

LETHAL IN DISGUISE 2

How Crowd-Control Weapons Impact
Health and Human Rights

Laws and Standards on the Use of Force and
Crowd-Control Weapons

LAWS AND STANDARDS ON THE USE OF FORCE AND CROWD-CONTROL WEAPONS

NEW DELHI, INDIA-JAN 14 2020: MUSLIM WOMEN PROTEST THE CAA ACT DURING A SIT IN. PRADEEP GAURS | SHUTTERSTOCK

Overview

Over the six years since the publication of LiD1, there has been a rapid development of international and regional laws and standards relating to the protection and promotion of assembly, association and free expression rights. These include new international laws and standards regulating the development, testing, trade, use and misuse of CCWs. Underpinned by existing, binding international instruments, these new laws and standards strengthen assembly, association and free expression rights, as well as rules on the use of CCWs in protest contexts. However, the implementation and adoption of these new laws and standards at the national level have been limited, severely

restricting the application of these rights in real-world protest contexts.

The most notable legal developments include the 2020 UN Guidance on LLWs,³³⁶ which INCLO and PHR helped inform.³³⁷ It provides detailed guidance on the principles concerning the lawful use of LLWs in policing, prohibitions on the use of certain LLWs, and instructions on the lawful deployment of LLWs in both protest and custodial settings. In addition, the UN Human Rights Committee—an authoritative body of legal experts mandated to monitor implementation of the International Covenant on Civil and Political Rights (ICCPR)—has produced two General Comments which, alongside various UN Human Rights Resolutions³³⁸ and

336 See above n 6.

337 The UN Guidance on LLWs and other groups use the term less-lethal weapons (LLWs) while our report uses the term crowd-control weapons (CCWs). Our report uses the term CCW to avoid suggesting that these weapons are not dangerous. Lethality is based not only on the weapon profile but on how it is used. A more objective term in this sense is CCWs, as it covers all weapons used in assemblies. In the context of this section, and where necessary, we use LLW as that is the term the UN uses. In practice, they can be used interchangeably.

338 See, for example, UNHRC Res. 25/38 (2014) and UNHRC Res. 38/11 (2018).

regional standards, give further guidance to states and law enforcement on the assembly, association and free expression rights of protesters, and the lawful use of LLWs.

Despite this expansion of international legal standards, there is limited evidence of the implementation of these standards at the national level. Resultantly, consistent violations of human rights and civil liberties in protest contexts stubbornly persist and, in some instances, have increased over the past six years. There is no question that standard-setting at the international and regional levels is critically important. Equally essential, however, are local and national standard-setting efforts and the revision of policies, operational protocols, and training manuals for law enforcement officials to bring them in line with prevailing international norms. Monitoring and reporting on, and accountability for, the use of CCWs by law enforcement officials remains a key area of concern, despite clear international law guidance on the need to ensure oversight over policing operations in protest contexts.

Policy-makers, civil rights activists, and protesters must continue to work tirelessly to advocate for stronger laws and standards at the international level—including advocating for amending the Chemical Weapons Convention³³⁹ to ban the use of chemical weapons against civilian populations and

supporting the development of a treaty to limit trade in the “tools of torture”—and ensure the domestication of these standards in order to bring meaningful change at the local and national levels, advance and develop assembly, association and free expression rights, and foster a culture of participation and dissent in democratic spaces.

International human rights law

In the context of CCWs, the internationally recognised right to life and the right to freedom from torture or ill-treatment play foundational roles in the development of instruments that regulate the use of force and CCWs, as do assembly, association, and free expression rights contained in international conventions and treaties. They do so by placing an obligation on law enforcement officials to respect and protect life during their operations and to respect, protect, and fulfil assembly, association and free expression rights.

The right to life is recognised in article 6(1) of the International Covenant on Civil and Political Rights (ICCPR),³⁴⁰ among other treaties.³⁴¹ The right to freedom from torture or ill-treatment is recognised in article 7 of the ICCPR, and it is further expounded upon in the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or

339 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Chemical Weapons Convention), (3 September 1992), accessible at: <https://legal.un.org/avl/ha/cpdpsucw/cpdpsucw.html>.

340 International Covenant on Civil and Political Rights, (16 December 1966), accessible at: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

341 See, among others, the African Charter on Human and Peoples' Rights, (27 June 1981), accessible at <https://achpr.au.int/en/charter/african-charter-human-and-peoples-rights>.

Punishment (CAT).³⁴² In addition, the ICCPR, which constitutes binding international law on state parties, guarantees the rights to expression, assembly, and association in articles 19, 21, and 22.³⁴³ These rights are equally provided for in binding regional treaties and place an obligation on law enforcement agencies to protect life and prohibit the excessive use of force during their operations.³⁴⁴ Additional instruments, like the UN Guidance on LLWs, expand on this duty by regulating the use of force and CCWs.

UN Human Rights Committee General Comment No 36

In 2018, the UN Human Rights Committee published General Comment No 36,³⁴⁵ which elaborates on the right to life in the ICCPR. General Comments constitute the treaty body's authoritative interpretation of its respective human rights treaty provisions and are intended to give expert guidance on the fundamental rights contained in the ICCPR and other binding international treaties.

General Comment No 36 states that the deprivation of life should be interpreted broadly to include intentional or otherwise

foreseeable and preventable life-terminating harm or injury, caused by either an act or omission, and that the deprivation of life goes beyond injury or threats to bodily or mental integrity.³⁴⁶ The obligation on states also extends to reasonably foreseeable life-threatening situations, including in protest contexts, even if those threats do not actually lead to a loss of life.³⁴⁷

The General Comment notes that any potentially lethal use of force for law enforcement purposes is an extreme measure that should be resorted to only when strictly necessary in order to protect life or prevent serious injury from an imminent threat.³⁴⁸ States are expected to take all necessary measures to prevent arbitrary deprivation of life by their law enforcement officials, including soldiers charged with law enforcement missions. These preventative measures include:

- › **Appropriate legislation** controlling the use of lethal force by law enforcement officials.
- › **Procedures** designed to ensure that law enforcement actions are adequately planned in a manner consistent with

342 Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment; (10 December 1984), accessible at: <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>.

343 See above n 340.

344 Centre for Human Rights, University of Pretoria, Overview of Global and Regional Human Rights Standards on the Police Use of Force, (20 May 2020), accessible at: <https://www.ohchr.org/en/calls-for-input/general-comment-no-36-article-6-right-life>.

345 General Comment No 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, adopted by the Human Rights Committee (General Comment No 36), accessible at: https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf.

346 *Id* at para 6.

347 *Id* at para 7.

348 *Id* at para 12.

the need to minimise the risk they pose to human life.

