SWAT teams to conduct ordinary law enforcement activities.<sup>524</sup> The ACLU reports that during their deployments, SWAT teams have used the battering ram (a heavy piece of wood or similar material) to hit and break through walls and doors. SWAT teams have also reportedly used the flash-bang grenade as a tool to distract the occupants of a building; the grenade temporarily overstimulates the retina and produces a deafening noise, resulting in temporary blindness. Although the grenade is meant to be non-lethal, in some circumstances, it has resulted in death.<sup>525</sup>

During deployment, SWAT teams have also reportedly worn combat helmets and “battle dress uniforms” designed for wear by the U.S. Army in the 1980s. Between 2011 and 2012, the ACLU documented a total of 15,054 battle uniforms or other protective equipment as reported by 63 responding agencies. The armored personnel carrier (“APC”), originally designed to transport infantry, has also been used by various domestic SWAT teams. In 2007, the United States spent \$50 billion to produce 27,000 modern models of APCs, also referred to as Mine Resistant Ambush Protected vehicles (“MRAPs”), to send to Iraq and Afghanistan. When the MRAPs were no longer needed abroad, the DOD began to give away MRAPs domestically through the existing 1033 program. In relating one report it received, the ACLU describes a SWAT team that drove a BearCat APC into a neighborhood to execute a warrant to search for drugs; the officers drove the APC to what was later determined to be an empty home, broke down the front and back doors, destroyed a glass table, deployed a distraction device, and pried the lock off of a shed.<sup>526</sup>

During its existence, the 1033 program has transferred over \$4.3 billion worth of property to domestic agencies,<sup>527</sup> with more than \$1.3 billion transferred in the past five years.<sup>528</sup> Since 2006, the 1033

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<sup>518</sup> Liz Goodwin, *As wars wind down, small-town police inherit armored vehicles*, Yahoo (Jun. 24, 2014), <http://news.yahoo.com/as-wars-wind-down--small-town-cops-inherit-armored-vehicles-233505138.html>.

<sup>519</sup> Peter Kraska, *Militarization and Policing—Its Relevance to 21st Century Police*, Oxford University Press, (2007), <http://cjmasters.eku.edu/sites/cjmasters.eku.edu/files/21stmilitarization.pdf>.

<sup>520</sup> American Special Ops, *Special Weapons & Tactics/Swat*, americanspecialops.com, <http://www.americanspecialops.com/special-weapons-and-tactics/> (last visited Oct. 11, 2015).

<sup>521</sup> *Id.*

<sup>522</sup> *Id.*

<sup>523</sup> *Id.*

<sup>524</sup> ACLU, *War Comes Home*, (Jun. 2014), <https://www.aclu.org/report/war-comes-home-excessive-militarization-american-police>.

<sup>525</sup> Virginia Hennessey, *Monterey County agrees to pay \$2.6 million in ‘flash-bang’ death of Greenfield man*, The Monterey Herald, (Aug. 19, 2013), [http://www.montereyherald.com/localnews/ci\\_23897554/monterey-county-agrees-pay-2-6-million-flash](http://www.montereyherald.com/localnews/ci_23897554/monterey-county-agrees-pay-2-6-million-flash); Shaila K. Dewan, *City to Pay \$1.6 Million in Fatal, Mistaken Raid*, N.Y. Times (Oct. 29, 2003), <http://www.nytimes.com/2003/10/29/nyregion/city-to-pay-1.6-million-in-fatal-mistaken-raid.html>.

<sup>526</sup> ACLU, *War Comes Home* 23 (Jun. 2014), <https://www.aclu.org/report/war-comes-home-excessive-militarization-american-police>.

<sup>527</sup> David Nakamura & Niraj Chokshi, *Obama orders review of military equipment supplied to police*, Wash. Post (Aug. 23, 2014), [https://www.washingtonpost.com/politics/obama-orders-review-of-military-equipment-supplied-to-police/2014/08/23/6316b8aa-2b03-11e4-8593-da634b334390\\_story.html](https://www.washingtonpost.com/politics/obama-orders-review-of-military-equipment-supplied-to-police/2014/08/23/6316b8aa-2b03-11e4-8593-da634b334390_story.html).

program has provided local police departments with at least 11,959 bayonets, 205 grenade launchers, and 605 MRAPs. Agencies other than municipal police departments have received military weaponry and other equipment,<sup>529</sup> including, for example the Utah Highway Patrol<sup>530</sup> and the Ohio State University Police.<sup>531</sup> Spotlighting a particular case, the ACLU reports that Arizona has received at least 32 bomb suits, 704 units of night vision equipment, 1034 guns, 42 forced entry tools, 830 units of surveillance equipment, 13,409 personal protective equipment, 64 armored vehicles, and 17 helicopters, among much else through the 1033 program.<sup>532</sup> Although the scope of the 1033 program was narrowed in May 2015 in the wake of protests in Ferguson, it remains largely intact.<sup>533</sup> The new federal program will still allow for the transfer of unmanned aerial vehicles, wheeled armored vehicles, tactical vehicles, specialized firearms and ammunition under .50 caliber (which can be used in many of the M-14 and M-16 assault rifles), and explosives.<sup>534</sup> There is also no immediate plan to remove military gear that local law enforcement agencies have already acquired.<sup>535</sup>

The deployment of SWAT teams has disproportionately affected communities of color. The ACLU obtained information regarding the deployment of SWAT units from 260 law enforcement agencies, ultimately analyzing nearly 4,000 records.<sup>536</sup> The ACLU found that there are more than 50,000 paramilitary raids in America each year, or about 124 homes per day<sup>537</sup>; the majority of SWAT deployments (79%) were for the purpose of executing a search warrant, usually for drug investigations, while just 7% of deployments were for barricade, hostage or active shooter situations. Overall, 42% of people impacted by a SWAT deployment to execute a search warrant were Black and 12% were Latino. Of the deployments in which all the people affected were minorities, 68% were in drug cases, and 61% of all the people impacted by SWAT raids in drug cases were minorities.<sup>538</sup>

The case of Tarika Wilson, a 26-year-old Black American mother living in Ohio, exemplifies the problems inherent in allowing SWAT teams to carry out everyday policing. She was not wanted by the police, but her boyfriend Anthony Terry was: he had an open warrant for his arrest on the suspicion of

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<sup>528</sup> Department of Defense 1033 Program, Website of Claire McCaskill,

<http://www.mccaskill.senate.gov/imo/media/doc/FactsFiguresEquippingPolice.pdf> (last visited Oct. 19, 2015).

<sup>529</sup> The *New York Times* has mapped counties' receipt of guns, grenade launchers, vehicles, night vision, and body armor through the 1033 program since 2006. See *Mapping the Spread of the Military's Surplus Gear*, N.Y. Times (Aug. 15, 2014), [http://www.nytimes.com/interactive/2014/08/15/us/surplus-military-equipment-map.html?\\_r=1](http://www.nytimes.com/interactive/2014/08/15/us/surplus-military-equipment-map.html?_r=1).

<sup>530</sup> Nate Carlisle, *Blankets to armored vehicles: Military gives it, Utah police take it*, Salt Lake Tribune (Jan. 19, 2014), <http://www.sltrib.com/sltrib/news/57358599-78/police-program-utah-1033.html.csp>.

<sup>531</sup> Molly Bloom, *Ohio State University Police Get IED-Resistant Military Vehicle for Use on Football Game Days*, NPR State Impact: Eye on Education (Sept. 30, 2013), <http://stateimpact.npr.org/ohio/2013/09/30/ohio-state-university-police-getied-resistant-military-vehicle-for-use-on-football-game-days/>.

<sup>532</sup> ACLU, *War Comes Home*, 23 (Jun. 2014), <https://www.aclu.org/report/war-comes-home-excessive-militarization-american-police>.

<sup>533</sup> Jordan Fabian, *Obama bans some transfers of military hardware to police*, The Hill (May 18, 2015), <http://thehill.com/homenews/administration/242346-obama-limiting-military-hardware-to-police-departments>.

<sup>534</sup> *Id.*; *White House Ban On Militarized Gear For Police May Mean Little*, NPR (May 21, 2015), <http://www.npr.org/sections/thetwo-way/2015/05/21/407958035/white-house-ban-on-militarized-gear-for-police-may-mean-little>.

<sup>535</sup> Eric Limer, *Here's the List of Military Gear Obama Will Ban For Cops*, Popular Mechanics (May 18, 2015), <http://www.popularmechanics.com/military/weapons/news/a15597/obama-military-gear-restrictions/>.

<sup>536</sup> ACLU, *War Comes Home*, 23 (Jun. 2014), <https://www.aclu.org/report/war-comes-home-excessive-militarization-american-police>.

<sup>537</sup> Carol Rose & Carl Williams, *Why Racial Bias And Militarization Are Eroding Trust In The Police*, Cognoscenti (Aug. 18, 2014), <http://cognoscenti.wbur.org/2014/08/18/ferguson-racial-bias-militarization-carl-williams-carol-rose>.

<sup>538</sup> ACLU, *War Comes Home*, 23 (Jun. 2014), <https://www.aclu.org/report/war-comes-home-excessive-militarization-american-police>.

drug dealing.<sup>539</sup> On January 4, 2008, in execution of this warrant, a SWAT team broke down Ms. Wilson's door looking for Mr. Terry and opened fire, killing Ms. Wilson and injuring her one-year-old son.<sup>540</sup> The sergeant who killed Ms. Wilson was cleared of all charges.<sup>541</sup>

iv. *For-profit policing*

In many municipalities, policing motivated by profit—sometimes called “for-profit policing”—is driving up the rates of police-civilian interactions among Black and poor communities. Law enforcement agencies stand to raise considerable revenue from a variety of practices, including criminal and civil asset forfeiture,<sup>542</sup> and from fines and administrative charges for minor offenses, particularly from impoverished communities.<sup>543</sup> In some localities, civilians are charged fees for their arrest, adjudication, incarceration, and probation. Someone who does not pay a small fine can be charged for each mile an officer drives to serve a warrant, for each night in jail, and for administrative costs related to her arrest—fines that can snowball into crippling criminal debt from infractions as minor as failing to pay a traffic ticket or enroll in the right trash collection service.<sup>544</sup>

Some police departments supplement their budgets through money earned by detaining civilians and seizing their assets—in some cases securing up to a third of their budgets through such policing practices.<sup>545</sup> Only eight states prohibit law enforcement agencies from profiting from civil and criminal asset forfeiture.<sup>546</sup> Twenty-six states permit law enforcement agencies to retain 100 percent of the assets they seize.<sup>547</sup>

Court fees and fines also create revenue: in 2013, they were the second-largest source of income in Ferguson, Missouri.<sup>548</sup> In its investigation of the Ferguson Police Department in Missouri, the Department of Justice noted that revenue seeking police and court practices disparately impact Black people, and increase in civilian-police encounters in Black communities.<sup>549</sup> After the Department of Justice released a report on an investigation into Michael Brown's death, President Obama noted the racial biases underlying for-profit policing: “What we saw was that the Ferguson Police Department, in conjunction with the municipality, saw traffic stops, arrests, and tickets as a revenue generator, as opposed to serving the community, and that it systematically was biased against African Americans in that city who were stopped, harassed, mistreated, abused, called names, fined.”<sup>550</sup>

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<sup>539</sup> Alex Kane, *Not Just Ferguson: 11 Eye-Opening Facts About America's Militarized Police Forces*, billmoyers.com (Aug. 13 2014), <http://billmoyers.com/2014/08/13/not-just-ferguson-11-eye-opening-facts-about-americas-militarized-police-forces/>.

<sup>540</sup> *Id.*

<sup>541</sup> *Id.*

<sup>542</sup> For more on civil asset forfeiture, see Marian R. Williams et al., *Policing For Profit: The Abuse of Civil Asset Forfeiture*, Institute for Justice (March 2010), [http://www.ij.org/images/pdf\\_folder/other\\_pubs/assetforfeituretoemail.pdf](http://www.ij.org/images/pdf_folder/other_pubs/assetforfeituretoemail.pdf).

<sup>543</sup> *Policing and Profit, Developments in the Law*, 128 Harvard L. Rev. 1723, 1723 (2015), <http://harvardlawreview.org/2015/04/policing-and-profit/>; Guilty Property, American Civil Liberties Union (June 2015), [http://www.aclupa.org/files/3214/3326/0426/Guilty\\_Property\\_Report\\_-\\_FINAL.pdf](http://www.aclupa.org/files/3214/3326/0426/Guilty_Property_Report_-_FINAL.pdf)

<sup>544</sup> *Policing and Profit, Developments in the Law*, 128 Harvard L. Rev. 1723, 1723, 1745 (2015), <http://harvardlawreview.org/2015/04/policing-and-profit/>.

<sup>545</sup> *Id.*

<sup>546</sup> *Id.*

<sup>547</sup> *Id.*

<sup>548</sup> *Id.*

<sup>549</sup> Investigation of the Ferguson Police Department, United States Department of Justice Civil Rights Division 2–4 (Mar. 4, 2015), [http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf).

<sup>550</sup> Carey Gillam & Julia Edwards, *Obama Criticizes Ferguson as City Seeks Settlement Over Racial Bias*, Reuters (Mar. 6, 2015 7:08PM), <http://www.reuters.com/article/2015/03/07/us-usa-missouri-shooting-idUSKBN0M21VC20150307#cyJDIQMO5vbeSc3.97>.

Distrust and hostility towards law enforcement in low-income and Black communities is only exacerbated by for-profit policing. In Ferguson, a city of about 21,000, the city issued 32,974 arrest warrants for non-violent offenses in 2013.<sup>551</sup> Where policing leads to fiscal gain, courtrooms increasingly feel like “revenue factories,” projected fines from ordinance violations are included in future city budgets, and the goal of policing shifts from one of protection to monetary extraction.<sup>552</sup> Many residents of cities such as Ferguson who are subject to for-profit policing see law enforcement officers “not as public servants drawn from their own community to enforce the laws and keep the peace, but as outsiders brought in to harass them, whose salaries are drawn from that harassment.”<sup>553</sup>

The right to property is well established under international law,<sup>554</sup> including under Article 47 of the ICCPR, Article 23 of the American Declaration on the Rights and Duties of Man<sup>555</sup> and Article 21 of the American Convention on Human Rights.

Under Article 21 of the American Convention on Human Rights, all people have the right to the use and enjoyment of their property. With regard to forfeiture, the Convention prohibits the deprivation of property except “upon payment or just compensation” and only for “reasons of public utility or social interest, and in the cases and according to the forms established by law.” This Commission has interpreted Article 21 to mean that any deprivation of property is only justified if there is no less-restrictive measure the State could take and where there is clear evidence that the property was connected to the offense.<sup>556</sup> It has also found that judicial oversight of any property forfeiture is required under Article 21.<sup>557</sup> In addition, this Commission has held that restrictions on the right to property are only justified where the measures used are proportional to the purpose of the restriction.<sup>558</sup> Justifiable purpose is either (1) to avoid loss or deterioration of evidence, or (2) where it is necessary to guarantee the investigation and payment of applicable pecuniary responsibilities.<sup>559</sup> For-profit policing violates international law where its purpose is profit alone, and where forfeiture lacks judicial oversight.

With regard to fees, this Commission has held that any pecuniary charges to a person whose case has been dismissed or where the person is acquitted violate the American Convention.<sup>560</sup> Where a person has not been found guilty of a crime, this Commission has construed a fee as a sanction, and therefore disproportionate and arbitrary under Article 21.<sup>561</sup> In the United States, therefore, any fines related to an offense of which a person is not found guilty violate the Convention. While this Commission has yet to rule explicitly on the proportionality of fines, it is abundantly clear, even under the American Declaration, that many of the fines levied on civilians in Ferguson, Missouri for petty offenses deprived them of “essential needs of decent living,” and may thus constitute a violation of international law.

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<sup>551</sup> *Policing and Profit, Developments in the Law*, 128 Harvard L. Rev. 1723, 1724 (2015)

<http://harvardlawreview.org/2015/04/policing-and-profit/>.

<sup>552</sup> Radley Balko, *Why We Need to Fix St. Louis County*, Wash. Post (Oct. 16, 2014), <https://www.washingtonpost.com/news/the-watch/wp/2014/10/16/why-we-need-to-fix-st-louis/>.

<sup>553</sup> *Id.*

<sup>554</sup> For a thorough discussion on the right to property under international human rights law, see Christophe Golay & Ioana Cismus, *Legal Opinion: The Right to Property from a Human Rights Perspective*, Rights and Democracy (2010), <http://www.geneva-academy.ch/docs/publications/ESCR/humanright-en.pdf>.

<sup>555</sup> The right to “own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and the home.”

<sup>556</sup> *Chaparro Alvarez and Lapo Iniguez v. Ecuador*, Inter-Am. Ct. H.R., (ser. C) No. 170, ¶ 188 (Nov. 21, 2007), [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_170\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_170_ing.pdf).

<sup>557</sup> *Id.*

<sup>558</sup> *Id.*, 196.

<sup>559</sup> *Id.*

<sup>560</sup> *Id.*, 193.

<sup>561</sup> *Id.*

## **B. The use of aggressive police practices that have a disproportionate impact on Black Americans violates international law**

- i. *International law obliges the United States to recognize and eliminate the existence of both direct and indirect racial discrimination in the context of the use of force by law enforcement officers*

Under international law, States must abstain from taking any action that is directly or indirectly addressed, in any way, “at creating situations of *de jure* or *de facto* discrimination.”<sup>562</sup> In light of this duty, the Inter-American Court has recognized that international human rights law not only prohibits those policies and practices that are deliberately discriminatory, but also those that may have a discriminatory impact on certain categories of individuals, even when it is not possible to prove discriminatory intent.<sup>563</sup> In other words, the rights to equality and freedom from discrimination are violated not only by deliberate animus against a particular group, but also by indirect discrimination reflected in the disproportionate impact of laws, actions, policies, or other measures that, although facially neutral, or general and undifferentiated in scope, have disproportionate effects on certain vulnerable groups.<sup>564</sup>

Harmful police practices, including the excessive use of force by police officers in a manner that disproportionately affects Black Americans, whether through direct or indirect discrimination, violate prohibitions under international human rights treaties to which the United States is party. The ICCPR provides that

each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political, or other opinion, national or social origin, property, birth or other status.<sup>565</sup>

Article 5(b) of ICERD obliges State Parties to “respect and protect the right to security of person and protection by the State Party against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.” The U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions observed, in the context of use of force by law enforcement authorities: “At times, the police exercise higher levels of violence against certain groups of people, based on institutionalized racism or ethnic discrimination.”<sup>566</sup>

- ii. *The use of force may at times be directly discriminatory, amounting to torture or inhuman treatment as defined by the Convention Against Torture*

As discussed above, in the section on training, police use of force can amount to torture or cruel,

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<sup>562</sup> Juridical Status and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 103 (Sept. 17, 2003); *see also* Atala v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) ¶ 80 (Feb. 24, 2012).

<sup>563</sup> D.H. and Others v. Czech Republic, no. 57325/00 Eur. Ct. H.R. (ser. A) 179, 184 & 194. (2007); Jordan v. United Kingdom, application no. 24746/94 Eur. Ct. H.R. (ser. A) ¶ 154 (2011); Hoogendijk v. The Netherlands, application No. 58641/00 Eur. Ct. H.R. (ser. A) (2005); *see also* Council of Europe, Directive 2008/0140 on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, Brussels, 2 July 2008, at 7-8; Council of Europe, Directive 2000/43/CE on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Brussels, 29 June 2000, ¶ 13.

<sup>564</sup> CESCR, General Comment No. 20, Non-discrimination in economic, social and cultural rights, ¶ 10(b).

<sup>565</sup> ICCPR, *supra* note 11, art. 2(1).

<sup>566</sup> U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, ¶ 74, submitted to the Human Rights Council pursuant to Resolution 17/5, U.N. Doc. A/HRC/26/36 (April 1, 2014) (by Christof Heyns)

inhuman, and degrading treatment (“CIDT”), depending on the circumstances and factors including the intent of the perpetrator, the severity of the harm inflicted, and the proportionality of the force to the threat posed. Article 1 of CAT defines torture and inhumane treatment as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as ... punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, *or for any reason based on discrimination of any kind*, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

The U.N. Committee Against Torture has observed that in considering whether the use of mental or physical violence constitutes torture, discrimination will serve as an important factor.<sup>567</sup> State Parties are obliged to ensure that laws are applied equally to “all persons, regardless of race, colour, ethnicity, age, religious belief or affiliation, political or other opinion, national or social origin, gender, sexual orientation, transgender identity, mental or other disability.”<sup>568</sup>

iii. *In the context of the use of force against certain groups, indirect discrimination may be evident, even where proof of discriminatory intent is lacking*

This Commission has previously recognized that, in the context of killings by police in Brazil, the disproportionately high number of Black victims killed in police actions is a “clear indication of racist tendency in the state’s law enforcement apparatus.”<sup>569</sup> In its review of the United States, the Committee on the Elimination of all forms of Racial Discrimination has expressed concern over “brutality and excessive use of force by law enforcement officials against members of racial and ethnic minorities, including against unarmed individuals, which has a disparate impact on African Americans ...”<sup>570</sup> Likewise, the Human Rights Committee highlights “the still high number of fatal shootings by certain police forces, including, for instance, in Chicago, and reports of excessive use of force by certain law enforcement officers including the deadly use of Tasers, which have a disparate impact.”<sup>571</sup> These observations, and other evidence of the disproportionate rate at which Black Americans are killed by police, strongly suggest a pervasive pattern of discrimination.

### **C. Racial profiling violates international law prohibiting discrimination and infringes on multiple other human rights**

Under international human rights law, racial profiling directly violates the right to live free from racial discrimination and the right to equality before the law.<sup>572</sup> Furthermore, racial profiling violates the right to personal freedom and security, the right to the presumption of innocence, and, in some circumstances, the right to privacy.<sup>573</sup> In cases where racial profiling results in the excessive use of force by police, it

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<sup>567</sup> Comm. Against Torture, *General Comment 2, Implementation of article 2 by States Parties*, U.N. Doc. CAT/C/GC/2/CRP.1/Rev.4 ¶ 20 (2007).