- › **Mandatory reporting, review and investigation** of lethal incidents and other life-threatening incidents and supplying officials responsible for the management of assemblies with effective, less-lethal means and adequate protective equipment in order to obviate their need to resort to lethal force.³⁴⁹

In particular, the General Comment reaffirms that all operations of law enforcement officials should comply with relevant international standards, including the UN Code of Conduct for Law Enforcement Officials³⁵⁰ (UN Code of Conduct) and the UN Basic Principles.³⁵¹ By way of key principles, the General Comment provides that:

- › States engaged in the **deployment, use, sale, or purchase of existing CCWs** and in the study, development, acquisition, or adoption of these weapons must always consider their impact on the right to life.³⁵²

- › CCWs must be subject to **strict independent testing and evaluation** in order to monitor their impact on the right to life³⁵³

- › CCWs must be restricted to law enforcement officials who have undergone **appropriate training** and must be strictly regulated in accordance with applicable international standards, including the UN Basic Principles.³⁵⁴

- › CCWs must be employed only subject to strict requirements of **necessity and proportionality**, in situations in which other less harmful measures have proven to be or clearly are ineffective.³⁵⁵

- › States should not resort to CCWs in situations of crowd control that can be addressed through **less harmful means**, especially situations involving the exercise of the right to peaceful protest.³⁵⁶

- › **Non-state actors**, such as privately-hired security officers, empowered or authorized by the state to employ force with potentially lethal consequences

349 *Id* at para 13.

350 United Nations Code of Conduct for Law Enforcement Officials, adopted by General Assembly resolution 34/169 of 17 December 1979 available at: <https://www.ohchr.org/en/professionalinterest/pages/lawenforcementofficials.aspx#:~:text=Law%20enforcement%20officials%20shall%20at,responsibility%20required%20by%20their%20profession>.

351 See above n 8.

352 *Id* at para 65.

353 *Id* at para 14.

354 *Id*.

355 *Id*.

356 *Id*.

are equally subject to the dictates of the General Comment.³⁵⁷

- › States must *investigate and prosecute unlawful deprivations of life*, such as allegations of excessive use of force with lethal consequences and the use of live fire against protesters.³⁵⁸

UN Human Rights Committee General Comment No 37

In 2020, the UN Human Rights Committee produced General Comment No 37, which elaborates on the right to peaceful assembly in the ICCPR.³⁵⁹ It states that the right to peaceful assembly is important in its own right. It also constitutes the foundation of participatory and democratic systems, and it is a tool to recognise many other rights. It constitutes an individual right that is exercised collectively.³⁶⁰ Inherent in the right is an associative element but the right applies to individuals, and law enforcement officials must be cautious about viewing individual protesters as a group.

The General Comment directly addresses the issue of police use of force in the context of assemblies stating that:

All law enforcement officials responsible for policing assemblies must be suitably equipped, including where needed with appropriate and fit-for-purpose less-lethal weapons and protective equipment. States parties must ensure that all weapons, including less-lethal weapons, are subject to strict independent testing, and that officers deployed with them receive specific training, and must evaluate and monitor the impact of weapons on the rights of those affected.³⁶¹

The General Comment also states that “law enforcement agencies must be alert to the potentially discriminatory impacts of certain policing tactics, including in the context of new technologies, and must address them.”³⁶² In general terms, General Comment 37 follows the principles stated in the UN Guidance on LLWs, which is discussed further below.

357 *Id* at para 15.

358 *Id* at paras 27 and 29.

359 General Comment No 37 (2020) on the right of peaceful assembly (article 21), adopted by the Human Rights Committee (General Comment No 37), accessible at: <https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=CCPR/C/GC/37&Lang=E>.

360 *Id* at paras 1-2.

361 *Id* at para 81.

362 *Id*.

Case study

Police usage of KIPs during summer 2020 Black Lives Matter protests

United States

The murder of George Floyd on 25 May 2020, after a Minneapolis police officer knelt on his neck for 9 minutes and 29 seconds, sparked nationwide protests against police brutality. In June 2020, about 15 to 26 million people participated in BLM protests, making it one of the largest protest movements in US history.³⁶³

Law enforcement agencies indiscriminately deployed CCWs, including KIPs, such as foam/sponge bullets, rubber bullets, pepper balls, beanbag rounds, chalk grenades and flashbang grenades against protesters, the vast majority of whom were peacefully assembled. Countless protesters, bystanders and journalists sustained critical wounds, broken bones, traumatic brain injuries and even blindness as a result of the projectiles fired by police.³⁶⁴ In just one day, 30 May 2020, police partially blinded eight people across the country.³⁶⁵

There were more than 950 incidents of police violence against civilians recorded during the

protests that followed the murder of George Floyd.³⁶⁶ These instances are symptomatic of the differentiated police response to those protesting racism and police brutality and illustrate the disproportionate impact of the violent policing on people of African descent and other people of colour. Moreover, while covering these protests, journalists became targets for assault and arrest by police officers. The violent and militarized response to BLM protesters stood in stark contrast to the largely passive police response to the violent insurrection by a white supremacist at the US Capitol on 6 January 2021.

Foam/sponge bullets

In May 2020, the Minneapolis Police and the Minnesota State Patrol tear-gassed, peppersprayed, shot in the face with rubber and foam bullets, arrested without cause, and threatened journalists at gunpoint, all after these journalists identified themselves and were clearly covering BLM protests. Linda Tirado, a freelance photographer, was one of

363 L Buchanan, Q Bui and JK Patel, "Black Lives Matter May Be the Largest Movement in U.S. History," *The New York Times*, (3 July 2020), accessible at: <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html>.

364 L Szabo, J Hancock, K McCoy, D Slack and D Wagner, "Fractured Skulls, Lost Eyes: Police Break Their Own Rules When Shooting Protesters With 'Rubber Bullets,'" *USA Today News*, (19 June 2020), accessible at: <https://www.usatoday.com/in-depth/news/nation/2020/06/19/police-break-rules-shooting-protesters-rubber-bullets-less-lethal-projectiles/3211421001/>.

365 M Kelly, J Sohyun Lee and J Swaine, "Partially Blinded by Police," *The Washington Post*, (14 July 2020), accessible at: <https://www.washingtonpost.com/investigations/2020/07/14/george-floyd-protests-police-blinding/>.

366 T Thomas, A Gabbat and C Bar, "Nearly 1,000 Instances of Police Brutality Recorded in US Anti-Racism Protest," *The Guardian*, (20 October 2020), <https://www.theguardian.com/us-news/2020/oct/29/us-police-brutality-protest>.



POLICE AND FEDERAL AGENTS USED TEAR GAS, PEPPER BALL, AND RUBBER BULLET WEAPONRY AGAINST PROTESTORS IN PORTLAND, OREGON, UNITED STATES IN JULY 2020. ANDREW STANBRIDGE | PHYSICIANS FOR HUMAN RIGHTS

the many people severely injured.³⁶⁷ Despite being clearly identifiable as a member of the press, on 29 May 2020, an officer shot a 40mm impact foam bullet round at her head.³⁶⁸ Tirado was permanently blinded in her left eye and suffered traumatic brain injury,³⁶⁹ and has undergone multiple eye surgeries to address ongoing complications.³⁷⁰ As a result of the attack, Tirado still suffers from constant headaches, has trouble recalling words, and uses a walker due to her loss of

depth perception. In June 2020, the ACLU of Minnesota filed a lawsuit on behalf of Tirado and other journalists targeted in the BLM protests³⁷¹ that resulted in a settlement agreement which included various policy changes, including prohibiting the arrest, threat or use of physical force or chemical agents against journalists.³⁷²

367 L Reyes, "Journalists Blinded, Injured, Arrested Covering George Floyd Protests Nationwide," USA Today, (31 May 2020), accessible at: <https://www.usatoday.com/story/news/nation/2020/05/31/journalists-blinded-injured-arrested-covering-george-floyd-protests/5299374002/>.

368 *Tirado v City of Minneapolis*, 521 F. Supp. 3d 833 (D. Minn. 2021), accessible at: <https://www.documentcloud.org/documents/20491477-2021-02-22-memorandum-opinion>.

369 T Webster, "Minneapolis Settles Lawsuit With Linda Tirado, Journalist Blinded In One Eye During May 2020 Unrest," Minnesota Reformer, (26 May 2022), accessible at: <https://minnesotareformer.com/2022/05/26/minneapolis-settles-lawsuit-with-linda-tirado-journalist-blinded-in-one-eye-during-may-2020-unrest/>.

370 See above n 362.

371 See <https://www.aclu-mn.org/en/cases/jared-goyette-et-al-v-city-minneapolis-et-al>.

372 *Goyette v City of Minneapolis*, 20-CV-1302 (WMW/DTS), 2022 WL 370161 (D. Minn. Feb. 8, 2022), accessible at: <https://www.aclu-mn.org/en/press-releases/goyettesettlement>.

Rubber bullets and pepper balls

In Denver, Colorado, protesters and bystanders were injured by rubber bullets and pepper balls deployed by law enforcement. Michael Driscoll filed a civil rights lawsuit after he was struck in the face with a rubber bullet shot by police on 30 May 2020.³⁷³ The impact shattered his sinus and fractured multiple parts of his face, including the orbital bone around his left eye. Driscoll was forced to undergo surgery to reconstruct his skull, which had collapsed between his eyes. Bystander Jax Feldman was struck in the eye with a pepper ball launcher when walking home near a protest and permanently blinded in one eye.³⁷⁴

In a landmark lawsuit brought by the ACLU of Colorado and two law firms, a federal jury held the city of Denver accountable for its response to the BLM protests and in March 2022 awarded \$14 million to twelve protesters injured by rubber and foam bullets, pepper balls, flash bang grenades, and tear gas while protesting police violence. The lawsuit was the first lawsuit in the US challenging the use of force by police against protesters to go to

trial, and it also marks the first time that a jury held a city liable for violating the civil rights of protesters.

Beanbag rounds

In Austin Texas, Justin Howell, a 20-year-old protester, was severely injured by a beanbag round during a protest against police brutality in late-May 2020.³⁷⁵ An officer was allegedly shooting beanbag ammunition at a protester who was throwing objects at police, but instead inadvertently struck Howell in the middle of his forehead.³⁷⁶ Howell suffered from a fractured skull and brain damage. Police continued to fire beanbag rounds at volunteer medics and protesters who were carrying Howell to safety. Meredith Michael, a volunteer medic wearing a firefighter shirt with a red medical cross sewed on, was shot in the hands and suffered severe injuries.³⁷⁷ Both Michael and Howell sued the city and later reached a settlement.³⁷⁸

Flash-bang grenades

In Santa Rosa, California, Marqus Martinez was peacefully taking a knee with his hands in the air when officers began firing tear gas,

373 *Driscoll v City of Denver*, Case No. 1:21-cv-02866 (25 October 2021), accessible at: <https://kdvr.com/wp-content/uploads/sites/11/2021/10/Driscoll-Complaint-2.pdf>.

374 S Towle and B Miller, "Attorneys For Denver Man Shot In Eye By Officers During Protests Call For Criminal Investigation, Settlement," Denver7, (15 June 2020), accessible at: <https://www.thedenverchannel.com/news/local-news/attorneys-for-denver-man-shot-in-eye-by-officers-during-protests-call-for-criminal-investigation-settlement>.

375 J McCullough, "Black Protester Who Was Critically Injured By Police In Protest Is Identified, Student Newspaper Reports," The Texas Tribune, (1 June 2020), accessible at: <https://www.texastribune.org/2020/06/01/austin-police-george-floyd-mike-ramos/>.

376 A Jamieson, "A College Student's Family Say He Has Brain Damage After Police Shot Him With A Beanbag Round," Buzzfeed News (4 June 2020), accessible at: <https://www.buzzfeednews.com/article/amberjamieson/justin-howell-protester-shot-head-police-austin-beanbag>.

377 *Id.*

378 A Weber, "Austin Oks \$850,000 Settlement For Volunteer Medic Shot With 'Less-Lethal' Ammunition During Protest," Austin Monitor, (6 May 2022), accessible at: <https://www.austinmonitor.com/stories/2022/05/austin-oks-850000-settlement-for-volunteer-medic-shot-with-less-lethal-ammunition-during-protest/>.

rubber bullets and flash-bang grenades at protesters. Police hit Martinez in the face with a flash-bang grenade³⁷⁹ which broke Martinez's jaw in multiple locations and split his upper lip in three places up to his nose. His teeth also broke off and drove into the roof of his mouth and through his tongue.³⁸⁰ Martinez still requires numerous surgeries to repair the extensive damage caused to his face. The city of Santa Rosa settled a lawsuit brought by Martinez and four others injured, agreeing to pay \$1.9 million.

Tear gas canisters

In Fort Wayne, Indiana, 21-year-old protester, Balin Brake, lost his eye after being hit in the face by a tear gas canister while participating in a racial justice protest on 30 May, 2020.³⁸¹ Brake suffered two eyelid lacerations, four occipital fractures, and permanent loss of vision and light perception in his right eye.³⁸² The impact completely ruptured Brake's eye, which had to be surgically removed and replaced with a prosthetic eye. Following the incident, Brake continues to experience severe headaches, pain where his eye once was, loss of depth perception and mental suffering. The lawsuit was settled in March 2022.³⁸³

There were more than 950 incidents of police violence against civilians recorded during the protests that followed the murder of George Floyd.

379 K Bryant, "Santa Rosa Police Sued for Brutality Against BLM Protestors," Top Class Actions, (25 June 2020), accessible at: <https://topclassactions.com/civil-rights/santa-rosa-police-sued-for-brutality-against-blm-protesters/>.

380 *Martinez v City of Santa Rosa*, 2020 WL 9762698 (N.D.Cal.) (23 June 2020), accessible at: <https://turtletalk.files.wordpress.com/2020/06/1-complaint-8.pdf>.

381 J Stanton, "Demonstrator, 21, loses an EYE after being struck in the face by a police tear gas canister while peacefully protesting death of George Floyd in Indiana," Daily Mail, (31 May 2020), accessible at: <https://www.dailymail.co.uk/news/article-8374743/Demonstrator-21-loses-EYE-struck-face-police-tear-gas-canister.html>.