<sup>568</sup> UN Comm. Against Torture (CAT), *General Comment No. 2: Implementation of Article 2 by States Parties*, U.N. Doc. CAT/C/GC/2, at ¶ 21 (Jan. 24, 2008).

<sup>569</sup> *De Almeida v. Brazil*, Case No. 12,440, Inter-Am. Comm’n H.R., Report No. 26/09, ¶ 66 (Mar. 20, 2009).

<sup>570</sup> Comm. on the Elimination of Racial Discrimination, *Concluding observations on the combined seventh to ninth periodic reports of the United States of America*, CERD/C/USA/CO/7-9, ¶ 17 (Sept. 25, 2014).

<sup>571</sup> Human Rights Comm., *Concluding observations on the fourth periodic report of the United States of America*, U.N. Doc. CCPR/C/USA/CO/4, ¶ 11 (Apr. 23, 2014).

<sup>572</sup> <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G15/080/01/PDF/G1508001.pdf?OpenElement> at ¶¶ 26, 40.

<sup>573</sup> *Id.*

also violates the right to personal integrity and, when lethal force is used, the right to life.

This Commission has defined “racial profiling” as:

a tactic ... adopted for supposed reasons of public safety and protection and ... motivated by stereotypes based on race, color, ethnicity, language, descent, religion, nationality, place of birth, or a combination of these factors, rather than on objective suspicions, [tending] to single out individuals or groups in a discriminatory way based on the erroneous assumption that people with such characteristics are prone to engage in specific types of crimes.<sup>574</sup>

This Commission has also noted with concern that “racial profiling . . . is still a general practice throughout the region, which directly affects the Afro-descendant population in a discriminatory way.”<sup>575</sup>

Similarly, this Commission has found that Afro-descendants are more likely to be suspected, chased, prosecuted and condemned than the rest of the population. It has also noted with concern reports detailing how persons of African descent are: selectively arrested based on racial profiling, at rates disproportionate to their representation in the population; subjected to unjustified police surveillance; more likely than non-Black individuals to be involved in hostile interactions with the police; and overrepresented in the criminal justice system.<sup>576</sup>

This Commission views racial discrimination as deserving strict scrutiny,<sup>577</sup> and has considered arguments that “[r]acial profiling and discriminatory treatment by the authorities of a State are [by themselves] a violation of the principle prohibiting degrading treatment.”<sup>578</sup> It has observed that for treatment to be considered “degrading,” it must “attain a minimum level of severity,” which “depends on the circumstances in each case, such as the duration of treatment, its physical and mental effects and, in some cases, the . . . race [or] color [of the victim].”<sup>579</sup>

In *Benito Tide Méndez, et al. v. Dominican Republic*, for example, this Commission addressed claims that Haitian petitioners had suffered degrading treatment “in the form of the discrimination they endured” at the hands of Dominican officials, among other abuses.<sup>580</sup> The State concluded that in allowing its agents to commit these abuses, “the State violated . . . the prohibition against cruel, inhuman and degrading treatment recognized in . . . the American Convention, read in conjunction with the obligation to respect rights without discrimination.”<sup>581</sup>

This Commission has elsewhere expanded on its definition of degrading treatment, noting that, “treatment or punishment of an individual may be degrading if he is severely humiliated in front of others or he is compelled to act against his wishes or conscience.”<sup>582</sup> As mentioned above, even though the U.S. Supreme Court has condoned the use of stop and frisk as a legitimate law enforcement practice, it has nevertheless admitted that frisks may be a “*humiliating* experience.”<sup>583</sup> The physically invasive, humiliating, and public nature of frisks on the street

<sup>574</sup> De Almeida v. Brazil, Case No. 12,440, Inter-Am. Comm’n H.R., Report No. 26/09, ¶ 134 (Mar. 20, 2009).

<sup>575</sup> *The Situation of People of African Descent*, *supra* note 95, at ¶ 161.

<sup>576</sup> *Id.* ¶ 148.

<sup>577</sup> Méndez, et al. v. Dominican Republic, Case 12.271, Inter-Am. Comm’n H.R., Report No. 64/12, ¶ 271 (Mar. 29, 2012).

<sup>578</sup> *Id.* ¶ 26.

<sup>579</sup> *Id.* ¶ 194.

<sup>580</sup> *Id.* ¶ 202.

<sup>581</sup> *Id.* ¶ 209. See Section IV(A)(ii) for further discussion.

<sup>582</sup> Inter-Am. Comm’n H.R., Case 12.271, Inter-Am. Comm’n H.R., Report No. 64/12, ¶ 194 (Mar. 29, 2012) (quoting *Luis Lizardo Cabrera v. Dominican Republic*, Case No. 10.832, Inter-Am. Comm’n H.R., Report No. 35/96, ¶ 76 (Feb. 17, 1998)).

<sup>583</sup> *Terry v. Ohio*, 392 U.S. 1, 25 (1968) (emphasis added).



implicates the right to freedom from degrading treatment.

Articles 2, 4, 5 and 7 of ICERD prohibit the use of racial profiling, as does the general equality provision of the ICCPR.<sup>584</sup> CERD has emphasized that State parties should take the necessary steps to prevent “questioning, arrests and searches which are in reality based solely on the physical appearance of a person, that person’s color or features or membership of a racial or ethnic group, or any profiling which exposes him or her to greater suspicion.”<sup>585</sup>

Noting the direct connection between the excessive use of force and racism in the Americas, this Commission has stated that

the Afro-descendant population has been affected by a double victimization, as it has been excluded from the protection of the State’s security forces, and has also been a victim of violent acts, disproportionate use of force and lethal force, and police corruption committed with total impunity.<sup>586</sup>

In light of this, this Commission has urged States to take action:

[I]t is essential for States to accept that they are using these practices, abolish the rules that establish them, design behavioral protocols for security forces which take into account ethnic and racial diversity, and implement proper mechanisms to follow-up and control the activity of State agents in order to identify and eliminate these practices in security agencies. For that purpose, this Commission considers it essential . . . to take proper disciplinary measures against those security agents who use racial profiling.<sup>587</sup>

#### **D. Militarized police tactics may violate international legal principles of necessity and proportionality in the use of force**

- i. The use of military-grade weapons and tactics in policing civilians may violate the principles of necessity and proportionality in the use of force under international law*

As stated above, the means by which the State may suppress criminal acts are “not unlimited.”<sup>588</sup> The principle of necessity must be exercised in police use of force, meaning the “measures used should be those strictly necessary to carry out the lawful orders of a competent authority.”<sup>589</sup> The use of force by police should also be “informed” by the principle of “reasonableness, moderation and graduality, always taking into account: (1) the rights that are to be protected; (2) the legitimate end to be achieved and (3) the risk that the police must face.”<sup>590</sup> In cases where an individual does not “represent a threat,” the use of force at all is “disproportional.”<sup>591</sup>

In *Finca “La Exacta”*, police forces entered an estate using SWAT-like techniques to arrest occupying workers, and in the course killed three people and injured eleven more. The Inter-American Court stated,

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<sup>584</sup> ICCPR, *supra* note 11, art 26.

<sup>585</sup> CERD, General Recommendation No. XXXI, General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system, U.N. Doc. A/60/18, ¶ 20 (2005).

<sup>586</sup> *The Situation of People of African Descent*, *supra* note 95, at ¶ 172.

<sup>587</sup> *Id.* ¶ 162.

<sup>588</sup> *Id.*

<sup>589</sup> *Id.*

<sup>590</sup> *Id.*

<sup>591</sup> *Id.*

“[T]he use of force should be necessary and proportionate to the needs of the situation and the objective to be achieved.”<sup>592</sup> Because the government in the case had offered “no evidence” demonstrating that the “police agents had reason to believe that their lives or the lives of third parties, were in danger,” the Court held that the lethal force used was disproportionate and violated the victims’ right to life.<sup>593</sup>

The threat of disproportionate use of force increases as police departments become increasingly militarized, and as SWAT teams are increasingly involved in carrying out everyday policing duties, including responding to reports of non-violent crimes. Because of their use of heavy arms and combat equipment, SWAT teams appear as a “quasi-military” police force, often deployed in full tactical gear and with assault rifles.<sup>594</sup> SWAT tactics—such as breaking into homes with battering rams and using flashbang grenades to subdue its occupants—especially when employed to serve warrants for non-violent crimes or other low-risk scenarios, set an aggressive tone and operate with a baseline level of force that is often disproportionate to the situation.<sup>595</sup>

ii. *The disproportionate effect of militarized police practices on communities of color violates the right to non-discrimination*

As discussed, the deleterious effects of police militarization, including the increased deployment of SWAT teams, have a disproportionate effect on communities of color in the United States, and Black Americans in particular. This disproportionate impact increases the likelihood that Black Americans will be subject to violations of the right to life and bodily integrity due to the excessive use of force. Reliance on such practices thus also jeopardizes the right to be free from discrimination.

iii. *The laws in the United States that permit and facilitate the militarization of the police may violate the obligation to eliminate norms and practices that violate the American Declaration*

This Commission has consistently noted that the American Declaration imposes a positive obligation on States to ensure the rights therein. States are required not only to refrain from committing human rights violations contrary to the provisions of the American Declaration,<sup>596</sup> but also “to adopt affirmative measures to guarantee that the individuals subject to their jurisdiction can exercise and enjoy the rights contained in the American Declaration.”<sup>597</sup> As noted by the president of the Police Foundation, a nonpartisan nonprofit, the recent U.S. actions in banning federal transfers of certain military-style equipment to police departments will not “preclude police departments from purchasing that gear from private vendors,” nor is the list of prohibited items in Executive Order 13688 “likely to impede policing.”<sup>598</sup> Some have called the recent Executive Order a “‘key transformational document’ in rebuilding trust that has been destroyed in recent years between police and minority communities” while

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<sup>592</sup> *Id.* at 41.

<sup>593</sup> *Id.* at 42.

<sup>594</sup> ACLU, *War Comes Home* (Jun. 2014), <https://www.aclu.org/report/war-comes-home-excessive-militarization-american-police>.

<sup>595</sup> *Id.*

<sup>596</sup> *Lenahan v. United States*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, ¶ 117 (2011); *see also*, *Mortlock v. United States*, Case 12.534, Inter-Am. Comm’n H.R., Report No. 63/08, ¶ 75-95 (2008); *Michael Domingues v. United States*, Case 12.285, Inter-Am. Comm’n H.R., Report No. 62/02, ¶ 84-87 (2002).

<sup>597</sup> *Lenahan v. United States*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, ¶ 188 (2011) (citing *Wayne Smith, Hugo Armendariz v. United States*, Case 12.562, Inter-Am. Comm’n H.R., Report No. 81/10, ¶ 61-65 (2010)); *Maya Indigenous Community v. Belize*, Case 12.053, Inter-Am. Comm’n H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 at 727, ¶¶ 122–135, 162, 193–196 (2004) ; *Dann v. United States*, Case 11.140, Inter-Am. Comm’n H.R., Report No. 75/02, ¶ 124-145 (2002).

<sup>598</sup> Colleen McCain Nelson, *Obama Calls for Restricting Military Gear to Local Police*, Wall St. J. (May 18, 2015), <http://www.wsj.com/articles/white-house-to-announce-new-policing-standards-1431943381>.

others believe it simply represents “symbolic politics.”<sup>599</sup> The new federal oversight will make it more difficult for police departments to obtain certain military grade weapons and equipment from federal agencies, but the White House itself has stated, “[T]he U.S. simply doesn’t have the authority to put restrictions on local equipment purchases that don’t use federal funds or come from the Pentagon.”<sup>600</sup> Thus, while the United States has taken recent steps to restrict access of local law enforcement to military-grade equipment, the response has been insufficient to stem abuses. In light of its human rights obligations, the State has a duty to revisit the laws and policies still in effect that facilitate the problematic trend of militarization.

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<sup>599</sup> Nedra Pickler, *Obama Bans Some Military-Style Equipment Provided to Police*, Military (May 18, 2015), <http://www.military.com/daily-news/2015/05/18/obama-bans-some-military-style-equipment-provided-to-police.html>; *White House Ban On Militarized Gear For Police May Mean Little*, NPR (May 21, 2015), <http://www.npr.org/sections/thetwo-way/2015/05/21/407958035/white-house-ban-on-militarized-gear-for-police-may-mean-little>.

<sup>600</sup> *Id.*

## V. Investigations and Accountability for Excessive Use of Force by Police

### A. Importance of accountability for the excessive use of force by police

Police impunity lies at the heart of a cycle of violence and discrimination against people of color, generally, and against Black Americans in particular. As Amnesty International has observed, “when it comes to excessive, arbitrary, abusive or otherwise unlawful use of force, the most important factor leading to such behavior is when impunity prevails.”<sup>601</sup>

A police officer who engages in misconduct, such as the use of excessive force resulting in death, may face one or more of three types of formal legal action—or no action. A civilian or a police department may initiate an internal police investigation, which could lead to sanctions against the officer or termination of the officer’s employment. State and/or federal authorities may initiate a criminal investigation. Lastly, a private plaintiff may choose to bring a civil action against an officer for monetary damages. Despite the existence of these different avenues for accountability, in practice, it remains the exception rather than the norm that officers are held accountable at all for the excessive and discriminatory use of force.

### B. Deficiencies in police accountability and access to justice in the United States

#### i. Failures to effectively investigate and prosecute police for the excessive use of force

Statistics suggest that police who use excessive force do not face criminal liability in the same manner as civilians who assault or kill others. First, police officers enjoy wide statutory discretion to use deadly force against civilians, as described above.<sup>602</sup> Second, prosecutors are less likely to file charges against members of the police,<sup>603</sup> and grand juries are less likely to indict them.<sup>604</sup> Prosecutors and police officers work together to convict private citizens, and that relationship can compromise prosecutorial impartiality.<sup>605</sup> Criminal proceedings against police are also plagued by many of the same problems as internal investigations, such as unreliable witnesses, limited evidence due to the influence of police unions, and secrecy.<sup>606</sup>

Unlike internal affairs reviews, criminal proceedings may only be initiated by prosecutors. State and federal prosecutors have discretion to bring a criminal suit against a police officer, and they exercise that

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<sup>601</sup> Amnesty Int’l, Use of Force, *Guidelines for Implementation of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (Aug. 2015) [http://www.amnesty.nl/sites/default/files/public/ainl\\_guidelines\\_use\\_of\\_force.pdf](http://www.amnesty.nl/sites/default/files/public/ainl_guidelines_use_of_force.pdf)

<sup>602</sup> See, e.g., Mo. Rev. Stat. § 563.046 (1979), § 563.051 (2014); Chase Madar, *Why It’s Impossible to Indict a Cop*, Nation (Dec. 25, 2014), <http://www.thenation.com/article/why-its-impossible-indict-cop/>.

<sup>603</sup> See Rueben Fischer-Baum, *Allegations of Police Misconduct Rarely Result in Charges*, FiveThirtyEight (Nov. 25, 2014 9:45AM), <http://fivethirtyeight.com/datalab/allegations-of-police-misconduct-rarely-result-in-charges/>.

<sup>604</sup> See James Pinkerton, *Hard to Charge*, Houston Chron. <http://www.houstonchronicle.com/local/investigations/item/Bulletproof-Part-3-Hard-to-charge-24421.php> (last viewed Oct. 5, 2015); Mark Motivans, *Federal Justice Statistics 2010 – Statistical Tables*, Bureau of Justice Statistics 12 (Dec.2013), <http://www.bjs.gov/content/pub/pdf/fjs10st.pdf>.

<sup>605</sup> Senate President Martin Looney stated, “[I]t creates the appearance of potential conflict when you have a prosecutor investigation a police department with whom that prosecutor has to work with day-to-day.” Joseph De Avila, *Bill Would Require Outside Prosecutors for Police Deadly Force Cases*, Wall St. J. (Apr., 6, 2015 8:48PM), <http://www.wsj.com/articles/bill-would-require-outside-prosecutors-for-police-deadly-force-cases-1428367724>; See also Bruce Fein, *Prosecutorial Conflict of Interest*, Washington Post (Dec. 5, 2014), <http://www.washingtontimes.com/news/2014/dec/5/prosecutorial-conflict-interest/?page=all>.

<sup>606</sup> See U.S. Atty David E. Nahmias, U.S. Dep’t of Justice, *Three Atlanta Police Officers Charged in Connection with the Fatal Shooting of an Elderly Atlanta Woman* 4 (Apr. 26, 2007), <http://www.justice.gov/archive/usao/gan/press/2007/04-26-07.pdf>.

discretion widely. While data on criminal prosecution of police officers for incidents that result in death is scarce, one study reports that police departments reported 2,600 “justifiable” homicides to the Federal Bureau of Investigations during a seven-year period ending in 2011, yet only 71 officers were charged with murder or manslaughter in line-of-duty shootings by police during that same period—and far fewer were convicted.<sup>607</sup> Another study similarly found that in the thousands of police-involved killings over the last ten years, only 54 police officers have faced criminal charges.<sup>608</sup>

Police are often held to a less stringent legal standard than civilians for conduct that results in death. In Washington State, for example, a police officer cannot be held criminally liable if he or she uses deadly force “without malice” and with a good faith belief that the act was justifiable under state law.<sup>609</sup> When three Washington officers fatally shot Antonio Zambrano-Montes, a 35-year-old Mexican immigrant who threatened them with a large rock while he was high on methamphetamine, the local prosecutor declined to indict the officers because of insufficient evidence of malice and lack of good faith.<sup>610</sup> Officers shot 17 rounds, hitting Zambrano-Montes seven times because they claimed they feared he would kill or injure them or someone else with the rock.

Prosecutors face pressure from various sources not to file charges against offending police officers. Resource constraints are one factor. Congress has not provided federal prosecutors with sufficient staffing to investigate all police brutality cases, and the Department of Justice, which decides how to allocate its resources, leaves many cases untried.<sup>611</sup> Moreover, elected district attorneys are vulnerable to pressure from police unions, which have considerable sway in local politics. New York City Public Advocate Letitia James stated, “Any district attorney knows that an endorsement from law enforcement unions is vital to earning voters’ trust. As a result, police unions play an outsized role in district attorney elections.”<sup>612</sup>

Even when charges are brought, police who lie under oath and jury bias towards officers slant prosecutions in favor of law enforcement officers.<sup>613</sup> Grand juries are unlikely to indict officers for criminal use of excessive force. While national data on indictment rates of police officers by grand juries do not exist, the Houston Chronicle found that grand juries in Dallas, Texas declined to indict 174 of the 175 police officers who faced investigation over a four-year period.<sup>614</sup> In contrast, the Bureau of Justice Statistics reported that grand juries only declined to indict in 11 out of 162,000 felony cases against

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<sup>607</sup> Philip M. Stinson, *Police Integrity Lost*, Bolling Green State Univ. Criminal Justice Program Blog (Aug. 20, 2014) <https://blogs.bgsu.edu/pilproject/2014/08/20/police-crime-involving-firearms/>; <https://www.fbi.gov/about-us/cjis/ucr/ucr>.

<sup>608</sup> Kimberly Kindy & Kimbriell Kelly, *Thousands dead, few prosecuted*, Wash. Post (Apr. 11, 2015) available at <http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/>. By year’s end, the *Washington Post* found that the number of indictments of police officers rose in 2015, but it remains to be seen how many will be convicted. *Six important takeaways from The Washington Post’s police shooting investigation*, Washington Post (Dec. 26, 2015), <https://www.washingtonpost.com/graphics/national/police-shootings-year-end/>.

<sup>609</sup> Wash. Rev. Code § 9A.16.040(3) (1986).

<sup>610</sup> Nicholas K. Geranios, *No Charges in Wash. Police Killing of Rock-Throwing Suspect*, PoliceOne.com (Sept. 9, 2015), <http://www.policeone.com/officer-misconduct-internal-affairs/articles/9495982-No-charges-in-Wash-police-killing-of-rock-throwing-suspect/>.

<sup>611</sup> See Asit S. Panwala, *The Failure of Local and Federal Prosecutors to Curb Police Brutality*, 30 Fordham Urban L. J. 639, 659–661 (2003).

<sup>612</sup> Letitia James, *Prosecutors and Police: The Inherent Conflict in Our Courts*, MSNBC (Dec. 5 2014, 12:16 AM), <http://www.msnbc.com/msnbc/prosecutors-police-inherent-conflict-our-courts>.

<sup>613</sup> See Michelle Alexander, *Opinion, Why Police Lie Under Oath*, N.Y. Times (Feb. 2, 2013), [http://www.nytimes.com/2013/02/03/opinion/sunday/why-police-officers-lie-under-oath.html?\\_r=0](http://www.nytimes.com/2013/02/03/opinion/sunday/why-police-officers-lie-under-oath.html?_r=0).

<sup>614</sup> James Pinkerton, *Hard to Charge*, Houston Chron. (last visited Oct. 5, 2015) <http://www.houstonchronicle.com/local/investigations/item/Bulletproof-Part-3-Hard-to-charge-24421.php>.

civilians in federal court.<sup>615</sup>

Most prosecutors impanel a special grand jury to investigate charges against a police officer, and the process can last for months. In contrast, most grand juries investigating charges against civilians either indict or decline to indict in a single day.<sup>616</sup> Practices like putting grand jurors through a “shooting simulator” training before hearing cases, to familiarize them with police use-of-force scenarios, risk biasing them in favor of officers.<sup>617</sup> In Houston, Texas, where grand jurors go through simulator training, they have declined to indict 300 Houston officers consecutively in on-the-job shootings.<sup>618</sup>

In the rare event that a police officer is indicted and tried, he or she is less likely to be convicted than a civilian defendant. The Cato Institute reported that about 33% of all police misconduct cases it tracked from 2009-2010 resulted in conviction.<sup>619</sup> In contrast, the Bureau of Justice Statistics reports that felony cases in the country’s largest counties during the same period led to convictions twice as often.<sup>620</sup>

ii. *Shortfalls of internal disciplinary actions*

The only way a police officer may be disciplined or terminated, short of a criminal conviction, is through an internal review. But such reviews rarely find officers at fault. For example, in 2002—the last time the Bureau of Justice Statistics conducted a national survey of police use of force complaints—the agency found that only eight percent of complaints filed with large state and local law enforcement agencies were upheld. In the other ninety-two percent of cases, the complaints were dismissed.<sup>621</sup>

Police departments have widely divergent policies as to how they address civilian complaints.<sup>622</sup> Some states, such as New Jersey, have enacted statutes that require local, county, and specialized police departments to adopt formal internal affairs procedures.<sup>623</sup> Many police departments in the United States, including even some large municipal departments, do not have a stand-alone internal affairs unit.<sup>624</sup> While some departments monitor personnel through a computer-based system, others maintain paper files on officers.<sup>625</sup> Lack of consistency or uniformity across police forces may make it more difficult to file an internal complaint or access evidence during adjudication, and may undermine confidence in the fairness of the process.

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<sup>615</sup> Mark Motivans, *Federal Justice Statistics 2010 – Statistical Tables*, Bureau of Justice Statistics 12 (Dec.2013), <http://www.bjs.gov/content/pub/pdf/fjs10st.pdf>.

<sup>616</sup> James McKinley Jr. & Al Baker, *Grand Jury System, With Exceptions, Favors the Police in Fatalities*, N.Y. Times (Dec. 7, 2014), [http://www.nytimes.com/2014/12/08/nyregion/grand-juries-seldom-charge-police-officers-in-fatal-actions.html?\\_r=0](http://www.nytimes.com/2014/12/08/nyregion/grand-juries-seldom-charge-police-officers-in-fatal-actions.html?_r=0).

<sup>617</sup> Juan A. Lozano, *Texas Prosecutors’ Shooting Simulator Stirs Debate on Whether It Promotes Pro-Police Mindset*, Star Tribune (May 5, 2014, 3:45 PM), <http://www.startribune.com/texas-grand-jury-shooting-simulator-stirs-debate/257968401/>.

<sup>618</sup> *Id.*

<sup>619</sup> David Packman, *The Truth About Police Misconduct Litigation*, CATO INST. (Feb. 22, 2010), <http://www.policemisconduct.net/the-truth-about-police-misconduct-litigation/>.

<sup>620</sup> Zusha Elinson & Joe Palazzolo, *Police Rarely Criminally Charged for On-Duty Shootings*, WALL ST. J. (Nov. 24, 2014, 7:22 PM), [http://www.wsj.com/articles/police-rarely-criminally-charged-for-on-duty-shootings-1416874955?mod=WSJ\\_hpp\\_LEFTTopStories](http://www.wsj.com/articles/police-rarely-criminally-charged-for-on-duty-shootings-1416874955?mod=WSJ_hpp_LEFTTopStories).

<sup>621</sup> Matthew J. Hickman, Bureau of Justice Statistics, *Citizen Complaints About Police Use of Force* 4 (June 2006), <http://www.bjs.gov/content/pub/pdf/ccpuf.pdf>.

<sup>622</sup> For a comparison of disciplinary policies at twelve large municipal police departments, see Standards and Guidelines for Internal Affairs: Recommendations for a Community of Practice, U.S. Department of Justice Office of Community Oriented Policing Services 61–76 (2008) <http://ric-zai-inc.com/Publications/cops-p164-pub.pdf>.

<sup>623</sup> See N.J. Rev. Stat. § 40A:14-181 (2013).

<sup>624</sup> Matthew J. Hickman, Bureau of Justice Statistics, *Citizen Complaints About Police Use of Force* 5 (June 2006), <http://www.bjs.gov/content/pub/pdf/ccpuf.pdf>.

<sup>625</sup> *Id.*

The average citizen encounters numerous obstacles to filing a complaint against a police officer. The ACLU of New Jersey found that police agencies regularly violate state statutory requirements by limiting the time, place, and manner in which citizens can file complaints.<sup>626</sup> Police departments actively discourage filing by providing incomplete information on the complaint process and refusing to accept complaints filed by juveniles unless submitted in person or in the presence of a parent, among other hurdles.<sup>627</sup>

Conflicts of interest can also affect the outcome of an internal review process. Police officers are often the only eyewitnesses to the fatal misconduct of their peers.<sup>628</sup> They may give false testimony out of loyalty to a fellow officer<sup>629</sup> or out of fear of being held liable for the injury caused by another officer.<sup>630</sup> In some circumstances, law enforcement unions have negotiated contracts with municipalities that make holding police accountable more difficult: officers cannot be interviewed at the scene of the use-of-force, internal affairs has to wait days to get officer statements, officers can collaborate on use-of-force reports, and they may see body camera footage before they write their report.<sup>631</sup> Internal reviews are often confidential, and complainants find that internal investigations take too long to be effective.

There are other barriers to holding police officers accountable. As many as 14 states have negotiated bills of rights specifically for police officers facing investigation for misconduct.<sup>632</sup> Additionally, internal reviews are confidential in many municipalities,<sup>633</sup> and they often extend beyond the standard time allotted.<sup>634</sup> In New Jersey, for example, the State Comptroller reviewed 48 internal investigations of police misconduct and found that only 10 were completed within the standard 120-day time limit.<sup>635</sup> Although police departments should have sought authority to extend the timelines for the remaining 38 investigations, they failed to do so.<sup>636</sup>

The internal review of police officers involved in the fatal shooting of 92-year-old Kathryn Johnston, a Black woman, failed for many of the reasons cited above. Three Atlanta police officers entered Ms.

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<sup>626</sup> Alexander Shalom, *The Crisis Continues Inside Police and Internal Affairs*, Am. Civil Liberties Union of N.J. 6 (Feb. 2013), [https://www.aclu-nj.org/files/3413/6059/3876/ACLU\\_NJ\\_Internal\\_Affairs.pdf](https://www.aclu-nj.org/files/3413/6059/3876/ACLU_NJ_Internal_Affairs.pdf).

<sup>627</sup> *Id.*

<sup>628</sup> Alan Maimon, *Wrongful Death Lawsuits Rarely Filed; Families Seldom Win*, Las Vegas Rev.-J. (Nov. 27, 2011 12:00 AM), <http://www.reviewjournal.com/news/deadly-force/always-justified/wrongful-death-lawsuits-rarely-filed-families-seldom-win>.

<sup>629</sup> Alexander Shalom, *The Crisis Continues Inside Police and Internal Affairs*, Am. Civil Liberties Union of N.J. 9 (Feb. 2013), [https://www.aclu-nj.org/files/3413/6059/3876/ACLU\\_NJ\\_Internal\\_Affairs.pdf](https://www.aclu-nj.org/files/3413/6059/3876/ACLU_NJ_Internal_Affairs.pdf).

<sup>630</sup> *See, i.e.*, Jones v. City of Hartford, 285 F.Supp.2d 174, 182 (D. Conn. 2003) (holding that police officers “have an affirmative duty to intercede on the behalf of a citizen whose constitutional rights are being violated in their presence by other officers”) (quoting O’Neill v. Krzeminski, 839 F.2d 9, 11 (2d. Cir. 1988)).

<sup>631</sup> Jonathan M. Smith, *Police Unions Must Not Block Reform*, N.Y. Times (May 29, 2015), <http://www.nytimes.com/2015/05/30/opinion/police-unions-must-not-block-reform.html>.

<sup>632</sup> Eli Hager, *Blue Shield*, Marshall Project (Apr. 27, 2015 12:06 PM), <https://www.themarshallproject.org/2015/04/27/blue-shield>. One commentator argues that these bills of rights create a problematic double standard. Paul Butler, *The Police Officers Bill of Rights Creates a Double Standard*, N.Y. Times (June 27, 2015), <http://www.nytimes.com/roomfordebate/2015/04/29/baltimore-and-bolstering-a-police-officers-right-to-remain-silent/the-police-officers-bill-of-rights-creates-a-double-standard>.

<sup>633</sup> *See, e.g.*, Rachel Dissel, *Some Police Settlements Confidential; Criminal Charges Deter Some from Calling Out Brutality, Lawsuits Say: Forcing Change*, Cleveland.com (Jan. 28, 2015), [http://www.cleveland.com/forcing-change/index.ssf/2015/01/city\\_wanted\\_some\\_police\\_settle.html](http://www.cleveland.com/forcing-change/index.ssf/2015/01/city_wanted_some_police_settle.html); Jim Mustian, *State Police Settle N.O. Civil Rights Lawsuit Before Trial*, New Orleans Advocate (Jan. 10, 2015), <http://www.theneworleansadvocate.com/news/crime/11294232-123/state-police-settle-no-civil>; Mark Puente, *Baltimore Settlements on Police Brutality More Restrictive than in Other Cities*, Baltimore Sun (Dec. 27, 2014), <http://www.baltimoresun.com/news/maryland/bs-md-settlement-confidentiality-20141227-story.html>.

<sup>634</sup> Christopher Baxter, *N.J. Comptroller: State Police Internal Investigations Take Too Long*, NJ.com (Apr. 17, 2012 7:23 PM), [http://www.nj.com/news/index.ssf/2012/04/nj\\_comptroller\\_state\\_police\\_in.html](http://www.nj.com/news/index.ssf/2012/04/nj_comptroller_state_police_in.html).

<sup>635</sup> *Id.*

<sup>636</sup> *Id.*

Johnston's home on a "no-knock" warrant procured through a fabricated informant.<sup>637</sup> Without notification, the officers cut burglar bars and broke down her door to enter her home. When Ms. Johnston fired one shot over the officers' heads, they returned 39 shots. After the shooting, officers planted marijuana in her home, met prior to writing their use-of-force report to fabricate a story, and falsely told Atlanta Police Department homicide investigators that suspected possession of cocaine was grounds for the warrant. The officer who shot Kathryn Johnston in her home was not interviewed until five days after the incident. Only after the Federal Bureau of Investigations began its own probe did one of the officers recant his story.<sup>638</sup> The Atlanta Citizen Review Board found that the misconduct that occurred in this case "[is] a symptom of a system of internal oversight that is slow to investigate and discipline, and this undermines the ability to ensure that officers are performing in a constitutional, legal and ethical fashion."<sup>639</sup>

Even where internal investigations lead supervisors to terminate or discipline police officers, their determinations can be overturned through independent arbitration. Between 2006 and 2013, independent arbiters overturned 17 of 23 administrative sanctions by the Boston Police Department.<sup>640</sup> In one instance, Boston Police Commissioner Edward Davis fired an officer after concluding that he choked a suspect during an arrest and lied about the incident to internal affairs investigators. Internal investigators did nothing about the civilian's complaint for one year and then waited two years before placing the officer on administrative leave.<sup>641</sup> Four years later, however, an independent arbitrator overturned the Commissioner's decision and awarded the police officer back pay for the years he was suspended, even though the City of Boston awarded the plaintiff \$1.4 million in a federal lawsuit for his injuries.<sup>642</sup>

### *iii. Limitations on civil suits and reparations for victims of excessive use of force by police*

Injured parties may sue individual police officers in their personal capacities, a police department, or a municipality to obtain monetary damages for the excessive use of force. Procedural law concerning the timeframe within which a suit can be filed, limitations on who can file a suit, and high pleading standards all present barriers to filing a civil case. Other pressures also come to bear on a plaintiff: she/he may be unable to pay an attorney, or find one who will represent her/him free of charge. Plaintiffs also fear reprisal from police departments, and may be intimidated by suing an entire law enforcement agency. Additionally, lawsuits are time-consuming.

If a civil suit is commenced, the outcome may be skewed by factors similar to those that often impede criminal prosecution of officers. For example, a judge or jury may be predisposed to believe police officers' accounts of their own conduct, or may disbelieve plaintiffs with criminal histories. Evidence may be scarce, and police officers may be reluctant to testify, or may give false testimony, because of loyalty to the offending officer, the department, or a union.

Despite the barriers to obtaining a just outcome in civil court, in some instances, plaintiffs obtain substantial sums of money in damage awards or in settlements. While major awards often make the

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<sup>637</sup> *Kathryn Johnston and Police System Failure: What Can Congress Do About It?* Am. Civil Liberties Union 1, [https://www.aclu.org/files/images/asset\\_upload\\_file332\\_30599.pdf](https://www.aclu.org/files/images/asset_upload_file332_30599.pdf) (last visited Oct. 5, 2015).

<sup>638</sup> David E. Nahmias, *Three Atlanta Police Officers Charged in Connection with the Fatal Shooting of an Elderly Atlanta Woman*, U.S. Dep't of Justice 4 (Apr. 26, 2007), <http://www.justice.gov/archive/usao/gan/press/2007/04-26-07.pdf>.

<sup>639</sup> *Study and Inquiry into the Atlanta Police Department's Involvement in the Death of Ms. Kathryn Johnston*, Atlanta Citizen Review Bd. 18 (May 3, 2010), <http://www.atlantaunfiltered.com/wp-content/uploads/2010/05/CRB-Johnston-Paper.pdf>.

<sup>640</sup> Lawrence Harmon, *Do Arbitrators Give Violent Cops a Pass?*, Bos. Globe (June 29, 2013), <http://www.bostonglobe.com/opinion/2013/06/28/out-control-officers-find-comfort-arbitration/02N6zKhHmM2GM63PDIYIHO/story.html>.

<sup>641</sup> *Id.*

<sup>642</sup> *Id.*



news, the Cato Institute found that of 925 civil suits for police misconduct tracked over a ten-month period, thirty-three percent resulted in an award for the plaintiff.<sup>643</sup> Of those cases, 74% were settled out of court. The median award for successful police misconduct litigation was \$225,000.<sup>644</sup> In Las Vegas, 24 of 142 police shootings over a 20-year period resulted in federal suits. Juries declined to return a guilty verdict in any of those 24 suits, but seven ended in cash settlements. Several of the cases are still pending.<sup>645</sup> The cost of police misconduct is increasing for American taxpayers. While the 10 U.S. cities with the largest police departments paid \$168.3 million in 2010 in settlements and judgments in police misconduct cases, they paid \$248.7 million, or almost fifty percent more, in 2014.<sup>646</sup> Over a five-year period, those 10 police departments paid out \$1.02 billion in those cases for beatings, shootings, and wrongful imprisonment alone. The increasing availability of video evidence may be a factor in the increase.

While civil suits can provide plaintiffs with important monetary compensation, the accountability that they offer is limited. The Cato Institute Report suggests that police officers are rarely found liable in civil suits. When plaintiffs settle out of court, defendant officers or police departments do not have to take responsibility for their actions because settlements are not acknowledgements of misconduct. Settlements further obfuscate data on police misconduct, as proceedings that might otherwise result in adverse outcomes for officers end without formal adjudication. Additionally, civil suits rarely result in institutional reform. Municipalities generally indemnify their officers, and the city pays the damage awards out of taxpayer money: most police departments do not even know how much a city has paid for police misconduct, or whose conduct resulted in a settlement.<sup>647</sup>

#### iv. *External and community oversight mechanisms*

The need for civilian oversight of police activity comes from the notion that the police “lack the objectivity and the distance to meaningfully police themselves.”<sup>648</sup> Some believe that internal affairs departments should be replaced with external professional investigators working for independent boards given the power to act with or without the concurrence of the chief of police.<sup>649</sup> Others argue that while there is a need for external review boards these should go hand in hand with internal affairs.<sup>650</sup> Making external boards dependent on internal mechanisms, however, could compromise their ability to ensure redress: “without responsibility to adjudicate wrongdoing and impose discipline” the police “will not be held accountable for dealing with police misconduct.”<sup>651</sup>

One way in which communities have sought to create an external oversight process to accompany law enforcement’s internal review procedures is through empowering civilians to participate. In some cases, cities have incorporated civilians into their internal affairs processes to bring an independent perspective.

<sup>643</sup> David Packman, *The Truth About Police Misconduct Litigation*, Cato Inst. (Feb. 22, 2010),

<http://www.policemisconduct.net/the-truth-about-police-misconduct-litigation/>.

<sup>644</sup> *Id.*

<sup>645</sup> Alan Maimon, *Wrongful Death Lawsuits Rarely Filed; Families Seldom Win*, Las Vegas Rev. J. (Nov. 27, 2011 12:00 AM), <http://www.reviewjournal.com/news/deadly-force/always-justified/wrongful-death-lawsuits-rarely-filed-families-seldom-win>.

<sup>646</sup> Zusha Elinson & Dan Frosch, *Cost of Police-Misconduct Cases Soars in Big U.S. Cities*, Wall St. J. (July 15, 2015 10:30 PM), <http://www.wsj.com/articles/cost-of-police-misconduct-cases-soars-in-big-u-s-cities-1437013834>. These ten cities include New York City, Chicago, Los Angeles, Philadelphia, Houston, Washington, D.C., Dallas, Phoenix, Baltimore, and Miami-Dade.

<sup>647</sup> *Civil Suits Against Police Cost Taxpayers Millions But Rarely Result in Reforms*, Free Speech Radio News (June 23, 2015), <http://fsrn.org/2015/06/civil-suits-against-police-cost-taxpayers-millions-but-rarely-result-in-reforms/>.

<sup>648</sup> Community Oriented Policing Services, *The Changing Mission of Police Monitoring*, U.S. Dep’t of Justice (Jan. 2010), [http://cops.usdoj.gov/html/dispatch/January\\_2010/police\\_monitoring.htm](http://cops.usdoj.gov/html/dispatch/January_2010/police_monitoring.htm).

<sup>649</sup> *Id.*

<sup>650</sup> *Id.*

<sup>651</sup> *Id.*

For example, the city of Seattle hired a civilian lawyer to head the internal affairs office of the police department.<sup>652</sup> In Los Angeles, the County Board of Supervisors in 2001 created the Office of Independent Review, which is a group of six lawyers “who are empowered to pass upon internal affairs investigations” in the Los Angeles Sheriff’s Department.<sup>653</sup>

Another way to involve the community is through the creation of a civilian review board. These are entities external to the police department office of internal affairs and made up of civilians from outside of the police department.<sup>654</sup> Civilian review boards consider complaints against police departments and then recommend disciplinary actions they think should be taken.<sup>655</sup>

These recommendations are typically presented alongside those made by the internal affairs department following its own investigation.<sup>656</sup> A civilian review board can either be charged with conducting its own investigation of a complaint or can review the same (or redacted) information used by internal affairs.<sup>657</sup>

Civilian review boards are not only a good way to involve the community in holding the police accountable for abuses, but they can also help establish legitimacy for the police department.<sup>658</sup> According to the VERA Institute of Justice, research has shown that “some form of civilian oversight is probably the best way to achieve legitimacy with the community, regardless of whether internal systems for dealing with police complaints might also be effective.”<sup>659</sup> Another study undertaken of 17 law enforcement agencies found that civilian review boards “sustain police brutality complaints at a higher [rate] than do the police themselves,” which may reflect their greater independent and capacity to treat grievances “fairly.”<sup>660</sup>

Washington, D.C. has had a long history of setting up civilian review boards. The first Complaint Review Board was established in 1948 by the Urban League and National Conference of Christians and Jews.<sup>661</sup> This early Board was plagued with inefficiencies, had little visibility and limited capacity to take on cases. The Board took these early lessons to heart when it expanded in 1965 from three to five members<sup>662</sup> and adopted more formal case procedures.<sup>663</sup> Despite these changes, there were still criticisms of the Board and in 1980 it was replaced with a new entity called the Civilian Complaint Review Board that had exclusive jurisdiction over complaints of excessive force.<sup>664</sup> In 1992, the number of Board members increased from seven to 21.<sup>665</sup> Backlog and financial problems saw the Board eventually abolished in 1995, but it was re-established in 2001 under the moniker of the Office of Citizen Complaint Review.<sup>666</sup>

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<sup>652</sup> *Id.*

<sup>653</sup> *Id.*

<sup>654</sup> USCCR, *Alternative Models for Police Disciplinary Procedures*, U.S. Comm. on Civil Rights, <http://www.usccr.gov/pubs/sac/wv0104/ch4.htm> (accessed Oct. 11, 2015).

<sup>655</sup> *Id.*

<sup>656</sup> *Id.*

<sup>657</sup> *Id.*

<sup>658</sup> Joel Miller & Cybele Merrick, *Civilian Oversight of Policing*, Vera Inst. of Justice (May 5-8, 2002), [http://www.vera.org/sites/default/files/resources/downloads/Civilian\\_oversight.pdf](http://www.vera.org/sites/default/files/resources/downloads/Civilian_oversight.pdf).

<sup>659</sup> *Id.*

<sup>660</sup> USCCR, *Alternative Models for Police Disciplinary Procedures*, U.S. Comm. on Civil Rights, <http://www.usccr.gov/pubs/sac/wv0104/ch4.htm> (accessed Oct. 11, 2015).

<sup>661</sup> Joel Miller & Cybele Merrick, *Civilian Oversight of Policing*, Vera Inst. of Justice (May 5-8, 2002), [http://www.vera.org/sites/default/files/resources/downloads/Civilian\\_oversight.pdf](http://www.vera.org/sites/default/files/resources/downloads/Civilian_oversight.pdf).