382 *Brake v City of Fort Wayne*, Case No. 1:20-cv-00345 (2 October 2022), accessible at: https://www.aclu-in.org/sites/default/files/field_documents/brake_v_ftwayne_-_complaint.pdf.

383 D Rowley, "Settlement Reached Between City Of Fort Wayne And Protester Who Lost Eye," Wane Local News, (5 March 2022), accessible at: <https://www.wane.com/news/local-news/settlement-reached-between-city-of-fort-wayne-and-protester-who-lost-eye/>.

International standards and best practices

A series of codes of conduct, basic principles, and guidelines have also been developed, which apply directly to questions on the use of force in protest contexts, including CCWs.

UN Code of Conduct

The UN Code of Conduct,³⁸⁴ adopted by the General Assembly of the United Nations in 1979, is recognised as one of the foundational instruments on the use of force by law enforcement agencies.³⁸⁵ It defines law enforcement agencies to include all officers of the law who exercise police powers, including military authorities and state security forces when exercising police powers, and recognises that law enforcement officials may use force in circumstances where it is strictly necessary—for the prevention of a crime or to effect a lawful arrest—but its use must be *exceptional*.³⁸⁶ It further requires that national legislation must be enacted to ensure compliance with the principle of proportionality which directs that the use of force must be proportionate to its objective.

UN Basic Principles

In addition to the UN Code of Conduct, the UN Basic Principles,³⁸⁷ adopted in 1990, is also recognised as one of the foundational instruments on the use of force. It recognises the important role that law enforcement agencies play in the protection of the right to life, liberty, and security of the person³⁸⁸ and requires that governments adopt and implement rules concerning the use of force in domestic law.³⁸⁹ The UN Basic Principles include specific references to CCWs.

Notably, the UN Basic Principles require states to:

- › Equip law enforcement officials with a variety of different weapons that allow for a differentiated use of force, which may include the development of CCWs.³⁹⁰
- › Evaluate the development and deployment of CCWs to mitigate the risk of injury to bystanders and ensure that “the use of such weapons should be carefully controlled.”³⁹¹
- › Use non-violent means before resorting to the use of force; the use of force may only be used if other

384 See above n 350.

385 See above n 345 at 1.

386 Article 2(a), Commentary on the UN Code of Conduct.

387 UN Basic Principles, above n 8.

388 *Id* at preamble.

389 *Id* at principle 1.

390 *Id* at principle 2.

391 *Id* at principle 3.

means are ineffective in achieving the intended result.³⁹²

- › Ensure that when the use of force is required, restraint is exercised in such use and officials act in proportion to the seriousness of the offence and the legitimate objective to be achieved, minimise damage and injury, respect and preserve human life, ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment, and ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment.³⁹³
- › Criminalise the arbitrary or abusive use of force in domestic criminal law.³⁹⁴
- › Ensure that in the dispersal of protests, law enforcement officials avoid the use of force or, where that is not practicable, restrict such force to the *minimum extent necessary*³⁹⁵ and that law enforcement officials may use firearms only when less dangerous means are not practicable and only to the minimum extent necessary.³⁹⁶

UN Guidance on LLWs

The primary international law document on CCWs is the 2020 UN Guidance on LLWs.³⁹⁷ While technically non-binding, it was published by the UN Office of the High Commissioner for Human Rights and was prepared by an international group of experts. It was informed by an extended and broad public participation process carried out under the auspices of the Geneva Academy and the University of Pretoria, which included states, academics and academic institutions, policing institutions, civil society organisations and activists.³⁹⁸ INCLIO and PHR were actively involved in this process, based on our research in LiD1.

As a result, the UN Guidance on LLWs is highly persuasive and consolidates the most up-to-date and comprehensive international thinking on the development, testing, deployment, use and trade in CCWs. It substantially clarifies both the UN Code of Conduct and the UN Basic Principles, which, to some extent, lack specificity.

The UN Guidance on LLWs acknowledges the lack of clear directives concerning the deployment of CCWs in compliance with human rights law³⁹⁹ and aims to supplement

392 *Id* at principle 4.

393 *Id* at principle 5.

394 *Id* at principle 7.

395 *Id* at principle 13.

396 *Id* at principle 14.

397 UN Guidance on LLWs, see above n 6.

398 For more information, see Geneva Academy, United Nations Human Rights Guidance on Less-Lethal Weapons, accessible at: <https://www.adh-geneve.ch/research/publications/detail/500-united-nations-human-rights-guidance-on-less-lethal-weapons-in-law-enforcement>.

399 UN Guidance on LLWs above n 6 at page v..

existing standards codified in the UN Code of Conduct and the UN Basic Principles. It does so by providing guidance on the responsible and lawful use of CCWs and stipulates the circumstances under which such weapons may be deployed. It also goes beyond the use of CCWs and provides guidance on their design, production, procurement, testing and training. It applies to the acts of all law enforcement officials at all times, including during counterterrorism activities, extraterritorially, and during instances of internal disturbances, including riots and acts of violence. It also applies to military personnel when they are acting in the capacity of law enforcement officials.

Importantly, the UN Guidance on LLWs recognises the misuse of CCWs and their potential to inflict serious or lethal harm, reinforcing some of the recommendations contained in LiD1. Specifically, it acknowledges that killings and torture, which are serious violations of international law, have previously been committed by using CCWs improperly.⁴⁰⁰ It also notes that CCWs may be used to reduce the risk of serious harm in one of two circumstances: either as a less dangerous alternative to a firearm, or in a circumstance where the use of force is

necessary but the use of a firearm would not be lawful.⁴⁰¹

The “six principles”

The UN Guidance on LLWs reaffirms the principle that all law enforcement officials must respect and protect fundamental human rights, particularly in circumstances that may require the use of force.⁴⁰² It provides that force may only be used as a last resort, after using nonviolent means, and only if alternative measures appear ineffective.⁴⁰³ *Any use of force must comply with the principles of legality, precaution, necessity, proportionality, nondiscrimination and accountability.*⁴⁰⁴

- › **Legality:** The principle of legality requires that rules concerning the use of force must be regulated in domestic law.⁴⁰⁵ Law enforcement officials must act in compliance with such laws and the use of force may only be justified when it is used in pursuit of a *legitimate objective*.⁴⁰⁶ Importantly, it provides that the use of force must never be used punitively.⁴⁰⁷ The Guidance mandates that only authorized CCWs and related equipment can be used under specific conditions and that domestic laws must

400 *Id* at page iii.

401 *Id* at page 1.

402 *Id* at principle 2.1.

403 *Id* at principle 2.2.

404 *Id* at principle 2.3.

405 *Id* at principle 2.4.

406 *Id*.

407 *Id*.

impose limitations for minimizing the risk of injury.⁴⁰⁸ The principle further requires that legislative instruments be sufficiently clear to ensure legal certainty and they must be widely published to enable accessibility.

- › Precaution: The principle of precaution requires that the planning and execution of law enforcement operations should aim to avoid the use of force and minimise the severity of injury.⁴⁰⁹ It provides that law enforcement officials should delay contact with protesters if doing so poses no risk and would decrease the possibility of requiring the use of force or violence. The principle also acknowledges the value of precautionary measures such as training and the provision of appropriate protective equipment and CCWs. It further requires that due consideration be accorded to the consequences of the use of force and CCWs on vulnerable members of society. The Guidance considers the following persons to be vulnerable: “children, pregnant women, the elderly, persons with disabilities, persons with mental health problems and persons under the influence of drugs or alcohol.”⁴¹⁰
- › Necessity: In terms of the principle of necessity, law enforcement officials may only use force when it is *strictly*

and absolutely necessary in order to achieve a legitimate law enforcement objective.⁴¹¹ Necessity requires that no reasonable alternative to the use of force exists. The principle places an obligation on law enforcement officials to deescalate situations and to seek a peaceful resolution where possible. Further, the principle directs that in circumstances where the use of force is necessary, the least amount of force must be used, and must not persist beyond what is required.

- › Proportionality: The principle of proportionality requires that any use of force and its consequent harm must be proportionate to the threat posed by any person or potential offence. The use of force must not exceed its intended objective. The principle further places an obligation on law enforcement officials to minimise the potential for their use of force to harm “bystanders, passers-by, medical personnel and journalists.”⁴¹²
- › Non-discrimination: The principle of non-discrimination places an onus on law enforcement officials to not discriminate against any person on one of the listed grounds. The grounds are non-exhaustive and include “race, ethnicity, colour, sex, sexual orientation, language, religion, political or other

408 *Id* at principle 2.5

409 *Id* at principle 2.6.

410 *Id* at principle 2.7.

411 *Id* at principle 2.8.

412 *Id* at principle 2.10.

opinion, national or social origin, disability, property or birth.”⁴¹³ To comply with this principle, law enforcement officials must exercise a heightened level of care concerning individuals who are likely to be more vulnerable to a particular weapon. Doing so requires active monitoring of the use of force.

- › **Accountability:** The Guidance reaffirms the principle that law enforcement officials must be held accountable for their actions, which includes their use of force as well as acts of omission, i.e., where law enforcement officials fail to meet their duty to protect members of the public.⁴¹⁴ The Guidance recognises the role played by additional actors in ensuring accountability—including members of the judiciary, civil society and human rights organisations. Accountability is enabled through effective monitoring, reporting and transparency. The principle also places an obligation on law enforcement agencies to establish internal accountability mechanisms that are effective and independent and recommends that states establish an external body that is appropriately resourced and able to provide an oversight function.⁴¹⁵

Notably, the Guidance recommends that all law enforcement officials should be identifiable, all weapons should be marked, the allocation of weapons should be recorded, and incidents of the use of force should be reported.⁴¹⁶ Such reporting should include sufficient detail to determine whether the use of force complies with the principles. The Guidance provides that in the event of death or injury as a result of CCWs, the incident should be reported to the officer’s superiors and a competent authority. Such authority must be authorised to conduct an investigation into the instance. If the outcome of an investigation concludes that death or injury was caused unlawfully, states must ensure that perpetrators are prosecuted and punished, if found guilty. Every law enforcement official is responsible for his or her decision.⁴¹⁷ Importantly, the Guidance provides victims with a right to a remedy which may include “compensation, guarantees of non-repetition, rehabilitation, reparation, restitution and satisfaction.”⁴¹⁸

413 *Id* at principle 2.11.

414 *Id* at principle 3.1.

415 *Id*.

416 *Id* at principle 3.3.

417 *Id* at principle 3.7.

418 *Id* at principle 3.12.

Additional considerations

The UN Guidance on LLWs provides further direction concerning the design and production of CCWs and considerations on legal review, testing and procurement, monitoring, transparency and training. Significantly less detail is provided on these topics, but the broad principles are outlined below:

- › Design and production: The Guidance places an obligation on states *and private companies* to design and produce CCWs and equipment that meets lawful law enforcement objectives and complies with human rights law.⁴¹⁹ Identified risks must be communicated to the user, purchaser and the general public, and there should be greater transparency concerning the specifications of the weapon. The Guidance further notes that the design and production of CCWs should duly consider the limitations constraining the use of force remotely.
- › Legal review, testing and procurement: The Guidance directs that before procuring CCWs, states must conduct a legal review to determine whether it would be prohibited by any domestic or international law, specifically any provision of human rights law.⁴²⁰ Such a review should include testing conducted by an independent party to assess the capability and potential consequences of the weapon. Testing should be conducted in accordance with a set of generally accepted standards and must consider the impact of the weapon on vulnerable individuals. Weapons that do not comply with the principles outlined in the Guidance should not be procured.
- › Monitoring: An obligation is placed on states and law enforcement agencies to monitor the deployment of CCWs.⁴²¹ The process should capture the circumstances of each use and the details of the people against whom force is used. It should also include spotchecks on CCWs. The results of the monitoring should be made publicly available.
- › Transparency: The Guidance provides that states and law enforcement agencies should be transparent concerning the use and regulation of CCWs.⁴²² It further provides that the anonymity of law enforcement officials may be protected in some instances, but it may not justify the non-publication of data.
- › Training: Training for law enforcement officials on the use of force is also prescribed.⁴²³ Training should include

419 *Id* at principle 4.1.1.

420 *Id* at principle 4.2.1.

421 *Id* at principle 4.3.1.

422 *Id* at principle 4.4.1.

423 *Id* at principle 4.5.1.

a focus on the applicable human rights standards and techniques to de-escalate situations, including mediation, communication and identification of the vulnerabilities of certain groups of people. The training should be updated where necessary, and law enforcement officials should receive periodic refresher training.

- › Medical assistance: The Guidance reaffirms the principle that medical assistance should be provided to any person as soon as possible and without discrimination.⁴²⁴ It provides that law enforcement officials should

be equipped with medical equipment and should fully cooperate with medical personnel.

- › Transfer and international cooperation: Concerning the transfer of CCWs, the Guidance provides that States shall regulate export and import of CCWs and related equipment in line with their international obligations.⁴²⁵

424 *Id* at principle 4.6.1.

425 *Id* at principle 4.7.1.

Case study

Venom launchers, a dangerous new technology used by police during 2021 social protests

Colombia

Between 28 April and 30 June 2021, a national strike occurred in Colombia. This strike was called by different sectors and social movements (trade unions, students, indigenous people and youth, among others) because of “public discontent over a tax reform proposal, the economic and health crises in the context of COVID-19 and the increase in massacres and assassinations of

social leaders and human rights defenders from across the country.” The strike was impactful at the national level and was harshly repressed by the security forces. Although Colombian government accounts reported that the protests were largely peaceful, official figures recorded 59 protest-related deaths by the end of May 2021. The Venom launcher system (Venom) was one of several



RIOT POLICE (ESMAD) TRY TO DISBAND DEMONSTRATORS WITH TEAR GAS AND STUNT GRANADES IN PASTO, NARIÑO ON MAY 26, 2021 AT THE START OF THE 4TH WEEK OF ANTI GOVERNMENT PROTESTS IN COLOMBIA THAT HAVE RESULTED IN AT LEAST 40 DEAD IN POLICE ABUSE OF AUTHORITY CASES AND UNREST. CAMILO ERASSO | LONG VISUAL PRESS/UNIVERSAL IMAGES GROUP VIA GETTY IMAGES

weapons and equipment used by Colombian security forces during the policing of the 2021 protests.