<sup>662</sup> *Id.*

<sup>663</sup> *Id.*

<sup>664</sup> *Id.*

<sup>665</sup> *Id.*

<sup>666</sup> *Id.*

This embattled history is illustrative of the challenges facing practical implementation of a civilian review board. The National Institute of Justice noted the following among the limitations of civilian review boards:

- The effectiveness of citizen oversight depends enormously on the talent, fairness, and personalities of the principal individuals involved.
- Oversight bodies have limited authority; they do not impose discipline or dictate department policies or procedures.
- The findings some oversight bodies make, or the investigations they conduct, have no influence on some police managers.
- Some complainants who lose their cases express disappointment with the oversight process.
- When long delays occur between the filing of a complaint and its resolution, complainants become frustrated and disillusioned—even when they ultimately win the case.
- Oversight procedures in some jurisdictions have exacerbated tensions among local officials, police and sheriff's departments and unions, and citizen groups and activists.<sup>667</sup>

To measure the above against a more specific context, consider the findings of the New York Civil Liberties Union (“NYCLU”) Complaint Review Board Study conducted in the early 2000s. The number of complaints filed with the Civilian Complaint Review Board (“CCRB”) in New York City jumped 66% during the years 2002–2006, and allegations of excessive use of force increased by 77%.<sup>668</sup> Given the rise in the number of complaints filed, however, the CCRB was struggling not only to keep up, but to work effectively at all. An evaluation of the CCRB process found the following:

- The CCRB has been unable to establish an effective investigative operation.
- The CCRB has failed to become an effective advocate for reform of police practices that pose an undue risk of harm to civilians.
- The NYPD fails to cooperate with the CCRB, seriously undermining the civilian oversight function.
- The NYPD rejects CCRB disciplinary findings and recommendations in the overwhelming majority of cases.<sup>669</sup>

Of the cases referred to an administrative trial during this period, consistent with the CCRB's recommendation, 64 percent resulted in no disciplinary action. The explanation for the large number of dismissals and not-guilty findings is well documented: The department advocates conducted little if any case preparation. The New York City Commission to Combat Police Corruption has published two reports—one in 2000 and a follow-up in 2004—that analyzed the performance of the Department Advocates Office. These reports found that the NYPD's prosecution of CCRB complaints failed to meet minimum standards of competence.<sup>670</sup>

Where they exist, community involvement mechanisms and civilian oversight boards possess enormous

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<sup>667</sup> Nat'l Inst. of Justice, *Citizen Review of Police: Approaches and Implementation*, Nat'l Criminal Justice Reference Service (Mar. 2001), <https://www.ncjrs.gov/txtfiles1/nij/184430.txt>.

<sup>668</sup> NYCLU, *Testimony of Donna Lieberman*, <http://www.nyclu.org/content/civilian-complaint-review-board-and-civilian-oversight-of-policing> (accessed Oct. 11, 2015).

<sup>669</sup> *Id.*

<sup>670</sup> *Id.*

potential to help hold police accountable for the excessive use of force. In many cases, however, their practical efficacy is severely limited.

v. *Gaps in federal law diminish the ability to hold police accountable for the excessive use of force*

While criminal investigations into police killings are typically the purview of state and local authorities, the federal government does have a limited set of tools available to hold police officers accountable under federal law. Specifically, the most commonly used law for federal prosecution of local, state, or federal officials for the excessive use of force is the criminal civil rights statute prohibiting the “Deprivation Of Rights Under Color Of Law,” 18 U.S.C. § 242.<sup>671</sup>

In practice, however, the federal government prosecutes very few of these cases.<sup>672</sup> To obtain a conviction under 18 U.S.C. § 242, the government must prove beyond a reasonable doubt that “(1) the defendant was acting under color of law, (2) that he deprived a victim of a right protected by the Constitution or laws of the United States, (3) that he acted willfully, and (4) that the deprivation resulted in bodily injury and/or death.”<sup>673</sup> The third element, willfulness, has been interpreted to effectively mean “specific intent.” In other words, there must be evidence to prove that the defendant officer intended to engage in unconstitutional conduct, and that he did so knowing that it was a wrongful act. The resulting evidentiary bar is so high that very few cases involving conduct that constitutes excessive use of force under international law qualify for investigation under this statute.

Commentators have long decried this standard; historically, “prosecutors ... could rarely prove to a jury that even a [Ku Klux] Klansman had lynched his victim for the purpose of depriving his victim of rights.”<sup>674</sup> For this reason, federal investigations consistently fail to provide meaningful review. Eric Holder, the former United States Attorney General who oversaw the federal investigation of Michael Brown’s killing and other Department of Justice investigations, stated in the aftermath of the investigation that the federal civil rights laws involved in the prosecution of police officers’ possible use of force involve meeting a standard of proof that is “too high.”<sup>675</sup> According to the Attorney General, “[w]e do need to change the law.”<sup>676</sup>

Several statutes authorize the federal government to investigate police misconduct, yet limited resources constrain the ability of the DOJ to thoroughly review allegations. Under the Violent Crime Control and Law Enforcement Act of 1994,<sup>677</sup> the DOJ has the authority to review practices of law enforcement agencies that may violate citizens’ federal rights.<sup>678</sup> (See the discussion below in Section V.D.ii.) Both the Omnibus Crime Control and Safe Streets Act of 1968<sup>679</sup> and Title VI of the Civil Rights Act of

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<sup>671</sup> 18 U.S.C. § 242.

<sup>672</sup> Christopher Dunn, *Column: Police Killings of Unarmed Black Men: Why No Federal Prosecutions?*, NYCLU (Dec. 4, 2014), <http://www.nyclu.org/oped/column-police-killings-of-unarmed-black-men-why-no-federal-prosecutions-new-york-law-journal>.

<sup>673</sup> U.S. Dep’t of Justice, *Report Regarding the Criminal Investigation into the Shooting Death of Michael Brown by Ferguson*, Missouri Police Officer Darren Wilson, 9 (Mar. 4, 2015), [http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj\\_report\\_on\\_shooting\\_of\\_michael\\_brown\\_1.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf).

<sup>674</sup> Mark Joseph Stern, *Will Justice Department Charge Darren Wilson?*, Slate (Mar. 14, 2015), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/11/will\\_justice\\_department\\_charge\\_darren\\_wilson\\_supreme\\_court\\_gutted\\_civil.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/11/will_justice_department_charge_darren_wilson_supreme_court_gutted_civil.html).

<sup>675</sup> Kelly Cohen, *Holder: ‘Standard is too high in federal civil rights cases*, Wash. Examiner (Feb. 27, 2015), <http://www.washingtonexaminer.com/holder-standard-is-too-high-in-civil-rights-cases/article/2560811>.

<sup>676</sup> *Id.*

<sup>677</sup> 42 U.S.C. § 14141 (2015).

<sup>678</sup> *Conduct of Law Enforcement Agencies*, U.S. Dep’t of Justice (Aug. 17, 2015), <http://www.justice.gov/crt/conduct-law-enforcement-agencies> [hereinafter *Conduct of Law Enforcement Agencies*].

<sup>679</sup> 42 U.S.C. § 3789d (2015).

1964<sup>680</sup> preclude agencies that receive federal funds from discriminating on the basis of race, color, sex, or national origin. Although the DOJ investigates allegations of discrimination, “[h]arm to a single person, or isolated action, is usually not enough to show a pattern or practice that violates these laws.”<sup>681</sup> The DOJ’s mandate is thus largely limited to structural discrimination and malpractice rather than individual cases. As previously stated, DOJ financial resources and personnel are determined through congressional budgetary decisions. The Department does not have sufficient staff to investigate all police brutality allegations.<sup>682</sup> Moreover, the federal government takes legal action against police brutality on an ad hoc basis; there are no guidelines for which cases are the responsibility of state, local, or federal prosecutors.<sup>683</sup>

Constitutional jurisprudence further hampers efforts to address structural discrimination through legal action. The U.S. Supreme Court has interpreted the Equal Protection Clause of the U.S. Constitution’s Fourteenth Amendment narrowly, limiting its ability to protect against, prevent, and remedy indirect racism. Consequently, violations of international law are left unaddressed. In light of the U.S. obligation to combat indirect discrimination, CERD has expressed continued concern over the limited scope and applicability of the disparate impact doctrine.<sup>684</sup> The Committee has repeatedly noted that the definition of racial discrimination used in federal and state legislation, as well as court practice in the United States, is out of line with the State’s duty to “prohibit and eliminate racial discrimination in all its forms, including practices and legislation that may not be discriminatory in purpose, but are discriminatory in effect.”<sup>685</sup>

In *Washington v. Davis*,<sup>686</sup> the U.S. Supreme Court held that the Fourteenth Amendment of the U.S. Constitution applies only to deliberate discrimination, not incidental disparate impact: “[T]he central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race ... [O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.”<sup>687</sup>

Measures to prevent, protect against, and remedy the effects of indirect discrimination exist only where provided for by statute. In *Texas Housing Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*,<sup>688</sup> the U.S. Supreme Court affirmed that where authorized by statute, parties can raise disparate-impact claims that challenge practices having a “disproportionately adverse effect on minorities” and are “otherwise unjustified by a legitimate rationale.”<sup>689</sup> This reasoning builds upon that of an earlier case, *Griggs v. Duke Power Co.*, which held that antidiscrimination laws as they pertain to race must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where such interpretation is consistent with statutory purpose.<sup>690</sup>

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<sup>680</sup> 42 U.S.C. § 2000d (2015).

<sup>681</sup> *Conduct of Law Enforcement Agencies*, U.S. Dep’t of Justice (Aug. 17, 2015), <http://www.justice.gov/crt/conduct-law-enforcement-agencies> [hereinafter *Conduct of Law Enforcement Agencies*].

<sup>682</sup> Asit S. Panwala, *The Failure of Local and Federal Prosecutors to Curb Police Brutality*, 30 Fordham Urb. Law J. 639, 656.

<sup>683</sup> *Id.* at 640.

<sup>684</sup> Comm. on the Elimination of Racial Discrimination, *Concluding observations on the combined seventh to ninth periodic reports of the United States of America*, U.N. Doc. CERD/C/USA/CO/7-9, ¶ 5 (Sept. 25, 2014) (recognizing that the doctrine applies by statute in certain fields of life, but expressing concern at its “limited scope and applicability”).

<sup>685</sup> *Id.*

<sup>686</sup> *Washington v. Davis*, 426 U.S. 229 (1976).

<sup>687</sup> *Id.* at 245 (1976).

<sup>688</sup> 575 U.S. \_\_\_\_ (2015).

<sup>689</sup> *Id.*

<sup>690</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424, 431–32 (1971).

Today, there is no route for bringing a disparate impact claim under the United States Constitution. Statutory avenues remain limited, largely inaccessible to victims of discriminatory police violence and their families, and otherwise ill-suited to address indirect, structural racism.<sup>691</sup> To date, the U.S. legal framework has proven inadequate to respond to the observations of international human rights bodies that the disproportionate, excessive use of force by police against Black Americans constitutes discrimination, in violation of international law.

### **C. Deficient investigations and lack of police accountability for excessive use of force and unlawful killings violate international law**

#### *i. The lack of accountability for the excessive use of force and unlawful killings results in impunity*

The Inter-American Court has defined impunity as “the absence of any investigation, pursuit, capture, prosecution and conviction” of those responsible for the violations of human rights.”<sup>692</sup> Further, this Commission has noted that such impunity “corrodes the foundations of a democratic state”<sup>693</sup> and “fosters chronic recidivism of human rights violations and the total defenselessness of victims and their relatives.”<sup>694</sup> Full compliance with the obligations to investigate, prosecute, punish, and provide redress, in accordance with due process, is essential to combat impunity.<sup>695</sup>

#### *ii. International law requires the United States to adopt policies to prevent the discriminatory and excessive use of force by police*

This Commission has consistently noted that the American Declaration imposes a positive obligation on States to ensure the rights therein are protected:

As a source of legal obligation, States must implement the rights established in the American Declaration in practice within their jurisdiction. The Commission has indicated that the obligation to respect and ensure human rights is specifically set forth in certain provisions of the American Declaration. International instruments in general require State parties not only to respect the rights enumerated therein, but also to ensure that individuals within their jurisdictions also exercise those rights. The continuum of human rights obligations is not only negative in nature; it also requires positive action from States.<sup>696</sup>

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<sup>691</sup> Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq., provides, “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial Assistance.” Many, if not most, police departments receive some form of federal funding, and therefore qualify as programs “receiving Federal financial Assistance.” But while it permits administrative enforcement actions, Title VI does not afford individuals a private right of action to bring claims based on disparate impact. See *Alexander v. Sandoval*, 532 U.S. 275 (2001).

<sup>692</sup> Inter-Am. Ct. H.R., *Case of the Ituango Massacres v. Colombia*, Preliminary Objection, Merits, Reparations and Costs, Judgment of July 1, 2006 Series C No. 148, ¶ 299; Inter-Am. Ct. H.R., *Case of the Mapiripán Massacre v. Colombia*, Merits, Reparations and Costs, Judgment of September 15, 2005, Series C No. 134, ¶ 237; Inter-Am. Ct. H.R., *Case of the Moiwana Community v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Judgment of June 15, 2005, Series C No. 124, ¶ 203; and Inter-Am. Ct. H.R., *Case of Serrano-Cruz Sisters v. El Salvador*, Merits, Reparations and Costs. Judgment of March 1, 2005, Series C No. 120, ¶ 170.

<sup>693</sup> *Report on the Situation of Human Rights Defenders in the Americas*, supra note 104, at ¶ 107.

<sup>694</sup> *Id.* at ¶ 108; see also *Rep. on Citizen Security and Human Rights*, supra note 105, ¶ 36.

<sup>695</sup> *Report on the Situation of Human Rights Defenders in the Americas*, supra note 104, at ¶¶ 124, 256.

<sup>696</sup> *Lenahan v. United States*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, ¶ 117 (2011).

Accordingly, “the Commission in its decisions has repeatedly interpreted the American Declaration as requiring States to adopt measures to give legal effect to the rights contained in the American Declaration.”<sup>697</sup> These affirmative measures include actions that translate into repairing corrupt environments that are incompatible with the protection of human rights<sup>698</sup> and bringing about the conditions for eradicating violations by State agents or private persons.<sup>699</sup>

In particular, this Commission also considers that States must adopt measures to guarantee the effective access of Afro-descendants to justice, and to take into account the material, economic and juridical obstacles, as well as the systematic exclusion from which Afro-descendants suffer.<sup>700</sup>

States are also obligated to enact laws, in compliance with international law, that clearly regulate police procedure.<sup>701</sup> The legal structure must include indicators and a system for verifying compliance with goals or objectives for law enforcement of citizen security.<sup>702</sup> In addition, a State must use “every means within its power” to publicize those rules.<sup>703</sup>

iii. *Police accountability mechanisms in the United States routinely fail to comply with the duties to investigate, prosecute, and punish perpetrators of human rights violations under international law*

The prohibition against the arbitrary deprivation of life is ineffective without a proceeding to verify the legality of a given use of force; thus, the State has a duty to adopt laws and practices for effective investigation.<sup>704</sup> In cases involving police misconduct, States have a “special duty” to clarify the facts and prosecute those responsible.<sup>705</sup> States must also initiate a “serious, independent, impartial and effective investigation” where firearms have been used by law enforcement officials with lethal consequence.<sup>706</sup>

Furthermore, the role of judicial authorities, including prosecutors, is essential to ensuring access to justice and making it “possible to punish those responsible for human rights violations, compensate the victims and, through a serious, impartial, and effective investigation, inform society regarding the truth about the reported events.”<sup>707</sup>

In the context of excessive use of force against communities of color, States must “take all reasonable steps to unmask any racist motive” and establish whether ethnic hatred or prejudice played a role in the

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<sup>697</sup> *Lenahan v. United States*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, ¶ 118 (2011); *see also* *Maya Indigenous Community v. Belize*, Case 12.053, Inter-Am. Comm’n H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 at 727 ¶ 162 (2004); *Oscar Elías Bicer v. Cuba*, Case 12.476, Inter-Am. Comm’n H.R., Report No. 67/06, ¶¶ 227–231 (2006).

<sup>698</sup> In similar sense, Inter-Am. Court H.R., *Case of Kawas-Fernández v. Honduras*. Merits, Reparations and Costs. Judgment (ser. C) No. 196, ¶ 74 (April 3, 2009).

<sup>699</sup> The U.N. Special Rapporteur on human rights defenders, Margaret Sekaggya, has expressed her concern over the continuous attacks to which human rights defenders are subject by non-State agents. For that reason, she decided to center one of her thematic reports to the General Assembly on the question of human rights violations committed against human rights defenders by non-State agents and their consequences for the full enjoyment of human rights of the defenders. *See* U.N. General Assembly, A/65/223, *Report of the Special Rapporteur on the situation of human rights defenders*, Aug. 4, 2010.

<sup>700</sup> *The Situation of People of African Descent in the Americas*, *supra* note 95, at ¶ 141.

<sup>701</sup> Inter-Am. Comm’n H.R., *Report on Citizens Security and Human Rights*, ¶ 97, OEA/Ser.L/V/II.Doc. 57 (Dec. 31, 2009).

<sup>702</sup> *Id.* at ¶ 95.

<sup>703</sup> *Id.* at ¶ 97.

<sup>704</sup> *Almonacid-Arellano v. Chile*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am Ct. H.R. (ser. C) No. 154 ¶ 118 (2006).

<sup>705</sup> *Report on Citizens Security and Human Rights*, *supra* note 701, ¶ 46.

<sup>706</sup> *Zambrano Vélez*, (ser. C) No. 166 at ¶ 88.

<sup>707</sup> *Report on the Situation of Human Rights Defenders in the Americas*, *supra* note 104, ¶ 349.

use of force.<sup>708</sup> This particular duty is motivated by a need to reaffirm the condemnation of racism and to retain the trust of racial minorities in law enforcement.<sup>709</sup>

When acts of violence are committed by state and non-state actors, the state must employ “due diligence” to prevent and punish those acts of violence.<sup>710</sup> The state must show that it carried out an investigation that was immediate, exhaustive, and impartial, and may be liable for failures to collect and order evidence that is essential to clarify the facts.<sup>711</sup>

In light of the duty to initiate an investigation, the discretionary nature of various methods of police accountability in the United States often violates international law. Additionally, internal affairs investigations frequently fail to meet the due diligence standard established under international law. Particularly when not initiated promptly, internal affairs investigations may take months if not years to adjudicate.

iv. *Accountability mechanisms in the United States often violate the principles of independence and impartiality required by international law*

Due process requires investigations and prosecutions of police violence to comply with the principles of independence and impartiality.<sup>712</sup> The absence of either principle has a negative impact on the free exercise of the right to access justice, and generates mistrust and even fear, which deters people from seeking justice.<sup>713</sup> Prosecutors must be able to conduct their own functions independently, autonomously, and impartially.<sup>714</sup>

In the United States today, most jurisdictions still lack systematic, thorough investigations conducted by independent organs outside of the police department. The U.N. Special Rapporteur on extrajudicial, summary, or arbitrary executions recommended that in the pursuit of such investigations, local jurisdictions should increase numbers of special prosecutors to avoid conflict of interest with the local district attorneys’ office.<sup>715</sup> The U.N. Basic Principles additionally recommend that judicial bodies have independent and prosecutorial authority.<sup>716</sup>

When police participate in judicial proceedings against a police officer, this Commission has found

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<sup>708</sup> Nachova vs. Bulgaria, App. 43577/98 Eur. Ct. H.R. ¶ 126 (2005).

<sup>709</sup> *The Situation of People of African Descent in the Americas*, *supra* note 95, at ¶ 170; Wallace De Almeida, Case 12.440, Inter-Am Comm’n H.R., Admissibility and Merits, Report No. 26/09 ¶ 139 (2009).

<sup>710</sup> Lenahan v. United States, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, ¶ 122 (2011).

<sup>711</sup> *Id.*; Juan Carlos Abella v. Argentina, Case 11.137, Inter-Am Comm’n H.R., Report No. 55/97, OEA/Ser.L/V/II.98, doc. 6 rev. ¶ 412 (1998).

<sup>712</sup> IACHR, *Report on the Human Rights Situation in Venezuela*. (2003), ¶ 155 (citing principles 10 and 13 of that international instrument). For its part, the Inter-American Court has stated that the judge in charge of hearing a case must be competent, in addition to being independent and impartial. See *Case of Radilla Pacheco v. Mexico*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶ 273 (Nov. 23, 2009); similarly see *Case of Ivcher Bronstein: Merits, Reparations, and Costs*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 74, ¶ 112 (Feb. 6, 2001); and *Case of 19 Tradesmen v. Colombia: Merits, Reparations, and Costs*, Inter-Am. Ct. H.R. (ser. C) No. 109, ¶ 167 (July 5, 2004).

<sup>713</sup> UN General Assembly, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social, and Cultural Rights, including the Right to Development. Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, A/HRC/8/4, ¶ 34 (May 13, 2008).

<sup>714</sup> See United Nations Human Rights Council, *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, A/HRC/20/19, ¶ 26 (June 7, 2012).

<sup>715</sup> Baore Waly Ndiaye (Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions), *Question of the Violations of Human Rights and Fundamental Freedoms in Any Part of the World, with Particular Reference to Colonial and Other Dependent Countries and Territories*, ¶ 159, U.N. Doc. E/CN.4/1998/68/Add.3 (Jan. 22, 1998).

<sup>716</sup> U.N. Basic Principles, *supra* note 33, princ. 24.



insufficient independence and impartiality of judicial process. In *Luis Jorge Valencia Hinojosa v. Ecuador*, police officers acted as triers in the criminal proceeding of an officer. This Commission found that a police tribunal “should not have been used in the investigation and trial of possible criminal offenses that could constitute violations of human rights.”<sup>717</sup> This Commission found that the proceeding was biased towards the officer because of flaws in the investigation, the judicial proceedings, and the decisions of the judicial body.<sup>718</sup>

Internal affairs reviews and criminal proceedings by local prosecutors in the United States are vulnerable to the same biases. Investigations and adjudications by internal affairs departments may be conducted by officers within the police department where the suspect officer works. In criminal prosecutions, district attorneys may be prosecuting officers they have worked with on other criminal cases. Prosecutors may be concerned with maintaining a good rapport with police departments who investigate their cases and act as their witnesses weakening their ability to act independently from their relationship with police that is necessary to do their job.