Venom is a multi-tube grenade launcher which is either mobile (mounted on a vehicle) or static (placed on the ground). It includes up to 30 tubes (smaller models are available) that can fire different grenades or canisters (for example, 38mm, 40 mm or 66mm). The tubes on the launcher are fixed, which means that while the system can generally be aimed in a particular direction, the angle of elevation cannot be altered. Security forces were documented placing the Venom system on the ground, holding it by hand,

and firing directly at protesters rather than overhead.⁴²⁶ Such use would be expected to cause movement of the launcher on firing, resulting in poor aiming or flat and direct firing trajectory. For law enforcement, the Venom 38mm munitions are advertised as having a range of between 100 and 160 meters.⁴²⁷

Venom is an inaccurate weapon which fires numerous canisters at the same time or successively in different directions. In addition, the canisters are fired at high velocity to long distances, which turns the canisters into KIPs. These features turn Venom into a dangerous weapon that can never comply with the principles of legality, precaution,

426 Temblores, Indepaz and PAIS, “Informe de Temblores, Indepaz y Pais a la CIDH sobre las violaciones a los derechos humanos cometidas por la fuerza pública contra la población civil colombiana en el marco del Paro”, (June 2021), accessible at: <http://www.derechos.org/nizkor/////colombia/doc/duque54.html#disparos>.

427 Combined Systems Inc, CSI The Less-Lethal Product Source, product catalogue, available at: <https://www.combinedsystems.com/download-our-catalog/>.

and proportionality. Some weapons have no place in the policing of protest.

As of mid-June, NGOs Temblores, Indepaz and PAIS reported that they had recorded 28 instances where Venom had been used against protesters. In one instance of use in Bogotá, it was reported that “at least 20 detonations were counted in less than 10 seconds”. Newspaper *El Espectador* reported multiple uses of Venom, firing both stun grenades and tear gas towards protesters in Bogotá. The use was described as “flashes and sparks (like missiles), then thunderous explosions, ending in a rain of tear gas that filled the streets” which appeared to be “heavy artillery” and “indiscriminate”.⁴²⁸ Video footage indicated significant numbers of cartridges being fired in quick succession. This type of use may cause panic among people in a crowd, risking a stampede, which may itself cause injuries, in addition to those caused by the impact or effects of the projectiles.

Use of Venom in the city of Popayán has been widely reported. France24 reported that “security forces fired the grenade launcher several times at protesters, who [were] located less than 80 metres away. Most of the protesters [were] sheltered behind shields and barricades.” In a joint report, Temblores, Indepaz and PAIS noted that one of the incidents in Popayán on 12 May 2021 was the first clear and recorded use

of Venom being placed on the ground and held by police officers and fired directly at protesters. Several reports document similar instances where Venom was fired directly at crowds, rather than overhead.

On 14 May 2021, Sebastián Quintero Múnera, a young protester, was killed during protests in Popayán. Múnera was allegedly killed by a Venom projectile. At the time of his death, Venom was being used by security forces on the streets of Colombian cities to disperse protesters. Its use was suspended by an administrative judge in Popayán in June 2021, although only in that city. The suspension is to be maintained until a protocol for its use is developed as “the way it is being used, can make it lethal”.

Following Múnera’s death, the Inter-American Commission on Human Rights (IACHR) called on the Colombian government to respect life and human rights, and warned against the indiscriminate use of CCWs, particularly noting “anti-riot weapons—like the Venom rocket launcher—that have an indiscriminate impact on mostly peaceful protests”.⁴²⁹

There is no evidence that Venom has been permanently retired from its use in Colombian law enforcement. Use of military-designed weapons, such as Venom, to police protests is indicative of a worrying trend towards violently suppressing the right to protest and freedom of expression.

428 *El Espectador*, ‘Venom: el arma en la tanqueta del Esmad, que causó pánico en el sur de Bogotá, en el Paro Nacional’, (5 May 2021), accessible at: <https://www.elespectador.com/bogota/venom-el-arma-en-la-tanqueta-del-esmad-que-causo-panico-en-el-sur-de-bogota-en-el-paro-nacional-article/>.

429 Organization of American States, “IACHR Condemns Serious Human Rights Violations in the Protest Context in Colombia, Rejects All Forms of Violence, and Stresses that the State Must Comply with its International Obligations”, (25 May 2021), accessible at: http://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2021/137.asp.

Sidebar

Manufacture and procurement of Venom

Developed by Combined Systems Inc (CSI), a US-based company, Venom is described as “a lightweight, high capacity, non-lethal grenade launcher”.⁴³⁰ According to CSI’s marketing materials, Venom “delivers non-lethal flash and sound, smoke obscuration, irritant and blunt trauma effects”.⁴³¹ Initially, Venom was created for use by the United States Marine Corps, but not used by them. It has also been used for more than a decade by the Israeli army in the West Bank.⁴³²

reportedly cost the Colombian government between 400 million and 445 million pesos, although the precise figure is unclear.⁴³⁴ In addition to the system itself, the Colombian government purchased cartridges from CSI for Venom, including, for example, signing a 745 million pesos contract for stun and tear gas cartridges.⁴³⁵ In 2020, the Colombian Ministry of Defense stated that Venom cost the Colombian government \$118,000, with each launched cartridge valued at \$71.⁴³⁶

In Colombia, Combined Systems Inc has reportedly supplied a range of munitions to the Colombian “riot control” agency, ESMAD (Escuadrón Móvil Antidisturbios or the Mobile Anti-Disturbance Squadron).⁴³³ Venom has

430 Combined Systems Inc, Venom, accessible at: <https://www.combinedsystems.com/Venom/>.

431 Combined Systems Inc, Venom®, accessible at: <https://www.combinedsystems.com/Venom/>.

432 B’Tselem, “Crowd Control: Israel’s Use of Crowd Control Weapons in the West Bank”, (January 2013) at p 13, accessible at: https://www.btselem.org/download/201212_crowd_control_eng.pdf.

433 For more information on this relationship and the weapons and equipment in question, see Omega Research Foundation, “Tools of torture and repression in South America: Use, manufacture and trade”, (2016), accessible at: <https://omegaresearchfoundation.org/publications/tools-torture-and-repression-south-america-use-manufacture-and-trade-july-2016>. See, also, Dirección General de la Policía Nacional, Proceso Número PN DIRAF CD 144 2013, accessible at: <https://www.contratos.gov.co/consultas/detalleProceso.do?numConstancia=13-12-1984581>; Colombia Licita, Antimotin importado – PONAL: ADQUISICION EQUIPO ANTIMOTIN IMPORTADO, (2022), accessible at: <https://colombialicita.com/licitacion/1919>; and Cuestión Pública, “Los millonarios contratos de armas ‘no letales’ para la Policía y el Esmad”, (6 February 2021), accessible at: <https://cuestionpublica.com/los-millonarios-contratos-de-armas-no-letales-para-la-policia-y-el-esmad/>.

428 El Espectador, “Venom: el arma en la tanqueta del Esmad, que causó pánico en el sur de Bogotá, en el Paro Nacional”, (5 May 2021), accessible at: <https://www.elespectador.com/bogota/venom-el-arma-en-la-tanqueta-del-esmad-que-causo-panico-en-el-sur-de-bogota-en-el-paro-nacional-article/> and Contagioradio, “Venom: una de las costosas armas del ESMAD”, (9 May 2020), accessible at: https://www.contagioradio-com.translate.goog/venom-una-de-las-costosas-armas-del-esmad/?x_tr_sl=auto&x_tr_tl=en&x_tr_hl=en&x_tr_pto=wapp.

435 See above n 420.

436 Information cited in S Torrado, “Venom, la cuestionada arma de los antidisturbios en Colombia”, El País, (21 May 2021), accessible at: <https://elpais.com/internacional/2021-05-21/venom-la-cuestionada-arma-de-los-antidisturbios-en-colombia.html>. See, also, report from Temblores, Indepaz and Pais Id, each cartridge is costed at 270,000 pesos, which is approximately similar to the account from El País, accounting for fluctuations in exchange rates.

Regional and national standards and best practices

In addition to international law and legal standards, regional organisations such as the African Union (AU) and the IACHR, among others, each have binding human rights treaties and standards on the use of force and CCWs, which should be read alongside international law and standards. Africa and the Americas present some notable examples and are detailed below for illustrative purposes.

Africa

In Africa, the right to life and related rights are detailed in the 1980 African Charter on Human and Peoples' Rights⁴³⁷ (African Charter). The African Commission on Human and Peoples' Rights (African Commission), which is the organ of the AU responsible for monitoring the implementation of the African Charter, has issued a series of resolutions on the use of force and CCWs. In 2017, it also published Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa (African Commission Guidelines), a precursor to the UN Guidance on LLWs.⁴³⁸

Resolution 281 from 2014 on the right to peaceful demonstrations mandates states

to comply with the UN Code of Conduct and the UN Basic Principles, and expressly notes concerns with increasing levels of sexual violence against women protesters, including cases of rape and sexual assault during protests. It calls on states to refrain from the disproportionate use of force against protesters and to conduct impartial and independent investigations into all human rights violations to ensure that all perpetrators are held accountable.⁴³⁹

Resolution 375 from 2017 urges states to ensure that their “domestic laws on the use of force by law enforcement officials are in line with regional and international standards” and to provide law enforcement officials with “appropriate personal protective equipment and weapons less likely to cause an injury than firearms.”⁴⁴⁰ Resolution 474, the most recent statement on the use of force which was issued in 2021 during the COVID-19 pandemic, reaffirms that law enforcement officials must comply with the principles of legality, necessity, proportionality, and accountability and must not endanger human life.⁴⁴¹

In addition to these resolutions, the African Commission Guidelines provide clear guidance on the use of CCWs and note that “less lethal weapons, designed for the purposes of crowd control, may be abused

437 See above n 341 at articles 4, 9, 10 and 11.

438 African Commission on Human and Peoples' Rights, Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa, (2017), accessible at: <https://achpr.au.int/index.php/en/node/898>.

439 African Commission, 281 Resolution on the Right to Peaceful Demonstrations - ACHPR/Res.281(LV)2014, accessible at: https://ecnl.org/sites/default/files/files/2021/ACHPRResolution181-2014_0.pdf.

440 African Commission, 375 Resolution on the Right to Life in Africa - ACHPR/Res.375(LX)2017, accessible at: <https://www.acdhrs.org/wp-content/uploads/2017/07/Resolution-on-the-Right-to-Life-in-Africa.pdf>.

441 African Commission, 474 Resolution on the Prohibition of Excessive Use of Force by Law Enforcement Officers in African States - ACHPR/Res. 474 (EXT.OS/ XXXI) 2021, <https://www.achpr.org/sessions/resolutions?id=505>.

by law enforcement officials who presume that such weapons are never lethal.”⁴⁴² The Guidelines further provide that:

[L]ess lethal crowd control weapons should only be used by well-trained law enforcement officials in order to prevent and minimise deaths, injuries and harm, and in a manner that complies with regional and international human rights standards. Prior to use, there must be in place precautionary measures such as appropriate independent testing of and training in the use of each type of device, in a range of situations, and in accordance with international standards.⁴⁴³

Americas

In the Americas, the right to peaceful assembly is recognised in various treaties and other human rights instruments, including article 21 of the American Declaration of the Rights and Duties of Man⁴⁴⁴ and article 15 of the American Convention on Human Rights.⁴⁴⁵ Following these treaties, the IACHR and

the Inter-American Court of Human Rights have developed a series of standards—and jurisprudence—to protect the right of peaceful assembly. Both the IACHR and the Court have recognised that protest is linked to the promotion and defence of democracy⁴⁴⁶ as a form of expression, participation, and a demand for the guarantee of political, economic, social, and cultural rights. Also, the IACHR’s Special Rapporteur for Freedom of Expression (FreeEx) has recognised that states have different obligations under the right to assembly: the obligations to respect, protect, and facilitate and the obligation to guarantee.⁴⁴⁷

Regarding the use of force and CCWs, a 2019 report by the IACHR’s Special Rapporteur for FreeEx notes that “the use of public force can be an important element in guaranteeing the right to protest and protecting the integrity of demonstrators. On the other hand, it also represents an important source of violations of these same rights.”⁴⁴⁸ Therefore, the use of force must be exceptional and justified by satisfying the principles of legality, absolute necessity, and proportionality.⁴⁴⁹

The IACHR has also issued statements regarding the acquisition, use, and control

442 African Commission Guidelines above n 438 at 21.2.8.

443 *Id.*

444 See article XXI.

445 See article 15.

446 Inter-American Commission on Human Rights, Office of the Special Rapporteur for Freedom of Expression, “Protesta y Derechos Humanos: Estándares sobre los derechos involucrados en la protesta social y las obligaciones que deben guiar la respuesta estatal” (IACHR FreeEx report), (CIDH/RELE/INF, 22/19) at para 4 and Inter-American Court of Human Rights, *López Lone et al v Honduras* (5 October 2015) at para 148.

447 IACHR FreeEx report *id.* See, also, <https://www.oas.org/en/iachr/expression/publications/Protesta/ProtestHumanRights.pdf>.