- v. *Even when civil remedies and disciplinary actions are available, they are insufficient to satisfy the U.S. obligation to prosecute and punish perpetrators of human rights violations*

Although civil remedies and settlements ensure that victims of police violence and their next of kin receive financial compensation, civil remedies often impede a full investigatory process, failing to reform the flaws in police practice or hold individuals accountable.

Attorneys representing victims of police abuse often advise their clients not to submit complaints with review agencies out of fear that their client may make a statement to the detriment of the civil case; this concern ultimately prevents many complaints from being submitted to review agencies, and thus, investigations are not fully pursued.<sup>719</sup> Most settlements are not paid from the police budget or by individual perpetrators, but rather, from general city funds; this system fails to hold police directly accountable.

Disciplinary and administrative remedies are not an “effective and sufficient means for prosecuting, punishing, or making reparation for the consequences of the homicide or extrajudicial execution of persons.”<sup>720</sup> To provide full reparations to victims, States must ensure that remedies include due diligence on the part of the State to prevent, investigate, and punish any violation of the rights recognized under international law.<sup>721</sup>

- vi. *Failure to hold perpetrators of police violence accountable may constitute CIDT of family members*

The Inter-American Court has consistently held that “the next of kin of the victims of human rights violations may also be victims” and that States have violated the right to mental and moral integrity of the next of kin of the victims “owing to their suffering as a result of the specific circumstances of the violations perpetrated against their loved ones and the subsequent acts or omissions of the State

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<sup>717</sup> *Hinojosa v. Ecuador*, Case 11.442, Inter-Am. Comm’n H.R., Report No. XX/14 at 38, ¶ 137 (2014) .

<sup>718</sup> *Id.* at ¶ 152.

<sup>719</sup> Human Rights Watch, *Civil Remedies: Shielded from Justice: Police Brutality and Accountability in the United States*, Human Rights Watch, (Jun. 1998), <https://www.hrw.org/legacy/reports98/police/uso30.htm>.

<sup>720</sup> See Admissibility Petition, *Leydi Dayan Sanchez v. Colombia*, Inter-Am. C.H.R., Report No. 43/02, ¶ 22 (Oct. 9, 2002), available at <http://www.cidh.org/annualrep/2002eng/Colombia.12009.htm>.

<sup>721</sup> *Velasquez Rodriguez Case* (Merits), Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 166 (1988).

authorities with regard to the events.”<sup>722</sup> Specifically, the Court has also held that the failure of the public authorities to fully investigate human rights violations and punish those responsible creates a feeling of insecurity and helplessness for the family of the victim.<sup>723</sup> The Court has also found “the absence of effective recourses is an additional source of suffering and anguish for the victims and their next of kin.”<sup>724</sup>

vii. *Failure to hold police accountable for unlawful killings may constitute a violation of the victim’s family members’ right to truth under international law*

Compliance with the duties to investigate and to punish those responsible for the excessive use of force and unlawful killings is closely linked to “the right of the next of kin of the alleged victims to know what happened and to know who was responsible for the respective events.”<sup>725</sup> Accordingly the State must ensure that the family members can learn the truth.

In particular victims, their families, and the public also have a right to information in state records as pertain to serious human rights violations, even where that information is maintained by police units, as part of a larger right to truth.<sup>726</sup> Limitations to the right to truth may only arise out of good faith and maximum transparency, and those exceptions must be set out by law.

Confidentiality and general lack of transparency surround internal investigations and adjudicatory outcomes for police misconduct in the U.S. violate the right to truth. In the state of Missouri, for example, settlements are often kept confidential. Cities may settle civil multiple cases of unrelated misconduct by one officer, without any reporting requirements to any agency. Officer misconduct must be reported to the Missouri Peace Officers Standards and Training Programs, which determines whether an officer may renew the police license required for law enforcement in that state.<sup>727</sup> The agency’s investigations are kept confidential. Almost four hundred police departments gave late notice to the agency of disciplinary actions and officer departures over a two-year period.

viii. *Lack of community and external oversight over investigations into the excessive use of force by police violate international standards*

As the U.N. Special Rapporteur on extrajudicial executions has noted, “[w]ithout external oversight, police are essentially left to police themselves.”<sup>728</sup> Accordingly, one of the main obstacles to proper fulfillment of States’ obligations with respect to the rights at stake in protecting citizens from excessive use of force by the police has been the lack of effective accountability systems that enable the citizens to exercise various types of oversight.<sup>729</sup> The Special Rapporteur has additionally emphasized that

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<sup>722</sup> Inter-American Court, *Caso de la Masacre de Pueblo Bello vs. Colombia*, Sentencia de 31 de enero de 2006, ¶ 154; Inter-American Court, *Caso Gómez Palomino Vs. Perú*, Sentencia de 22 de noviembre de 2005, ¶ 60; Inter-American Court, *Caso de la “Masacre de Mapiripán” Vs. Colombia*, Sentencia de 15 de septiembre de 2005, ¶ 144 y 146; y Inter-American Court, *Caso de las Hermanas Serrano Cruz Vs. El Salvador*, Fondo y Reparaciones, Sentencia de 1 de marzo de 2005, ¶ 113-114.

<sup>723</sup> Inter-American Court, *Caso Villagrán Morales y otros*, ¶ 173.

<sup>724</sup> *Masacre de Pueblo Bello v. Colombia*, ¶ 158; “*Masacre de Mapiripán*” v. Colombia, ¶ 145; *Comunidad Moiwana v. Suriname*, June 15, 2000, ¶ 94; *Hermanas Serrano Cruz v. El Salvador*, ¶ 113-115; *Valle Jaramillo v. Colombia*, Nov. 27, 2008.

<sup>725</sup> *Case of García-Prieto et al. v. El Salvador*. Preliminary Objections, Merits, Reparations, and Costs. Inter-Am.Ct. H.R.(ser. C) No. 168, ¶ 102 (Nov. 20, 2007); *Case of the “Las Dos Erres” Massacre v. Guatemala*. Preliminary Objection, Merits, Reparations and Costs. Inter-Am. Ct. H.R. (ser. C) No. 211, ¶ 105 (Nov. 24, 2009).

<sup>726</sup> Inter-Am. Comm’n H.R., *Right to Truth in the Americas*, ¶ 110, OEA/Ser.L/V/II.152 Doc. 2 (Aug. 13, 2014).

<sup>727</sup> Paul Adler, *KY3 News Investigation: Public Isn’t Told About Probes of Police Wrongdoing*, KY3News.Com (May 21, 2014 1:25 PM), [http://www.ky3.com/news/local/ky3-investigation-confidential-settlements-and-police-licensing/21048998\\_26075114](http://www.ky3.com/news/local/ky3-investigation-confidential-settlements-and-police-licensing/21048998_26075114).

<sup>728</sup> Special Rapporteur on extrajudicial, summary or arbitrary executions, U.N. Doc. A/HRC/14/24 Add. 8 (2010) ¶ 3.

<sup>729</sup> *Report on Citizens Security and Human Rights*, *supra* note 701, ¶ 96.

“[i]ndependent, external oversight of police is a best practice,” but that the “mere establishment of an external oversight body itself is insufficient” as effective external police oversight “requires the necessary powers, resources, independence, transparency and reporting, community and political support, and civil society involvement.”<sup>730</sup>

#### **D. Access to data regarding the conduct of public officials is a human right**

The lack of systematic collection and reporting of data on the use of force by police and on discriminatory police violence thwarts prevention and undermines accountability. It also violates the right of access to information under international law.

- i. The United States is subject to a general duty under international human rights law to disclose information in order to ensure public oversight and participation in governance*

In October 2000, this Commission approved the Inter-American Declaration of Principles on Freedom of Expression, recognizing freedom of expression as a fundamental right protected by the American Declaration on the Rights and Duties of Man. The Declaration provides that “access to information held by the state is a fundamental right of every individual.”<sup>731</sup> A Joint Declaration issued in 2004 by the United Nations, Organization for Security and Co-operation in Europe and the OAS special mandates on freedom of expression provides: “The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.”<sup>732</sup>

The United States is bound to give effect to the right of access to information at all levels, whether federal, state or local. In 2011 the Human Rights Committee reiterated that the obligation to uphold Article 19 of the ICCPR, which guarantees the rights to freedom of opinion and expression, extends to “all branches of the State (executive, legislative and judicial) and other public or governmental authorities, at whatever level; national, regional or local, are in a position to engage the responsibility of the State party.”<sup>733</sup> Furthermore, to give effect to the right of access to information, “State parties should proactively put in the public domain Government information of public interest... State parties should make every effort to ensure easy, prompt, effective and practical access to such information.”<sup>734</sup>

One key element of the freedom of expression is its instrumental value to ensuring proper civic oversight and participation in governance. In 1999 a Joint Declaration of the UN, OSCE and OAS special mandates for freedom of expression stated, “Implicit in freedom of expression is the public’s right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people’s participation in government would remain fragmented.”<sup>735</sup>

Interpreting the American Convention on Human Rights, the Inter-American Court of Human Rights has

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<sup>730</sup> Special Rapporteur on extrajudicial, summary or arbitrary executions, U.N. Doc. A/HRC/26/36, ¶ 84 (2014).

<sup>731</sup> Inter-American Declaration of Principles on Freedom of Expression, adopted at the Commission’s 108th regular session, ¶ 4 (Oct.19, 2000).

<sup>732</sup> United Nations Special Rapporteur on Freedom of Opinion and Expression, OAS Special Rapporteur on Freedom of Expression and OSCE Representative on Freedom of the Media, Joint Declaration, at 2 (Dec. 6, 2004).

<sup>733</sup> Human Rights Comm., *Gen. Comment No. 34; art. (freedom of opinion and expression)*, U.N. Doc. CCPR/C/GC/34, ¶ 18 (2011).

<sup>734</sup> *Id.* at ¶ 19.

<sup>735</sup> Joint Declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the OAS Special Rapporteur on Freedom of Expression and the OSCE Representative on Freedom of the Media (Nov. 26, 1999).

held that states:

should be governed by the principles of disclosure and transparency in public administration that enable all persons subject to its jurisdiction to exercise the democratic control of those actions, and *so that they can question, investigate and consider whether public functions are being performed adequately*. Access to State-held information of public interest can permit participation in public administration through the social control that can be exercised through such access.<sup>736</sup>

While the United States has not ratified the American Convention, by virtue of its status as a member of the OAS and signatory of the American Declaration, it is bound to protect freedom of expression as interpreted within the Inter-American system.<sup>737</sup> When adopting the Model Inter-American Law on Access to Public Information in 2010, the OAS General Assembly reaffirmed the Inter-American Court's decision in *Claude Reyes et al. v. Chile*<sup>738</sup> that "formally recognized the right of access to information as part of the fundamental right to freedom of expression."<sup>739</sup>

Based on the above principles, the United States is obliged under international human rights law not only to respond to demands for information, but also to proactively disclose at all levels of government information relevant to the public, including information concerning police policies and practices.

ii. *The failure of the United States to gather and report data on police killings contravenes international human rights law*

The failure of the United States to gather and publicly report nationwide data on police killings has attracted criticism from a number of international human rights bodies. In 2014, the Human Rights Committee called upon the United States to "improve reporting of excessive use of force violations."<sup>740</sup> In the same year, CERD raised concerns over the racially disparate impact of police killings and "urge[d] the State party to...improve the reporting of cases involving the excessive use of force."<sup>741</sup> The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has similarly called on "police and independent monitoring agencies [to] keep comprehensive data on the use of lethal force and, ideally, other dangerous forms of coercion by their members."<sup>742</sup>

No accurate figure exists on how many individuals are killed annually by police in the United States.<sup>743</sup> In 1993 the US Commission on Civil Rights highlighted the lack of reliable national statistics on police brutality as an impediment to the development of policies to prevent police misconduct.<sup>744</sup> The 1994 Violent Crime Control and Law Enforcement Act sought to address this data gap, by obliging the Department of Justice to "acquire data about the use of excessive force by law enforcement officers,"

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<sup>736</sup> *Claude Reyes et al. v. Chile*, Judgement of Sept. 19, 2006, Inter-Am. Ct. H.R. (ser. C) No. 151, ¶ 86.

<sup>737</sup> See Section II for an overview of how Inter-American standards apply to the United States.

<sup>738</sup> *Claude Reyes et al. v. Chile*, Inter-Am. Ct. H. R., Judgment, (ser. C) No. 151, (Sept. 19, 2006).

<sup>739</sup> OAS, General Assembly Resolution adopting a "Model Inter-American Law on Access to Public Information," preamble, AG/RES. 2607 (XL-O/10) (June 8, 2010).

<sup>740</sup> Human Rights Comm., *Concluding observations on the fourth periodic report of the United States of America*, U.N. Doc. CCPR/C/USA/4 and Corr.1, ¶ 11 (Apr. 23, 2014).

<sup>741</sup> Comm. on the Elimination of Racial Discrimination, *Concluding observations on the combined seventh to ninth periodic reports of United States of America*, U.N. Doc. CERD/C/USA/CO/7-9, ¶ 17 (Sept. 25, 2014).

<sup>742</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, U.N. Doc. A/66/330, ¶ 95 (Apr. 30, 2011) (by Christof Heyns).

<sup>743</sup> Amnesty Int'l, *Deadly Force: Police Use of Lethal Force in the United States* 8, (2015), available at [https://www.amnestyusa.org/sites/default/files/aiusa\\_deadlyforcereportjune2015.pdf](https://www.amnestyusa.org/sites/default/files/aiusa_deadlyforcereportjune2015.pdf).

<sup>744</sup> USSCR *Revisiting Who is Guarding the Guardians? A Report on Police Practice and Civil Rights in America* U.S. Comm. on Civil Rights (November, 2000), <http://www.usccr.gov/pubs/guard/main.htm>

including all nationwide fatal police shootings, and to “publish an annual summary of the data acquired under this section.”<sup>745</sup> Reporting two years later, the Bureau of Justice Statistics in the DOJ stated: “The basic problem is the lack of routine, national systems for collecting data on incidents in which police use force during the normal course of duty and on the extent of use of excessive force.”<sup>746</sup> To date, however, the Department of Justice has not received the funding necessary to enable it to fulfil this mandate.<sup>747</sup> Data collection at the Federal level instead relies on voluntary reporting from over 18,000 police agencies nationwide; in 2014, only 224 law enforcement agencies submitted such data.<sup>748</sup> In its March 2015 report, the Bureau of Justice Statistics concluded that large variations in state collection and reporting of data on arrest-related homicides have “resulted in a significant underestimate of the annual number of arrest related deaths.”<sup>749</sup>

There have been recent efforts to improve data collection, but more needs to be done. In December 2014, Congress enacted “The Death in Custody Reporting Act.”<sup>750</sup> The law provides that states receiving Federal funding for any law enforcement activities<sup>751</sup> must gather and report data to the U.S. Attorney General or be penalized with reduced funding.<sup>752</sup> The law requires reporting of *deaths* in police custody or during the course of an arrest, but not of other injuries or uses of force.<sup>753</sup> On June 2, 2015, a bill entitled “Police Reporting Information, Data and Evidence Act of 2015” was introduced in the U.S. Senate. The bill would broaden the data collection requirements to include those instances when use of force by a law enforcement officer results in serious bodily injury or death of a civilian. The bill would also require reporting of more details than the Death in Custody Reporting Act, including demographic information on the race and gender of the victims of police violence, as well as whether the civilian was unarmed.

iii. *In absence of effective government reporting on police killings, civil society organizations and media outlets have filled the gap*

Due to a lack of effective nationwide reporting on police killings, civil society organizations and media outlets have taken up the task of quantifying and reporting nationwide deaths at the hands of law enforcement.<sup>754</sup> *Killed by Police*, a crowdsourced online database, tracked 1100 media-reported deaths in 2014.<sup>755</sup> Another crowd-sourced online database, *Mapping Police Violence*, recorded 1149 killings in 2014 and identified the race of 91% of all victims.<sup>756</sup> In contrast, the *Guardian* notes, the Federal Bureau of Investigation’s public log of police killings lists only 444 justifiable homicides for the year 2014.<sup>757</sup> Due to lack of voluntary compliance by local police departments and restrictive reporting criteria, the

<sup>745</sup> H.R. 3355 – Violent Crime Control and Law Enforcement Act of 1994 § 210402

<sup>746</sup> U.S. Dep’t of Justice, Bureau of Justice Statistics, *National Data Collection on Police Use of Force*, 2 (April 1996)

<sup>747</sup> U.S. Dep’t of Justice, COPS, *Final Report of the President’s Task Force on 21<sup>st</sup> Century Policing* 19 (May 2015).

<sup>748</sup> *Eric Garner and Tamir Rice among those missing from FBI record of police killings*, THE GUARDIAN (15 Oct, 2015) accessible at <http://www.theguardian.com/us-news/2015/oct/15/fbi-record-police-killings-tamir-rice-eric-garner>

<sup>749</sup> U.S. Dept’ of Justice, Office of Justice Programs, Bureau of Justice Statistics *Arrest-Related Deaths Program: Data Quality Profile* 17 (March 2015).

<sup>750</sup> H.R. 1447 – Death in Custody Reporting Act of 2013, codified at 42 U.S.C. § 13727.

<sup>751</sup> See 42 U.S.C. § 13727(c)(2).

<sup>752</sup> *Id.* at §13727(a).

<sup>753</sup> *Id.*

<sup>754</sup> Amnesty Int’l, *Deadly Force: Police Use of Lethal Force in the United States* 9 (2015)

[https://www.amnestyusa.org/sites/default/files/aiusa\\_deadlyforcereportjune2015.pdf](https://www.amnestyusa.org/sites/default/files/aiusa_deadlyforcereportjune2015.pdf) (last accessed 11/11/2015).

<sup>755</sup> *Killed by Police* – 2014, <http://www.killedbypolice.net/kbp2014.html> (last accessed 11/11/2015).

<sup>756</sup> Amnesty Int’l, *Deadly Force: Police Use of Lethal Force in the United States* 9 (2015)

[https://www.amnestyusa.org/sites/default/files/aiusa\\_deadlyforcereportjune2015.pdf](https://www.amnestyusa.org/sites/default/files/aiusa_deadlyforcereportjune2015.pdf).

<sup>757</sup> *Eric Garner and Tamir Rice among those missing from FBI record of police killings*, THE GUARDIAN (15 Oct, 2015), <http://www.theguardian.com/us-news/2015/oct/15/fbi-record-police-killings-tamir-rice-eric-garner>

FBI's 2014 tally omitted the high profile deaths of Eric Garner and Tamir Rice.<sup>758</sup>

The U.S. Government's failure to gather and report data on nationwide police killings and subsequent attempts by civil society organizations to publish accurate data is by no means a new phenomenon. In 2002 a former NYPD officer observed, "[W]e still live in a society in which the best data on police use of force come to us not from the government or from scholars, but from the *Washington Post*."<sup>759</sup> FBI Director James Comey reiterated this sentiment in October 2015: "It is unacceptable that the *Washington Post* and the *Guardian* newspaper from the UK are becoming the lead source of information about violent encounters between [U.S.] police and civilians."<sup>760</sup>

- iv. *Federal, state and local level police departments must ensure maximum disclosure in order enable public input into policy development on the use of force, police training and accountability mechanisms.*

Access to information is a prerequisite for meaningful public participation in design, implementation, and oversight of police policies, training, and accountability mechanisms. The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has highlighted that use of force policies "should be developed by national or other governments or by police agencies in accordance with international standards, acting in consultation with civilians."<sup>761</sup> Likewise, the development of independent accountability mechanisms "should be done in consultation with National Human Rights Institutions or ombudsman offices and civil society."<sup>762</sup> The Final Report of the President's 21<sup>st</sup> Century Policing Task Force states that training policies must be "clear, concise and openly available for public inspection",<sup>763</sup> and underscores that "some form of civilian oversight of law enforcement is important in order to strengthen trust with the community."<sup>764</sup>

Civil society organizations within the United States similarly have called for greater transparency to enable meaningful civilian oversight of policy development. The New York Civil Liberties Union has stated the need for New York Police Department to be:

transparent about its current use of force training, including curriculum outlines, written training materials, and information about the length and frequency of such training....This will allow the public and relevant stakeholders the opportunity to comment and raise concerns about these trainings as well as provide new ideas and innovations in training.<sup>765</sup>

The New York City Department of Investigation itself acknowledged in its 2015 report that

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<sup>758</sup> *Id.*

<sup>759</sup> James Fyfe, *Too many missing cases: Holes in our knowledge about police use of force*, JUSTICE RESEARCH AND POLICY, 4: 87–102, 99 (2002).

<sup>760</sup> *FBI Chief: 'unacceptable' the Guardian has better data on police violence*, THE GUARDIAN (8 Oct. 2015) accessible at <http://www.theguardian.com/us-news/2015/oct/08/fbi-chief-says-ridiculous-guardian-washington-post-better-information-police-shootings>

<sup>761</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, U.N. Doc. A/66/330, ¶ 92 (Apr. 30, 2011) (by Christof Heyns).

<sup>762</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, U.N. Doc. A/26/36, ¶ 123 (Apr. 1, 2014) (by Christof Heyns).

<sup>763</sup> U.S. Dep't of Justice, COPS, *Final Report of the President's Task Force on 21<sup>st</sup> Century Policing*, 20 (May 2015).

<sup>764</sup> U.S. Dep't of Justice, COPS, *Final Report of the President's Task Force on 21<sup>st</sup> Century Policing*, 26 (May 2015).

<sup>765</sup> New York Civil Liberties Union *Testimony Regarding the NYPD's Training on Use of Force* (Sept. 8 2014) <http://www.nyclu.org/content/testimony-regarding-nypds-training-use-of-force>.

“accountability begins with access to reliable data.”<sup>766</sup> The civil society organization *Campaign Zero* advocates for transparency as an essential to effective oversight mechanisms that can prevent excessive and discriminatory use of force and provide retrospective accountability for harm caused. The campaign calls for police departments to notify relevant state departments when police officers have been found to have willfully violated department policy or the law, have engaged in official misconduct, or have resigned while under investigation for such offences.<sup>767</sup> It further demands that such data be publicly accessible, to help prevent offenders from serving within law enforcement, teaching positions or government.<sup>768</sup>

As emphasized by the Committee on the Elimination of Racial Discrimination, access to data is also essential to addressing racial disparities in police methods.<sup>769</sup> Statistics released by New York’s Office of Court Administration reveal that Black and Latino individuals receive approximately 81 percent of the tickets issued by New York City Police.<sup>770</sup> In 2013, a comparable percentage of the stop-and-frisk complaints submitted to New York City’s independent Civilian Complaint Review Board were filed by Black and Latino individuals, who were also more likely to report the use of force by police.<sup>771</sup> DOJ itself has identified the need for law enforcement agencies to regularly post information on “stops, summonses, arrest, reported crime and other law enforcement data aggregated by demographics.”<sup>772</sup> DOJ has further acknowledged the need for public disclosure of census data revealing the race, gender and age composition of police forces, with the twofold aim of promoting diversity and ensuring that the demographics of law enforcement agencies align with those of the communities they serve.<sup>773</sup>

As recognized by the special mandates of the United Nations, OSCE and OAS, effective civilian oversight is only possible when members of the public have access to information. Where excessive and discriminatory use of force by police is concerned, transparency must entail disclosure of information on use of force policies and practices, including data on all instances in which force is used, the content of police training programs, and the records of disciplinary procedures or complaints against police officers.

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<sup>766</sup> Mark G. Peters & Philip K. Eure, *Office of the Inspector Gen., Police Use of force in New York City: Findings and Recommendations on NYPD’s Polices & Practices*, 2 (2015).

<sup>767</sup> Campaign Zero, *Solutions: Limit Use of Force*, <http://www.joincampaignzero.org/force> (last accessed Nov. 11, 2015).

<sup>768</sup> *Id.*

<sup>769</sup> Comm. on the Elimination of Racial Discrimination, *Concluding observations on the combined seventh to ninth periodic reports of the United States of America*, U.N. Doc. CERD/C/USA/CO/7-9, ¶ 17(c)–(d) (Sept. 22, 2014) (recommending improved reporting of cases involving excessive use of force and information on investigations undertaken and their outcomes).

<sup>770</sup> New York Civil Liberties Union *Testimony Regarding the NYPD’s Training on Use of Force* (Sept. 8 2014) <http://www.nyclu.org/content/testimony-regarding-nypds-training-use-of-force>.

<sup>771</sup> New York Civil Liberties Union *Testimony Regarding the NYPD’s Training on Use of Force* (Sept. 8 2014) <http://www.nyclu.org/content/testimony-regarding-nypds-training-use-of-force>.

<sup>772</sup> U.S. Dep’t of Justice, COPS, *Final Report of the President’s Task Force on 21<sup>st</sup> Century Policing*, 13 (May 2015).

<sup>773</sup> U.S. Dep’t of Justice, COPS, *Final Report of the President’s Task Force on 21<sup>st</sup> Century Policing*, 24 (May 2015).

## VI. The Road Ahead: Positive Steps and Outstanding Issues

The federal government and some state governments in the United States have taken initial steps to address discriminatory and excessive use of force by the police. This section critically examines two of the approaches pursued by the federal government to date: (1) enforcement of Section 14141, through DOJ investigations and the implementation of consent decrees with local police departments, and (2) the report issued by the President's Task Force on 21<sup>st</sup> Century Policing. These efforts, though important, are insufficient. Through a close look at the positive dimensions and limitations of these measures, this section helps to identify where efforts should be intensified and where effective protection of the rights of Black Americans requires altogether new methods of investigating, preventing, prosecuting, and punishing discriminatory and excessive use of force by the police.

### A. Consent decrees demonstrate both the prospects and the limitations of federal intervention into policing

#### i. *The U.S. Congress has the power to address systemic problems of excessive use of force.*

In 1991, footage of the beating of Rodney King by LAPD officers aired around the world. The disturbing images of a group of white police officers repeatedly striking an unarmed Black man lead to a national call for police reform. Investigations conducted in the wake of the Rodney King beating revealed what those in Black, low income Los Angeles communities already knew: This act of violence “was not the result of a few rogue officers. It was indicative of a diseased organizational culture within the LAPD that condoned violence, tolerated racism, and failed to respond to wrongdoing.”<sup>774</sup> In 1991, however, federal law offered no viable mechanism for addressing this type of systemic abuse.<sup>775</sup> In 1994 Congress attempted to fill this regulatory gap by passing 42 U.S.C. § 14141 (“Section 14141”).<sup>776</sup>

Section 14141 empowers the U.S. Department of Justice (DOJ) to take actions to remedy a “pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.”<sup>777</sup> To hold a police department liable under Section 14141, the government must show that officers in the department have committed acts that violate the Constitution or federal law, and that there is evidence of a “pattern or practice” of such conduct.<sup>778</sup> Obtaining adequate proof typically involves a long, resource-intensive process.<sup>779</sup> A full investigation may be undertaken at the discretion the Special Litigation Section of the DOJ Civil Rights Division.<sup>780</sup> If the investigation reveals evidence of a “pattern or practice” of unconstitutional conduct, DOJ is authorized to file suit against the law enforcement agency.<sup>781</sup> In practice, however, the vast majority of Section 14141 investigations are resolved without litigation. If the

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<sup>774</sup> Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 Minn. L. Rev. 1343, 2 (2015).

<sup>775</sup> *Id.*

<sup>776</sup> *Id.*

<sup>777</sup> Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489, 2 (2008)

<sup>778</sup> *Id.* at 8.

<sup>779</sup> Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489, 517 (2008); Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 47 (2009).

<sup>780</sup> Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 44 (2009) (explaining that a full investigation entails taking stock of departmental policies on training, the frequency and nature of the use of force, the disciplinary procedures for officers, and routine police activities, including extensive interviews with police to determine if practices align with policies).

<sup>781</sup> *Id.*



DOJ takes any action at all, it may issue a technical assistance letter recommending-but not requiring-reform, or proceed to negotiate a consent decree or other agreement with the municipality concerned, mandating reform.<sup>782</sup>

- ii. *Consent decrees based on Section 14141 investigations have had limited effect on the epidemic of the excessive use of force by police against Black Americans.*

Consent decrees are agreements reached between a municipality and the DOJ, which describe the actions needed to end systematic violations of the Constitution or federal law by a given police department. By signing a consent decree that requires it to implement remedial measures, a municipality does not admit any liability, but avoids litigation and maintains eligibility for federal funding.<sup>783</sup> Consent decrees are approved and monitored by a federal judge and may be terminated only with judicial approval, upon determination that the agreed remedial measures have been sufficiently implemented.<sup>784</sup>

Most consent decrees addressing police misconduct require the following elements: reform of use of force policies, including guidance on the appropriate use of different levels of force, as well as mandatory reporting and investigation of use of force<sup>785</sup>; changes in officer training; the creation of an accessible citizen complaint process; and the implementation of early warning systems to identify officers who engage in a pattern of misconduct.<sup>786</sup> In addition, about half of the agreements require external auditing or monitoring to ensure compliance.<sup>787</sup>

While such reforms represent important measures to combat patterns of discriminatory and excessive use of force by law enforcement, several structural limitations hinder the efficacy and legitimacy of consent decrees. First, because there is no private right of action under Section 14141, enforcement of the statute depends on DOJ discretion and resources, which may vary with the political climate and changes in administrations.<sup>788</sup> Second, there is often little scope for participation of community members in negotiations of consent decrees between DOJ and municipal officials.<sup>789</sup>

Third, consent decrees predicate remedy of systemic violations on oversight by judges who may be ill equipped to address the types of problems at issue and whose role in enforcement may be seen to encroach on powers reserved to other branches of government.<sup>790</sup> Fourth, the lengthiness of the process undermines the impact of many consent decrees.<sup>791</sup> For instance, a consent decree negotiated with the LAPD in the summer of 1996 remained under judicial supervision for almost two decades. The DOJ describes this consent decree as a success story, despite the slow progress and the fact that complaints

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<sup>782</sup> Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489, 508–11 (2008).

<sup>783</sup> *Id.*

<sup>784</sup> Elliot Harvey Schatmeier, *Reforming Police Use-of-force Practices: A Case Study of the Cincinnati Police Department*, 46 COLUM. J.L. & SOC. PROBS. 539, 448 (2013).

<sup>785</sup> Stephin Rushin, *Structural Reform Litigation In American Police Departments*, 99 MINN. L. REV. 1343, 1378–80 (2015).

<sup>786</sup> Samuel Walker, *Institutionalizing Police Accountability Reforms: The Problem of Making Police Reforms Endure*, 32 ST. LOUIS U. PUB. L. REV. 57, 73-75 (2012).

<sup>787</sup> *Id.*

<sup>788</sup> Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489, 518–19 (2008).

<sup>789</sup> *Id.*

<sup>790</sup> Stephin Rushin, *Structural Reform Litigation In American Police Departments*, 99 Minn. L. Rev. 1343(2015).

<sup>791</sup> Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489, 517 (2008).

regarding police stops, arrests, and racial profiling all increased at various times throughout the period of supervision.<sup>792</sup>

Another fundamental weakness of consent decrees stems from the lack of consequences for backsliding or repeating a pattern of abuse following the termination of judicial supervision. In the case of the city of Cleveland, for example, the failure of a consent decree from 2000 to result in lasting change had no effect on the city's ability to receive federal funding. In September 2013, six months after the DOJ began the latest investigation into discriminatory policing in Cleveland (discussed in the following section), the city received a federal grant of \$1.25 million to hire 10 new police officers and another \$1 million for crime-prevention efforts. The next year, just before the findings of the investigation were released, citing systemic deficiencies, Cleveland was awarded \$1.9 million more to hire 15 new officers.<sup>793</sup>

Several studies have found that consent decrees have had little to no effect in ending racial profiling. For instance, a 2008 study compared the consent decrees implemented for the New Jersey State Troopers and the Los Angeles and New York police departments and found that despite variance in design, strictness of requirements, and level of monitoring, no program proved effective in decreasing the racial disparity in stops and searches.<sup>794</sup> Similarly, a study on the effects of a 1999 consent decree with the New Jersey state police found that between 2005 and 2007, Black Americans and Latinos were still almost three times more likely to be searched than whites and that white troopers were 20 percent more likely to search minority drivers than were Black troopers.<sup>795</sup> "That's the problem with consent decrees," offered the professor who oversaw the study, "[law enforcement] did everything that was asked of them except stop profiling."<sup>796</sup>

- iii. *The recent consent decree adopted in Cleveland illustrates both the possibilities and limitations of using consent decrees to combat patterns of excessive use of force by law enforcement.*

The 2015 Cleveland consent decree is among the most detailed police reform plans announced by the Obama administration to date and represents both the promise and limitations of employing consent decrees as a means of remedying police misconduct.<sup>797</sup>

On March 14, 2013, the DOJ announced the beginning of its investigation into the Cleveland Division of Police (CDP) to determine whether the department engaged in a pattern or practice of using excessive force in violation of the Fourth Amendment and Section 14141.<sup>798</sup> On December 4, 2014, the DOJ announced that it had reasonable cause to believe that, "although most force used by CDP officers was reasonable, a significant amount of deadly and less lethal force was excessive and constituted an ongoing

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<sup>792</sup> Simone Weichselbaum, Policing the Police, The Marshall Project (May 26, 2015), [https://www.themarshallproject.org/2015/04/23/policing-the-police?utm\\_medium=email&utm\\_campaign=newsletter&utm\\_source=opening-statement&utm\\_term=newsletter-20150526-187](https://www.themarshallproject.org/2015/04/23/policing-the-police?utm_medium=email&utm_campaign=newsletter&utm_source=opening-statement&utm_term=newsletter-20150526-187). While complaints regarding excessive use of force declined over the supervision period, complaints regarding racial profiling increased. *Id.*

<sup>793</sup> *Id.*

<sup>794</sup> Noah Kupferberg, Note: Transparency : A New Role for Police Consent Decrees, 42 COLUM. J.L. & SOC. PROBS. 129, 129, 163 (2008).

<sup>795</sup> Simone Weichselbaum, Policing the Police, The Marshall Project (May 26, 2015), [https://www.themarshallproject.org/2015/04/23/policing-the-police?utm\\_medium=email&utm\\_campaign=newsletter&utm\\_source=opening-statement&utm\\_term=newsletter-20150526-187](https://www.themarshallproject.org/2015/04/23/policing-the-police?utm_medium=email&utm_campaign=newsletter&utm_source=opening-statement&utm_term=newsletter-20150526-187)

<sup>796</sup> *Id.*

<sup>797</sup> *Id.*

<sup>798</sup> U.S. v. City of Cleveland, Settlement Agreement at 1, Department of Justice, <http://www.justice.gov/file/441426/download>.

risk to the public and to CDP officers.”<sup>799</sup> The findings revealed violations such as the unnecessary, excessive or retaliatory use of less lethal force including Tasers, chemical spray and fists, the excessive use of force against mentally ill persons, and the use of misguided tactics that placed officers in situations where the avoidable use of force became inevitable.<sup>800</sup> The DOJ also determined that systemic deficiencies in accountability systems, resource deployment, community policing efforts, policies, and officer support, training, equipment, and supervision contributed to the pattern of excessive force.<sup>801</sup> As a result of these findings, the DOJ and CPD entered into negotiations, which led to a consent decree announced on May 26, 2015.<sup>802</sup>

As adopted, the decree focuses on: increasing community engagement, reforming policies on the use of force, implementing bias-free policing, reworking the existing Crisis Intervention model, increasing accountability, and improving support and tools available for officers.<sup>803</sup>

The Cleveland consent decree includes positive developments in the areas of combating discrimination, responding appropriately to persons with mental illness, and providing adequate resources to officers. In line with Article 5 of ICERD, the decree requires provision of comprehensive training to ensure bias-free policing.<sup>804</sup> The requirements aim at eliminating both direct and indirect discrimination through such efforts as recruitment of diverse applicants, implicit bias training, and policies that clearly forbid basing the decision to detain a person on racial stereotypes.<sup>805</sup> In addition, the Crisis Intervention reform requires CDP to provide officers with sufficient training to identify and appropriately respond to individuals in mental health crises and requires that specialized officers are always available to respond to calls relating to such crises.<sup>806</sup> These measures are vital to ensuring that a reasonable and proportionate amount of force is used in situations involving mentally ill individuals. Such measures could have saved the life of Tanesha Anderson, a 37-year-old mother diagnosed with schizophrenia and bipolar disorder, who was killed in November 2014 when members of CDP attempted to forcibly transfer her to a hospital for a psychiatric evaluation.<sup>807</sup> Moreover, these reforms are in line with the principles of differentiated treatment for those suffering from mental illness discussed in Section I. Finally, the requirements aimed at improving officer recruitment, training, equipment, and resources<sup>808</sup> are line with the rights of officers to security of their person, to safe working conditions, and to access to the tools needed to effectively serve the public.

<sup>799</sup> U.S. v. City of Cleveland, Settlement Agreement, at 2, ¶ 4,

[http://www.justice.gov/sites/default/files/crt/legacy/2015/05/27/cleveland\\_agreement\\_5-26-15.pdf](http://www.justice.gov/sites/default/files/crt/legacy/2015/05/27/cleveland_agreement_5-26-15.pdf).

<sup>800</sup> See *Justice Department Reaches Agreement with City of Cleveland to Reform Cleveland Division of Police Following the Finding of a Pattern or Practice of Excessive Force*, Justice News (May 26, 2015), <http://www.justice.gov/opa/pr/justice-department-reaches-agreement-city-cleveland-reform-cleveland-division-police>.*Id.*

<sup>801</sup> U.S. v. City of Cleveland, Settlement Agreement at 2, ¶ 4,

[http://www.justice.gov/sites/default/files/crt/legacy/2015/05/27/cleveland\\_agreement\\_5-26-15.pdf](http://www.justice.gov/sites/default/files/crt/legacy/2015/05/27/cleveland_agreement_5-26-15.pdf).

<sup>802</sup> *Id.* at 3

<sup>803</sup> *Id.* at i-iv.

<sup>804</sup> ICERD, *supra* note 12, art. 5; U.S. v. City of Cleveland, Settlement Agreement, Department of Justice at 10,

<http://www.justice.gov/file/441426/download>.

<sup>805</sup> ICERD, *supra* note 12, art. 5; U.S. v. City of Cleveland, Settlement Agreement at 10–11, Department of Justice, <http://www.justice.gov/file/441426/download>; Department of Justice, Summary of Settlement Agreement with the City of Cleveland Regarding the Cleveland Division of Police, <http://www.justice.gov/file/441496/download>. *But See* Brief of Amici Curiae The Cleveland Branch of the National Association for the Advancement of Colored People (NAACP); Collaborative for a Safe, Fair and Just Cleveland; and the Ohio Chapter of the National Lawyers Guild regarding their Concerns with the Parties’ Settlement Agreement at 2, *U.S. v. Cleveland*, Case No. 1:15-CV-01046, (N.D. Ohio). (stating that despite the Agreement’s praise for bias-free policing, it “fails to collect some critical demographic data for investigations”).

<sup>806</sup> U.S. v. City of Cleveland, Settlement Agreement, at 35-38, Department of Justice,

<http://www.justice.gov/file/441426/download>.

<sup>807</sup> Jaeah Lee, *A Mentally Ill Black Woman’s Sudden Death at the Hands of Cleveland Police*, Mother Jones (May 28, 2015),

<http://www.motherjones.com/politics/2015/05/tanisha-anderson-killing-cleveland-police>.

<sup>808</sup> U.S. v. City of Cleveland, Settlement Agreement at 67, Department of Justice, <http://www.justice.gov/file/441426/download>.

Despite these positive developments, the Cleveland consent decree reflects several of the limitations of using negotiated agreements to achieve full departmental reform. First and foremost, similar DOJ efforts have already failed in Cleveland. In 2004, following a four-year investigation, the DOJ reached a settlement with the city of Cleveland that prohibited officers from firing at fleeing vehicles unless someone's life was in danger.<sup>809</sup> When the DOJ was invited back in 2013, it was in the wake of just such an incident, in which Cleveland police officers fired 137 bullets at two unarmed individuals fleeing in a vehicle.<sup>810</sup> In addition, key stakeholders have expressed dissatisfaction with the process by which the consent decree was finalized. The municipality and DOJ utilized several mechanisms to solicit community input, among them town hall meetings, "listening tours," and meetings with community organizations<sup>811</sup>. At least one key civil society coalition,<sup>812</sup> however, contended that they had insufficient time to air their concerns before the finalization of the proposed text of the decree.<sup>813</sup> The coalition filed an *amicus curiae* brief with the supervising court, seeking an opportunity to amend the content of the decree, but the request was denied.<sup>814</sup>

Moreover, some of the potentially positive structural changes required by the consent decree raise a number of concerns. First, the decree requires officers to employ de-escalation techniques where "possible and appropriate," prohibits retaliatory force, and mandates the creation of an internal Force Review Board.<sup>815</sup> The failure to require exhaustion of non-violent and non-lethal means is inconsistent with international law. Moreover, these measures fail to guarantee adequate public oversight and accountability for the use of force. According to the civil society coalition mentioned above, the Force Review Board allows officers to "police themselves regarding the most serious uses of force that result in homicides or grievous bodily harm."<sup>816</sup> In addition, the coalition has raised concerns about the adequacy of resources available for and of community representation on the Community Police Commission.<sup>817</sup> Finally, while the Cleveland consent decree contains strong language on accountability<sup>818</sup> and an unprecedented requirement that a civilian be appointed to head the police department's internal affairs

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<sup>809</sup> Simone Weichselbaum, Policing the Police, The Marshall Project, (May 26, 2015)

[https://www.themarshallproject.org/2015/04/23/policing-the-police?utm\\_medium=email&utm\\_campaign=newsletter&utm\\_source=opening-statement&utm\\_term=newsletter-20150526-187](https://www.themarshallproject.org/2015/04/23/policing-the-police?utm_medium=email&utm_campaign=newsletter&utm_source=opening-statement&utm_term=newsletter-20150526-187).

<sup>810</sup> David Graham, *Can the Feds Clean Up Cleveland's Police Force* (May 26, 2015), <http://www.theatlantic.com/politics/archive/2015/05/cleveland-consent-decree/394085/>; Ryan J. Reilly, Cleveland Police Agree to Rein in Force Under Justice Department Agreement, May 26, 2015, [http://www.huffingtonpost.com/2015/05/26/cleveland-police-reform-justice-department\\_n\\_7444102.html](http://www.huffingtonpost.com/2015/05/26/cleveland-police-reform-justice-department_n_7444102.html).

<sup>811</sup> U.S. v. City of Cleveland, Joint Motion for Entry of Consent Decree, at 5, Department of Justice, <http://www.justice.gov/file/441426/download>.

<sup>812</sup> Composed of the Cleveland Branch of the National Association for the Advancement of Colored People, the Collaborative for a Safe, Fair and Just Cleveland, and the Ohio Chapter of the National Lawyers Guild

<sup>813</sup> Brief of Amici Curiae The Cleveland Branch of the National Association for the Advancement of Colored People (NAACP); Collaborative for a Safe, Fair and Just Cleveland; and the Ohio Chapter of the National Lawyers Guild regarding their Concerns with the Parties' Settlement Agreement at 2, *U.S. v. Cleveland*, Case No. 1:15-CV-01046, (N.D. Ohio).

<sup>814</sup> Eric Heisig, *Federal judge denies activists' bid to change Cleveland consent decree* (Oct. 6, 2015), [http://www.cleveland.com/court-justice/index.ssf/2015/10/federal\\_judge\\_denies\\_activists.html](http://www.cleveland.com/court-justice/index.ssf/2015/10/federal_judge_denies_activists.html)

<sup>815</sup> U.S. v. City of Cleveland, Settlement Agreement, at 12, Department of Justice, <http://www.justice.gov/file/441426/download>.

<sup>816</sup> Brief of Amici Curiae The Cleveland Branch of the National Association for the Advancement of Colored People (NAACP); Collaborative for a Safe, Fair and Just Cleveland; and the Ohio Chapter of the National Lawyers Guild regarding their Concerns with the Parties' Settlement Agreement at 2, *U.S. v. Cleveland*, Case No. 1:15-CV-01046, (N.D. Ohio).

<sup>817</sup> *Id.* at 3

<sup>818</sup> U.S. v. City of Cleveland, Settlement Agreement, at 43, Department of Justice, <http://www.justice.gov/file/441426/download>.

division,<sup>819</sup> local organizations have questioned the impact of these reforms given that the civilian inspector general would still report to the police chief.<sup>820</sup>

In conclusion, the Cleveland consent decree illustrates the critical role that the federal government can play in remedying problematic police policies and practices, while underscoring the limitations of relying on negotiated agreements to ensure rapid, meaningful, and lasting change.

**B. The Final Report of the President’s Task Force on 21<sup>st</sup> Century Policing recommends important improvements but falls short of international standards in several areas**

In the spring of 2015, the President of the United States gathered eleven public figures, from a range of areas of expertise, to form a Task Force on 21st Century Police Practices.<sup>821</sup> The Task Force met for 90 days in a series of public and private sessions in order “to identify the best policing practices and offer recommendations on how these practices can promote effective crime reduction while building public trust.”<sup>822</sup> In its final report, published in May 2015 (“Task Force Report” or “Report”), the Task Force developed a series of recommendations related to policing and provided discrete action items to bring those recommendations to fruition.

These recommendations were organized under six pillars: 1) building trust & legitimacy; 2) policy & oversight; 3) technology & social media; 4) community policing & crime reduction; 5) training & education; and 6) officer wellness & safety.<sup>823</sup>

Many of the recommendations and actions items identified under each pillar in the Task Force Report propose important improvements to current U.S. legal standards regulating the use of force, policies aimed at eliminating discrimination, training methods for law enforcement officers, and policing tactics. In several areas, however, they still fall short of what is required under international human rights law and fail to meet prevailing international standards regarding the use of force by police and non-discrimination. The following preliminary draft analysis highlights some of those shortcomings.

*i. The report omits reference to international human rights law and standards*

The only express references to “human rights” in the Report appear in the context of Pillar 3, on Technology and New Media,<sup>824</sup> and in the Task Force’s description in Pillar 4 of “[t]he vision of policing in the 21<sup>st</sup> century” as “that of officers as guardians of human and constitutional rights.”<sup>825</sup> The Report fails to mention that the United States and police officers, in their capacity as agents of the State, are bound by international human rights obligations. Even the visionary reference to human rights in Pillar 4, does not make its way into the Report’s recommendations. The Task Force recommendations do not

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<sup>819</sup> Ryan J. Reilly, *Cleveland Police Agree to Rein in Force Under Justice Department Agreement* THE HUFFINGTON POST, (May 26, 2015), [http://www.huffingtonpost.com/2015/05/26/cleveland-police-reform-justice-department\\_n\\_7444102.html](http://www.huffingtonpost.com/2015/05/26/cleveland-police-reform-justice-department_n_7444102.html).

<sup>820</sup> Brief of Amici Curiae The Cleveland Branch of the National Association for the Advancement of Colored People (NAACP); Collaborative for a Safe, Fair and Just Cleveland; and the Ohio Chapter of the National Lawyers Guild regarding their Concerns with the Parties’ Settlement Agreement at 2, *U.S. v. Cleveland*, Case No. 1:15-CV-01046 (N.D. Ohio).

<sup>821</sup> President’s Task Force on 21st Century Policing, *Final Report of the President’s Task Force on 21st Century Policing*, Office of Community Oriented Policing Services (May 2015), [http://www.cops.usdoj.gov/pdf/taskforce/taskforce\\_finalreport.pdf](http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf) [hereinafter *Task Force Report*].

<sup>822</sup> *Id.* at iii.

<sup>823</sup> *Id.* at 1-4.

<sup>824</sup> See *id.* at 90 (Recommendation 3.1: “[N]ational standards for the research and development of new technology ... should also address compatibility and interoperability needs both within law enforcement agencies and across agencies and jurisdictions and maintain civil and human rights protections.”)

<sup>825</sup> *Id.* at 45.

delineate the steps required to bring the United States into compliance with its international obligations to protect the right to life,<sup>826</sup> the right to freedom from torture and ill-treatment,<sup>827</sup> the rights to freedom from discrimination and to equality before the law,<sup>828</sup> the right to due process,<sup>829</sup> and the right of access to information,<sup>830</sup> among other rights. The failure to reference international human rights law and standards is a significant shortcoming of the Report, and represents a missed opportunity to provide the country's numerous police departments with a common, uniform set of principles and requirements to guide their reforms. In addition, some of the recommendations in the Report, if implemented, could give rise to unintended socio-political consequences that would hinder the Report's stated goal of building public trust.<sup>831</sup>

The Report offers **two overarching recommendations**. First, it recommends that the President "support the creation of a National Crime and Justice Task Force to examine all areas of criminal justice and propose reform."<sup>832</sup> Second, the Report calls on the President to "promote programs that take a comprehensive and inclusive look at community-based initiatives that address the core issues of poverty, education, health, and safety."<sup>833</sup> While neither overarching recommendation references international human rights law, both provide opportunities for the government to take additional action in the future to bring its laws and policies into compliance with international standards. **If a task force is created, it should consider relevant human rights norms as part of its evaluative framework.** Additionally, any recommendations issued by that new task force should aim to bring the United States into compliance with international human rights law and international standards throughout the criminal justice system. Furthermore, the "core issues of poverty, education, health, and safety," are matters of economic, social, and cultural rights, which the United States has an obligation to respect, protect and fulfill, under the American Declaration on the Rights and Duties of Man.<sup>834</sup> **Legislative, regulatory and policy measures should explicitly reference and seek to uphold those binding duties.**

## ii. Pillar 1

Pillar 1 centers on the idea that law enforcement organizations are only seen as legitimate if they act in a "procedurally just" manner, which includes treating people with dignity and respect, giving individuals "voice" during encounters, being neutral and transparent in decision-making, and conveying trustworthy motives.<sup>835</sup>

It is laudable that the Report emphasizes human dignity, in which all human rights are grounded.<sup>836</sup> And the Report importantly recognizes that changing formal rules is not enough to protect rights and ensure justice; a reform in policies would be ineffective absent a shift in organizational culture.<sup>837</sup> The Task

<sup>826</sup> American Declaration, *supra* note 9, art. 1; ICCPR, *supra* note 11, art. 6.

<sup>827</sup> American Declaration, *supra* note 9, art. 1; ICCPR, *supra* note 11, art. 7; UDHR, *supra* note 10, art. 5; CAT, *supra* note 13, art. 2.

<sup>828</sup> American Declaration, *supra* note 9, art. 2; ICCPR, *supra* note 11, art. 16; UDHR, *supra* note 10, art. 6.

<sup>829</sup> ICCPR, *supra* note 11, art. 14; UDHR, *supra* note 10, art. 10.

<sup>830</sup> American Declaration, *supra* note 9, art. IV; ICCPR, *supra* note 11, art. 19; UDHR, *supra* note 10, art. 19.

<sup>831</sup> *Task Force Report*, *supra* note 821, at iii.

<sup>832</sup> *Task Force Report*, *supra* note 821, at 7.

<sup>833</sup> *Task Force Report*, *supra* note 821, at 8.

<sup>834</sup> The United States has signed but not ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR). See United Nations Treaty Collection, International Covenant on Economic, Social and Cultural Rights, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en) (last visited Jan. 25, 2016).

<sup>835</sup> *Id.* at 10.

<sup>836</sup> The 1948 Universal Declaration of Human Rights enshrined this principle in its preamble: "[R]ecognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."

<sup>837</sup> *Task Force Report*, *supra* note 821, at 12.

Force notes: “Good policing is more than just complying with the law. Sometimes actions are perfectly permitted by policy, but that does not always mean an officer should take those actions.”<sup>838</sup> Nonetheless, gaps in Pillar 1 reflect missed opportunities to strengthen the rules regulating police conduct and particularly the use of force.

*a. Use of Force*

While shifts in organizational culture of the police are necessary, a myopic focus on promoting responsible extemporaneous decision-making, rather than creating clear guidelines for officers when using force, fails to remedy the deficiencies in the U.S. constitutional standard governing the use of force. As discussed above in Section III, the Fourth Amendment “reasonableness” test does not clearly delineate (a) when the use of force generally, and deadly force in particular, is permissible, (b) at what stage of an encounter it is permissible, (c) for what objectives it is permissible, and d) in what proportion it is permissible. “There is no federal statute governing the use of lethal force in the United States,”<sup>839</sup> and state statutes also fail to adequately set forth these parameters.<sup>840</sup>

As such, the legal framework governing the use of force by police in the United States is not in conformity with the requirements of international human rights law. To date, the United States has failed to codify international standards recognizing the “protection of life” principle, premised on the principles of proportionality and necessity, and the requirement that lethal force be used only as a last resort to prevent loss of life, and only after exhaustion of non-violent and non-lethal alternatives.<sup>841</sup> These gaps in the legal framework contribute to a lack of clarity regarding what constitutes objectively reasonable conduct on the part of officers and leads to undue deference to officers’ subjective decision-making.<sup>842</sup> Pillar 1 could inadvertently encourage such deference, in its call to “adopt procedural justice as the guiding principle for internal and external policies and practices to guide their interactions with the citizens they serve.”<sup>843</sup>

Strikingly, the Report remains largely silent on the gaps in the *legal* framework regulating the use of force by police.<sup>844</sup> The focus is instead on individual police action.

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<sup>838</sup> *Task Force Report*, *supra* note 821, at 12.

<sup>839</sup> Amnesty Int’l, *Deadly Force: Police Use of Lethal Force in the United States* 6 (2015) [https://www.amnestyusa.org/sites/default/files/aiusa\\_deadlyforcereportjune2015.pdf](https://www.amnestyusa.org/sites/default/files/aiusa_deadlyforcereportjune2015.pdf).

<sup>840</sup> See Section III of IACHR Written Submission in Support of the Thematic Hearing on Excessive Use of Force by the Police against Black Americans in the United States (October 23, 2015) (hereinafter Written Submission). All references to “Sections” or “above” in the above-the-line text here refers to the Written Submission; see also Amnesty Int’l, *Deadly Force: Police Use of Lethal Force in the United States*, (2015) [https://www.amnestyusa.org/sites/default/files/aiusa\\_deadlyforcereportjune2015.pdf](https://www.amnestyusa.org/sites/default/files/aiusa_deadlyforcereportjune2015.pdf).

<sup>841</sup> See U.N. Code of Conduct, *supra* note 32; U.N. Basic Principles, *supra* note 33; Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, U.N. Doc. A/66/330, ¶¶ 19–45 (Aug. 30, 2011). A small number of police departments have implemented new use-of-force guidelines: see Use of Force Policy Database, <http://useofforceproject.org/database/>.

<sup>842</sup> See Written Submission, Section III.

<sup>843</sup> *Task Force Report*, *supra* note 821, at 14.

<sup>844</sup> The majority of the Report’s recommendations are directed to law enforcement agencies, rather than legislative bodies or regulatory authorities. The Task Force explained: “Though legislation and funding from the Federal Government is necessary in some cases, most of the policies, programs, and practices recommended by the task force can and should be implemented at the local level.” *Task Force Report*, *supra* note 821, at 65. Nonetheless, the Report does recommend legislative action on a few issues. For example, Recommendation 3.4 states: “Federal, state, local and tribal legislative bodies should be encouraged to update public record laws.” *Id.* at 36. And recommendation 6.7 states: “Congress should develop and enact peer review error management legislation.” *Id.* at 67, 97. There is no comparable recommendation, however, regarding the reform of federal, state, and local laws on the use of force.

**To ensure adherence to international standards on the use of force, the constitutional standard could be strengthened and clarified through national legislation or regulations issued by the executive branch, as well as by state and local actions.**

The Report's emphasis on procedural justice rather than on the establishment of clear guidelines extends to the internal discipline processes with law enforcement agencies. For example, **Action Item 1.4.2** calls for "values adherence rather than adherence to rules."<sup>845</sup> This approach poses a significant risk with regard to the use of force. As detailed elsewhere (see Part VI, "Investigations and Accountability for Excessive Use of Force by Police"), police officers are already routinely afforded deference by courts for their use of force. **Action Item 1.4.2** could be interpreted as extending that deference to internal reviews as well, calling for the application of the subjective values of the officer and his department in evaluating an officer's actions, rather than an evaluation of whether the officer's actions conformed to a set procedures. Thus, Pillar 1's emphasis on values-based assessments over clear guidelines risks creating more opportunities for confusion and inconsistent application of disciplinary sanctions and penalties. Under international human rights law, however, States have an obligation to be clear when defining domestic policies on the use of force.<sup>846</sup>

*b. Non-discrimination*

Pillar 1's recommendations also fall short of international requirements with regard to discrimination. **Recommendation 1.2** states, "Law enforcement agencies should acknowledge the role of policing in past and present injustice and discrimination and how it is a hurdle to the promotion of community trust."<sup>847</sup> This recognition of the role law enforcement plays in facilitating discrimination aligns with the spirit of the obligations set forth by the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD"). But this recommendation should go farther than *acknowledgment* to call for *elimination* of discrimination based on race.

Elsewhere the Report emphasizes public reporting of department-level police activity data based on demographics (**Action Item 1.3.1**) and calls on law enforcement agencies to adopt policies prohibiting profiling or other forms of discrimination based on race or other characteristics (**Recommendation 2.13**). Under Pillar 1 and elsewhere, however, the Report falls short of demanding that the U.S. government *require by law*, law enforcement agencies to collect and disclose data on police encounters or *prohibit* racial profiling under law. As a State party to ICERD, the ICCPR, and other relevant human rights treaties, the United States bears an obligation to eliminate discrimination not only at the federal level, but also at the state and local levels. Under international law, all levels of government possess a duty to respect, protect, and fulfill the country's international human rights obligations, and the State bears responsibility regardless of its internal organization.<sup>848</sup>

Article 2(e) of ICERD also calls for each State Party to "encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to

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<sup>845</sup> *Id.*

<sup>846</sup> See, e.g., *Hinojosa v. Ecuador*, Case 11.442, Inter-Am. Comm'n H.R., Report No. XX/14 at 38, ¶ 169 (2014).

<sup>847</sup> *Task Force Report*, supra note 811, at 12.

<sup>848</sup> U.N. Human Rights Council, *Role of local government in the promotion and protection of human rights*, U.N. Doc. A/HRC/30/49 (Aug. 7, 2015) ("But, while the State remains free to determine its internal structure and functions through its own law and practice, for the purposes of international responsibility the conduct of its institutions, administrative divisions performing public functions and exercising public powers is attributable to the State, even if those institutions are regarded, in domestic law, as autonomous and/or independent of the central executive government." [¶ 4] "Local authorities are obliged to comply, within their local competences, with their duties stemming from the international human rights obligations of the State." [¶ 21]).



discourage anything which tends to strengthen racial division.”<sup>849</sup> Recommendation 1.2 and the accompanying commentary are not comparably specific and, strikingly, do not mention the word “race” or “racial discrimination” at all.<sup>850</sup>

*c. Community Policing*

Finally, Pillar 1 makes some recommendations that risk exacerbating inequalities in the level of police presence across communities based on race, thereby potentially increasing the frequency of interaction between police and civilians in those communities and the statistical likelihood of a fatal encounter.<sup>851</sup> Policing practices that have a disparate impact on racial minorities undermine the fundamental rights to equality and non-discrimination, and the right to privacy. For example, Pillar 1 encourages law enforcement officials to insert themselves into the neighborhoods and schools of already over-policed communities. **Recommendation 1.5** calls for law enforcement agencies to “proactively promote public trust by initiating positive non-enforcement activities to engage communities that typically have high rates of investigative and enforcement involvement with government agencies.”<sup>852</sup> Within this recommendation are a number of action items that call for steps like providing officers housing in public housing neighborhoods and creating opportunities for officer presence in schools.<sup>853</sup> These recommendations, while aimed at creating opportunities for non-confrontational interactions, risk fostering a sense that the police are “an occupying force”—the very sentiment that Pillar 1 seeks to combat.<sup>854</sup>

*iii. Pillar 2*

Pillar 2 focuses on creating clear policies on use of force, data collection, supervision, and accountability.<sup>855</sup> Again, however, recommendations fall short of international standards.

*a. Use of Force Standards*

The preamble of Pillar 2 states, “Not only should there be policies for deadly and non-deadly uses of force but a clearly stated ‘sanctity of life’ philosophy must also be in the forefront of every officer’s mind.”<sup>856</sup> Such policies would represent an improvement on the blanket Fourth Amendment “reasonableness” inquiry, which does not differentiate between types of force. As discussed above,<sup>857</sup> however, the focus on “deadly and non-deadly” force could inadvertently suggest that the baseline for engagement is the use of force, rather than the exhaustion of all alternatives to force. Under international law, officers have a duty to exhaust non-violent means before resorting to force.<sup>858</sup> **In the preamble to Pillar 2 and throughout the Report, greater attention should be given to the requirement that officers exhaust alternatives to force.**

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<sup>849</sup> ICERD, *supra* note 12, art. 2(e).

<sup>850</sup> *Task Force Report*, *supra* note 821, at 12.

<sup>851</sup> See, e.g., Sendhil Mullainathan, *Police killings of Blacks: here is what the data say*, N.Y. Times (Oct. 16, 2015) <http://www.nytimes.com/2015/10/18/upshot/police-killings-of-blacks-what-the-data-says.html>; Zaid Jilani, *95% of Police Killings in 2015 Occurred in Neighborhoods with Incomes Under \$100,000*, AlterNet (July 24, 2015) <http://www.alternet.org/civil-liberties/95-police-killings-2015-occurred-neighborhoods-incomes-under-100000>.

<sup>852</sup> *Task Force Report*, *supra* note 821, at 14.

<sup>853</sup> *Id.* at 14–15.

<sup>854</sup> *Id.* at 1.

<sup>855</sup> *Id.* at 19.

<sup>856</sup> *Id.*

<sup>857</sup> See Section III of Written Submission.

<sup>858</sup> See U.N. Basic Principles, *supra* note 33, princ. 4.

**Recommendation 2.2** appears to comply with the international standard that there be a clear policy on the use of force as it states, “law enforcement agencies should have comprehensive policies on the use of force that include training, investigations, prosecutions, data collection, and information sharing.”<sup>859</sup> Importantly, the Report recommends that those policies be publicly disclosed.<sup>860</sup> **The recommendation should go further, however, by calling on the federal government to enact minimum standards or mandate uniformity in those policies, and it should expressly address the role of federal and state legislatures in codifying rules on the use of force in line with international law.**

The action items associated with this recommendation also do not go far enough to ensure that international human rights standards for the use of force are respected. **Action Item 2.2.1** states that trainings on the use of force should “*emphasize* de-escalation,”<sup>861</sup> but not that attempts at de-escalation should be required, wherever possible, prior to using force, consistent with the requirement under international law to exhaust non-violent and less-than-lethal means prior to using force. Similarly, while the Report adds, “Policies should also include, at a minimum, annual training that includes shoot/don’t shoot scenarios and the use of less than lethal technologies,”<sup>862</sup> it fails to emphasize the need for training on non-violent alternatives to force. **The Report stops short of calling for regulations that would require officers to first take steps to de-escalate a situation, absent imminent threat to life or of serious bodily injury, before resorting to force at all, let alone deadly force.**

*b. Non-discrimination*

**Recommendation 2.13** closely aligns with Article 5 of ICERD.<sup>863</sup> It calls for law enforcement agencies to adopt and enforce policies “prohibiting profiling and discrimination based on race, ethnicity, national origin, religion, age, gender, gender identity/expression, sexual orientation, immigration status, disability, housing status, occupation, or language fluency.”<sup>864</sup> The associated action items, however, all focus on sexual harassment and misconduct, and fail to address the use of lethal force.<sup>865</sup> Thus, while calling for the elimination of discrimination by law enforcement in non-lethal interactions, this recommendation fails to address the fact that a grossly disproportionate number of Black civilians are killed by law enforcement each year.

The 2014 DOJ “Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity” makes great strides toward the elimination of racial profiling. The Task Force Report fails to address the responsibility of the federal and state governments to enact legislation and regulations, *binding* on all law enforcement agencies, that prohibit racial profiling and other forms of racial discrimination. Such a prohibition is required under international law, generally,<sup>866</sup> and Inter-American jurisprudence, specifically.<sup>867</sup>

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<sup>859</sup> *Id.* at 20.

<sup>860</sup> *Id.*

<sup>861</sup> *Id.* at 21 (emphasis added).

<sup>862</sup> *Id.* at 21.

<sup>863</sup> ICERD Art. 5.

<sup>864</sup> *Task Force Report*, *supra* note 821, at 28.

<sup>865</sup> *Id.*

<sup>866</sup> See, e.g., Comm. on the Elimination of Racial Discrimination, *Concluding observations on the combined seventh to ninth periodic reports of United States of America*, U.N. Doc. CERD/C/USA/CO/7-9, ¶¶ 5, 8 (Sept. 25, 2014); Human Rights Committee, *Concluding observations on the fourth periodic report of the United States of America*, U.N. Doc. CCPR/C/USA/4 and Corr.1, ¶¶ 6–7 (Apr. 23, 2014).

<sup>867</sup> Articles 2, 4, 5 and 7 of ICERD prohibit the use of racial profiling, as does the general equality provision of the ICCPR, Article 26. See ICERD, *supra* note 12. This Commission has held that “[r]acial profiling and discriminatory treatment by the authorities of a State are [by themselves] a violation of the principle prohibiting degrading treatment.” Méndez, et al. v. Dominican Republic, Case 12.271, Inter-Am. Comm’n H.R., Report No. 64/12, ¶ 26 (Mar. 29, 2012). See also Comm. on the

c. *Accountability*

Pillar 2 of the Report calls for a number of important reforms to increase transparency and accountability when officers use force. Such reforms are essential to protecting the rights to life and non-discrimination, as well as fulfilling the rights to remedy and to access to information under human rights law. For instance, in the case of the use of force resulting in death or the use of firearms resulting in death or injury, **Recommendation 2.2.2** calls for external and independent criminal investigations.<sup>868</sup>

**Recommendation 2.2.4** requires the collection and reporting of data to the federal government in all officer-involved shootings, whether fatal or non-fatal, as well as any in-custody death.<sup>869</sup> In addition, **Recommendation 2.2.6** calls for law enforcement agencies to establish a Serious Incident Review Board to review cases of officer-involved shootings and other serious incidents.<sup>870</sup> These recommendations are in line with the reporting and review procedures in the U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, which call for government and law enforcement agencies to establish effective reporting and review procedures when law enforcement officials use force or firearms.<sup>871</sup> **Action Item 2.2.5** could be strengthened, however, if, instead of leaving it to the discretion of individual law enforcement agencies to devise policies on “what types of information will be released, when and in what situation,” minimum reporting and disclosure requirements were mandated by law, consistent with the Basic Principles, which call for a “detailed report” to be sent “promptly to the competent authorities.”<sup>872</sup> Similarly, the recommendation that law enforcement agencies merely be “*encouraged* to collect, maintain, and analyze demographic data on all detentions”<sup>873</sup> is inconsistent with the government’s responsibility not only to prevent future violations of the rights to life and non-discrimination, but also to ensure accountability and remedy for violations that have occurred.

Pillar 2 also addresses the important issue of militarization of police operations, particularly in the context of mass demonstrations.<sup>874</sup> **Recommendation 2.7** mentions the need for policies and procedures regarding the policing of protests. This focus is responsive to the recommendation of the High Commissioner for Human Rights that “in order to prevent the commission of human rights violations during protests, States should develop practical and operationally focused guidelines on the appropriate types of weapons, methods and tactics to be used to facilitate and manage peaceful protests, including with respect to assemblies during which acts of violence occur.”<sup>875</sup> But instead of underscoring that the maintenance of law and order cannot justify the use of deadly force, or emphasizing the requirement under international law that force be limited to the minimum necessary,<sup>876</sup> the Recommendation emphasizes minimizing “the *appearance* of a military operation” and the use of “provocative tactics and equipment that undermine civilian trust.”<sup>877</sup> Militarized policing is not simply a matter of appearance nor does the use of military-style tactics and equipment simply undermine public trust. Rather, it may violate

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Elimination of Racial Discrimination, General Recommendation No. XXXI (emphasizing the need for State parties to take steps to eliminate racial profiling in law enforcement).

<sup>868</sup> *Task Force Report*, *supra* note 821, at 21.

<sup>869</sup> *Id.*

<sup>870</sup> *Id.*

<sup>871</sup> U.N. Basic Principles, *supra* note 33, princ. 22.

<sup>872</sup> *Id.*

<sup>873</sup> *Task Force Report*, *supra* note 821, at 24 (Recommendation 2.6).

<sup>874</sup> *See id.* at 25 (Recommendation 2.7).

<sup>875</sup> Report of the United Nations High Commissioner for Human Rights, Seminar on effective measures and best practices to ensure the promotion and protection of human rights in the context of peaceful protests, U.N. Doc. A/HRC/25/32, ¶ 48 (Jan. 29, 2014).

<sup>876</sup> *See* U.N. Basic Principles, *supra* note 33, princ. 5; *see also* Report of the Special Rapporteur on extrajudicial, summary, or arbitrary executions, U.N. Doc. A/66/330, at 10.

<sup>877</sup> *Task Force Report*, *supra* note 821, at 25 (emphasis added).

the principles of necessity and proportionality in the use of force under international law. And when used in the context of peaceful protests, militarized police tactics may undermine the rights to freedom of expression, association and assembly, and the right to take part in the conduct of public affairs, as set out articles 19, 21, 22 and 25 of the International Covenant on Civil and Political Rights.<sup>878</sup>

It is laudable that **Action Items 2.7.1. and 2.7.2** of the Report emphasize that law enforcement policies should prioritize de-escalation in responses to mass demonstrations, and call for the creation of an investigation and accountability mechanism for violations related to policing of protests. But the Report stops short of addressing the circumstances in which the use of military-grade equipment is permissible or the laws and policies that regulate access to such equipment. And it does not address the use of military-grade equipment outside the context of protests, despite evidence that quasi-military SWAT teams are increasingly being deployed in routine law enforcement contexts.<sup>879</sup> The inattention to the legal framework for, and facilitation of, militarized policing seems to ignore the U.S. obligations both to refrain from violating rights and “to adopt affirmative measures to guarantee that the individuals subject to their jurisdiction can exercise and enjoy the rights contained in the American Declaration.”<sup>880</sup>

iv. *Pillar 3*

Pillar 3 centers on the use of social media and technological innovations such as body cameras to improve community relations, strengthen both police and civilian accountability, and improve evidence collection.

**Recommendation 3.1** specifically notes that human rights should be considered in the development of new technology,<sup>881</sup> but the associated action items refer only to the protections of U.S. constitutional standards (in **Action Item 3.1.2**) rather than the protections and obligations of international human rights law. New technology should comply not only with U.S. constitutional standards, but also with international obligations, particularly with regard to privacy rights, which govern the acquisition, use, retention and dissemination of all types of data collected from civilians by law enforcement.<sup>882</sup>

The Report also calls on the federal government to support the development of “less than lethal” technology.<sup>883</sup> While the focus on non-lethal means of law enforcement is critical, the continued focus on the binary of lethal and non-lethal force deflects attention from non-violent means. The lack of attention to alternatives to force sidesteps the requirement under international law to exhaust non-violent options before resorting to force.<sup>884</sup>

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<sup>878</sup> Report of the United Nations High Commissioner for Human Rights, U.N. Doc. A/HRC/25/32, at ¶ 11.

<sup>879</sup> See generally ACLU, *War Comes Home*, (Jun. 2014), <https://www.aclu.org/report/war-comes-home-excessive-militarization-american-police>.

<sup>880</sup> *Lenahan v. United States*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, ¶ 188 (2011) (citing *Wayne Smith*, *Hugo Armendariz v. United States*, Case 12.562, Inter-Am. Comm’n H.R., Report No. 81/10, ¶¶ 61-65 (2010)); *Maya Indigenous Community v. Belize*, Case 12.053, Inter-Am. Comm’n H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 at 727, ¶¶ 122-135, 162, 193-196 (2004) ; *Dann v. United States*, Case 11.140, Inter-Am. Comm’n H.R., Report No. 75/02, ¶ 124-145 (2002).

<sup>881</sup> *Task Force Report*, *supra* note 821, at 33.

<sup>882</sup> The OHCHR has weighed in on this issue, stressing the importance of balancing the degree of interference into a person’s privacy against the necessity of the measure, in light of States’ obligations under Article 17 of the ICCPR. For a full discussion, see *The right to privacy in the digital age*, Report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/27/37 (June 30, 2014), [http://www.ohchr.org/Documents/Issues/DigitalAge/A-HRC-27-37\\_en.doc](http://www.ohchr.org/Documents/Issues/DigitalAge/A-HRC-27-37_en.doc).

<sup>883</sup> *Task Force Report*, *supra* note 821, at 37.

<sup>884</sup> U.N. Basic Principles, *supra* note 33, princ. 4.

Finally, while technology such as body-worn cameras (“BWCs”) can strengthen accountability by improving police and civilian behavior<sup>885</sup> and assisting in evidence collection, the use of such cameras must conform with international human rights law. BWC footage is often held or selectively edited by police departments in order to bolster their own positions.<sup>886</sup> Indeed, **Action Item 3.1.3** calls on police departments to prevent tampering with or manipulation of evidence, including BWC footage.<sup>887</sup>

However, the Report appears to caution against complete transparency of BWC footage:

**Recommendation 3.4** notes that the release of BWC footage can “negatively influence public perception and trust of police” when videos of “legitimate” uses of force are transmitted to the public over mass media.<sup>888</sup> This risk must be weighed against the necessity of allowing public access to uncut footage for fact-finding purposes. At a minimum, uncut footage must be made available to all parties involved in the investigation of a use-of-force incident, including civilian victims and their representatives. In describing States’ obligation to investigate human rights violations, this Commission has noted that States have a “special duty” to “clarify the facts” in cases involving police misconduct.<sup>889</sup> This special duty must also apply to the facts contained in unedited BWC footage. A mandate to release uncut BWC footage would also comport with the spirit of principle 22 of the U.N. Basic Principles (adopted before BWC technology was developed), which calls for a “detailed report” to be “sent promptly to the competent authorities responsible for administrative review and judicial control,” as well as principle 23, which mandates that “persons affected by the use of force and firearms ... have access to an independent process, including a judicial process.”<sup>890</sup>

v. *Pillar 4*

Pillar 4 focuses on the importance of “community policing,” which entails having police work with neighborhood residents to co-produce public safety.<sup>891</sup> Community policing often involves the increased physical presence of police, which can generate feelings of “resentment,”<sup>892</sup> and can make the police seem like an “occupying force.”<sup>893</sup> While outside the framework of international human rights standards, this Commission should carefully consider the criticisms of community policing in the United States.<sup>894</sup> To ensure adherence to human rights principles of non-discrimination and equality, efforts to involve community members in the design, implementation, and oversight of policing must provide equal opportunity for all individuals in the community to participate on equal footing, regardless of race, ethnicity, gender, religion, physical ability, age, or other characteristics. The Report’s attention to

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<sup>885</sup> Michael D. White, *Police Officer Body-Worn Cameras: Assessing the Evidence*, Office of Justice Programs (U.S. Department of Justice), 2014, 6, <https://www.ojpdiagnosticcenter.org/sites/default/files/spotlight/download/Police%20Officer%20Body-Worn%20Cameras.pdf> (“Body-worn cameras have a civilizing effect, resulting in improved behavior among both police officers and citizens,” referring to several empirical studies demonstrating changes in police and civilian behavior on the watch of cameras.)

<sup>886</sup> See Section C(2)(a), *Considering Police Body Cameras: Developments in the Law*, 128 Harv. L. Rev. 1794, Apr. 10, 2015, <http://harvardlawreview.org/2015/04/considering-police-body-cameras/> (“[A]symmetric access to the footage is therefore problematic as it allows officers to adapt their testimony in order to bolster their credibility while civilian witnesses cannot do the same.”).

<sup>887</sup> Task Force Report, *supra* note 821, at 34.

<sup>888</sup> *Id.* at 36.

<sup>889</sup> Inter-Am. Comm’n H.R., *Report on Citizens Security and Human Rights*, *supra* note 701, ¶ 46.

<sup>890</sup> U.N. Basic Principles, *supra* note 33, princs. 22-23.

<sup>891</sup> Task Force Report, *supra* note 821, at 41.

<sup>892</sup> *Id.* at 42.

<sup>893</sup> *Id.* at 43.

<sup>894</sup> Tom R. Tyler, Stephen J. Schulhofer, Aziz Huq, *American Policing at a Crossroads*, 101 J. of Criminal L. & Criminology 335, 343 (2011) (criticizing the effects of “Broken Windows” policing as part of a larger analysis of changes in police strategies).

involvement of youth in community decision-making and problem-solving is laudable.<sup>895</sup> Particular efforts are necessary to include other marginalized and vulnerable populations as well.

**Action Item 4.1.1** suggests that “in lieu of arrests,” officers should engage in “least harm” resolutions, like citations or warnings.<sup>896</sup> While the emphasis on reducing arrests and minimizing use of force is laudable, police departments should also mitigate any negative consequences of “least harm” alternatives. Citations are often accompanied by fines, and when people are unable to pay fines, the amounts owed can escalate with late fees and court costs.<sup>897</sup> This can force individuals into cycles of debt, which can result in eventual incarceration if judges force defendants to choose between “pay-or-stay” options.<sup>898</sup> Such practices violate international law, which prohibits the deprivation of liberty due to debt,<sup>899</sup> as well as discrimination on the basis of economic status.<sup>900</sup> **Recommendation 2.9** of the Report acknowledges the problem of for-profit policing, when revenue generation acts as an incentive for law enforcement. The Report does not address, however, the potential tensions between the recommendations under Pillars 2 and 4.

**Recommendation 4.3** calls for multidisciplinary teams to respond to crisis situations.<sup>901</sup> **Action Item 4.3.3** calls upon communities to hold law enforcement agency leaders accountable for outcomes. This call is consonant with international human rights law, which demands that accountability rise up through the chain of leadership.<sup>902</sup> The recommendation should be expanded, however, to include the standard set forth under international human rights that superior orders are no excuse for human rights violations. Doing so would emphasize the need for human rights education for trainees at all levels, and make clear that officers will be held accountable for the human rights violations of their subordinates.<sup>903</sup>

**Recommendation 4.4** calls for police to adopt a policing oath of “do no harm,”<sup>904</sup> along the lines of doctors’ Hippocratic Oath. To do so, the Report suggests law enforcement officers’ primary goal should be to “avoid use of force if at all possible, even when it is allowed by law and by policy.”<sup>905</sup> While this recommendation aligns with international human rights law on its face, it exposes a lack of attention to the need to reform existing laws and regulations regarding the use of force. Laws and policies regulating the use of force must be updated to comply with international standards so that force is used only when strictly necessary and only in proportion to the threat presented. The law should be clear so that officers do not need to rely on their subjective judgment.

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<sup>895</sup> See *Task Force Report*, *supra* note 821, at 46 (Action Item 4.5.2), 49 (Recommendation 4.7).

<sup>896</sup> *Id.* at 43.

<sup>897</sup> Ben Kesling, *Lawsuit Alleges Ferguson, Mo., Legal System Violates Constitutional Protections*, Wall St. J. (Feb. 9, 2015) <http://www.wsj.com/articles/lawsuit-alleges-ferguson-mo-legal-system-violates-constitutional-protections-by-jailing-poor-for-fines-1423502968>; Radley Balko, *How municipalities in St. Louis County, Mo., profit from poverty*, Wash. Post (Sept. 3, 2014) <https://www.washingtonpost.com/news/the-watch/wp/2014/09/03/how-st-louis-county-missouri-profits-from-poverty/>.

<sup>898</sup> See generally, ACLU, *Ending Modern Day Debtors Prisons*, <https://www.aclu.org/feature/ending-modern-day-debtors-prisons>.

<sup>899</sup> ACHR, *supra* note 59, Art. 7.7 (“No one shall be detained for debt.”).

<sup>900</sup> See ICCPR, *supra* note 11, art. 2(1) (prohibiting discrimination on the basis of property or other status).

<sup>901</sup> Task Force Report at 44.

<sup>902</sup> See, e.g., U.N. Basic Principles, *supra* note 33, princ. 22.

<sup>903</sup> See, e.g., *id.* princ. 26; see also CAT, *supra* note 13, art. 2.3 (“An order from a superior officer or a public authority may not be invoked as a justification of torture.”).

<sup>904</sup> Task Force Report, *supra* note 821, at 45.

<sup>905</sup> *Id.*

vi. *Pillar 5*

Pillar 5 covers the need for more effective police training.<sup>906</sup> Throughout this Pillar, the Task Force insists on the need to research training and consult with appropriate experts and community members on training programs and practices. The recommended improvements to training do not contradict international law and represent positive steps. Recommendation 5.1 recognizes the need for the Federal government to ensure uniform minimum training practices for police around the country: “[T]he Federal Government should promote consistent standards for high quality training.”<sup>907</sup>

Most of the recommendations under Pillar 5 address Peace Officer and Standards Training (“POST”) and Field Training Officer programs.<sup>908</sup> POSTs set the minimum standards for selection and training in each state.<sup>909</sup> It is laudable that the Report recommends inclusion of training on social interaction (**Recommendation 5.7**), addiction (**Recommendation 5.8**), and implicit bias (**Recommendation 5.9**), with particular emphasis on interactions with the LGBTQ population. The relative lack of express attention to *racial* biases and discrimination, however, is concerning. Training programs should explicitly address the need for training on the elimination of racial profiling, in line with the recommendations of the Human Rights Committee to the United States.<sup>910</sup>

Moreover, the Report fails to mention the U.S. obligation under the Convention Against Torture (“CAT”) to train law enforcement agents, including police officers, to avoid cruel, inhuman and degrading treatment (“CIDT”).<sup>911</sup> As discussed above in Section IV, use of force by police can, in some circumstances, amount to torture or CIDT<sup>912</sup> if it is intentionally inflicted, causing severe pain or suffering, for the purposes of interrogation, punishment, intimidation or discrimination.<sup>913</sup> Moreover, even if not inflicted for an unlawful purpose under Article 1 of CAT, police use of force may constitute ill-treatment, in violation of both of CAT and Article 7 of the ICCPR, when it violates the proportionality principle.<sup>914</sup> Training police officers on the definitions of torture and CIDT, and their duty to avoid both, is an essential part of the U.S. obligation to ensure that police conduct conforms to international law, and the rights of the population are protected.

**This Commission should encourage the federal government of the United States to ensure that all POSTs comply with international human rights law and proposed training improvements.**

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<sup>906</sup> *Task Force Report*, *supra* note 821, at 51.

<sup>907</sup> *Id.* at 53.

<sup>908</sup> *See Id.* Recommendations 5.6–5.13.

<sup>909</sup> *See, e.g.*, State of California, *About Us*, Commission on POST, <https://www.post.ca.gov/about-us.aspx>.

<sup>910</sup> *See* Human Rights Committee, *Concluding observations on the fourth periodic report of the United States of America*, U.N. Doc. CCPR/C/USA/4 and Corr.1, ¶ 7 (Apr. 23, 2014).

<sup>911</sup> CAT, *supra* note 13, arts. 10.1 & 16.1 (mandating anti-torture training in art. 10.1 “[e]ach State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel,” and, by virtue of art. 16.1, training must include the prohibition against cruel, inhuman or degrading treatment).

<sup>912</sup> *See, e.g.*, *Gayle v. Jamaica*, Case 12.418, Inter-Am. Comm’n H.R., Report No. 92/05, ¶ 63 (2005) (finding that the excessive use of force by police for the purpose of the criminal justice was CIDT); *see also* *Finca “La Exacta” v. Guatemala*, Case 11.382, Inter-Am. Comm’n H.R., Report No. 57/02, doc. 5 rev. 1, ¶ 41 (2002).

<sup>913</sup> CAT, *supra* note 13, art. 1 (“the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person...” (emphasis added); *see also* IACPPT, *supra* note 63, art. 2 (“any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation...”)).

<sup>914</sup> *See* Manfred Nowak & Elizabeth McArthur, *The distinction between torture and cruel, inhuman or degrading treatment*, 16 *Torture* 147, 150 n.7 (2006).

vii. *Pillar 6*

Pillar 6 addresses officer wellness and safety. While police officers are agents of the State, they also have rights vis-à-vis the State, in their capacity as state employees and individual residents. Under international human rights law, police officers have the right to proper training as part of their right to be adequately prepared for their job responsibilities.<sup>915</sup> In this sense, training should be considered an obligation owed to police officers themselves, who are entitled to the tools that will enable them to confront risky situations and respond appropriately, and to the psychological preparation to account for “the constant stress of the job.”<sup>916</sup>

The call in action item 6.1.2 for mental health services for officers,<sup>917</sup> is in line with international human rights standards.<sup>918</sup> Good mental health is a prerequisite for responsible policing, as described in Section IV above.

viii. *Implementation Recommendations*

Finally, the Task Force suggests three recommendations regarding implementation.<sup>919</sup> **This Commission should encourage the United States to add a fourth implementation recommendation: all implementation strategies should be in accordance with international human rights law.**

ix. *Conclusion*

Policymakers must intensify efforts to reform law and practice in order to stop the excessive use of force by police against Black Americans. This requires a concerted effort toward reforming laws, police training, policing tactics, and the criminal justice system, in order to ensure that the United States satisfies its obligations under international human rights law in general and its specific legal obligations as a member of the Organization of American States. The creation of the 21<sup>st</sup> Century Task Force and other executive programs are laudable, but the systemic problems underlying discriminatory and excessive use of force by police against Black Americans will not be solved through ad hoc initiatives. True reform requires broad-based, widespread, sustained changes in law and practice.

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<sup>915</sup> American Declaration, *supra* note 9, art. xiv (“Every person has the right to work, under proper conditions, and to follow his vocation freely, insofar as existing conditions of employment permit.”); ICERD, *supra* note 12, art. 5(e)(i) (States parties must guarantee the right “[t]he rights ... to just and favourable conditions of work...”); *Rep. on Citizen Security and Human Rights*, *supra* note 105, ¶ 92 (describing the entitlement to “constant training that enables the police officer to perform his or her functions”) (quoting Domínguez Vial, *Andrés Policía y Derechos Humanos, Policía de Investigaciones de Chile/IIDH*, Santiago, 1996); *see also Rep. on the Situation of Human Rights in Mexico*, *supra* note 366, ¶ 391 (commenting on the conditions of employment of the police).

<sup>916</sup> *Rep. on the Situation of Human Rights in Mexico*, *supra* note 366, ¶ 391 (commenting on the conditions of employment of the police).

<sup>917</sup> *Task Force Report*, *supra* note 821, at 63.

<sup>918</sup> U.N. Basic Principles, *supra* note 33, princ. 21.

<sup>919</sup> *Task Force Report*, *supra* note 821, at 79.