448 IACHR FreeEx report *id.* at para 101.

449 *Id.* at paras 102-106.

of CCWs.⁴⁵⁰ It considers the distinction between lethal and non-lethal weapons difficult to draw as “not only the design or characteristics of the weapon must be taken into account, but also other factors related to its use and control.”⁴⁵¹ It also warns of the indiscriminate effect of these weapons in the context of protests.

The IACHR has also called for the introduction and use of tests related to the acquisition and incorporation of new CCWs and types of ammunition.⁴⁵² These tests should be based on criteria provided by multidisciplinary and independent experts, should incorporate detailed regulations covering these weapons, and require specific training for officials in the appropriate use of each specific weapon. Finally, the IACHR notes that special attention should be paid to the development of new technologies in this area, such as remotecontrolled devices.

Implementation of the law: experiences from the field

Implementation of the law

While standards on the use of force and CCWs in protest contexts are expressed in international and regional law and standards and, in some cases, integrated into national regulations, our research indicates that there is a significant gap between these legal frameworks and their implementation on the ground by law enforcement officials.

Experts in all 18 countries studied for this report noted that there are international and regional instruments and constitutional, federal, state and local regulations which protect the right to life, and expression, assembly, and associative rights.⁴⁵³ The experts cited the importance of these laws as the foundation for their advocacy and litigation work. At the same time, many interviewees reported frequent restrictions on the freedom of assembly in implementing the protections as they are written. In fact, the vagueness of applicable laws has, at times, been leveraged to strengthen policing powers. As one expert we interviewed noted:

The general perception of CCWs, as non-lethal, has resulted in weaker or non-existent controls over their deployment.

450 *Id* at para 120.

451 *Id* at para 121. Direct quotation from interviews with civil liberties experts conducted between October 2021 and March 2022.

452 From interviews with civil liberties experts conducted between October 2021 and March 2022.

453 See Section 1: Introduction for more information on the interview methods.

There is a long history of peaceful protest and critical social change thanks to protests but there has been repression at each stage. Many times, overbroad public order laws give a lot of discretion to the police (e.g., overly broad riot laws, street/nuisance laws, public order laws, orders about public spaces, and trespass laws). In some countries, the authorities introduce order laws to outlaw demonstrations, despite the existence of constitutional freedoms.⁴⁵⁴

According to many experts, the most common justifications for declaring protests “unlawful” include an alleged risk to public safety and the possibility of property damage or blocking traffic. The extent to which protests are prevented, therefore, depends largely on local authorities, by-laws, and city ordinances. As one expert noted, “[i]n many places, the landscape is ‘piecemeal’, making enforcement challenging.”⁴⁵⁵ In general, there are “major issues with anti-riot bills. They are too broad as they can arrest people for just being in a group. Also, it doesn’t require violence but the threat of the violence, so it is very much a judgement call for police.”⁴⁵⁶

According to the experts interviewed for this report, the use of national security, anti-terrorism, or anti-hate speech laws has also been co-opted to restrict protest rights. An

interviewee noted that “over the past 4 to 6 years, there has been a shrinking of civic space. Over time, the challenge has been to ensure that good pieces of legislation are actually enacted. The card of national security is used to trump people’s rights.”⁴⁵⁷ Another interviewee noted that “national security [is used] as an excuse over the right to freedom of expression, exacerbated by a history of terrorist attacks.”⁴⁵⁸ Experts note that this is a fine needle to thread between hate speech, which may require certain limitations, and using hate speech laws as a pretext to curb free speech.

Implementation of use of force guidelines

In addition to vague legal provisions and overbroad exceptions, a lack of transparency appears to be a barrier to implementing and relying on national use of force principles and guidelines. Most experts noted that while there are national or local use of force guidelines, these are often not publicly available and are either classified or inaccessible to the public: “the police manuals—when is a certain thing deployed, when are these weapons to be deployed, how to use them—all of that is obscured.”⁴⁵⁹ In other cases, guidelines may exist, but police may be unfamiliar with them. As one interviewee stated, “there are some guidelines, service standing orders—how police should conduct themselves,

454 See above n 446.

455 *Id.*

456 *Id.*

457 *Id.*

458 *Id.*

459 *Id.*

talk to protesters—that are publicly available for anyone to read. . . but we doubt that all the police are reading all 1,000 pages or downloading it. [It] needs to be abridged.”⁴⁶⁰ Operationalising those guidelines is another matter: “[g]overnment makes the guidelines but the police have to create its own definitions on how to operationalize those guidelines.”⁴⁶¹

Most experts noted that working directly with law enforcement to ensure that protests are well organized and planned is a critical component of organising marches, demonstrations, and other large events. In many contexts, there are established and functional pathways for activists to be in full communication with law enforcement before, during and after protests to ensure the safety of all parties. In some cases, however, there are either dominant protocols requiring a permit for a protest or a notification system which in practice becomes a permission system. When permission is not granted, assemblies are declared illegal and the use of force to disperse them is justified by law enforcement. There are numerous other laws that can be used to limit protest rights. Public order laws such as curfews, transport regulations, and noise and nuisance rules can be used to neuter the right to protest.

Even where public order laws exist, the primary tactic used by police is much more basic: to disperse protesters and end the assembly altogether. “There is generally no de-escalation, the first instinct is to shut down.”⁴⁶² Police may actively disperse the

protest or may end it by “kettling”. In this method, protesters are blocked into a certain limited space and ordered to sit or stand, often for hours. They are not allowed to leave and are surrounded by police. Technically, police do not use violence during kettling, allowing them to evade use of force guidelines but interviewees noted that kettling is effectively “mass incarceration” for a short period of time.

Experiences with the use of force

In many countries, the primary law enforcement response to protest is dispersal, including the use of force and arrest to intimidate protesters. In addition to being deployed to disperse assemblies, the use of force is deployed in response to other forms of conduct by protestors, such as refusing to disperse, chaining themselves to objects, damaging property, or wearing masks. But most often, the use of force is deployed for no reason at all. As one expert noted, “When is force used in protests? Basically, all the time.”⁴⁶³

In describing the use of force by law enforcement against protesters, the primary concern of most experts was the failure to issue warnings before weapons were deployed. Some interviewees noted:

- › “Police don’t always give a sufficient warning, especially if there has been an injunction, and [there is] not enough time between when the police issue a

460 *Id.*

461 *Id.*

462 *Id.*

463 *Id.*

dispersal warning and when they start beating people.”⁴⁶⁴

- › “Usually they will warn people but start repressing as people are trying to disperse and very quickly escalate to [the] use of LLWs.”⁴⁶⁵
- › There are even situations of “hunting protesters that were trying to run away.”⁴⁶⁶
- › [There is] no apparent relation between the actual threat to public order and level of force used.”⁴⁶⁷

Police accountability for misuse of force

As detailed above, international law and standards define the state's obligation to report, investigate, and seek justice for any misuse of force. However, experts from all countries described a lack of accountability and noted that very few offending law enforcement officials have been convicted for misuse of force or injuring protesters. The general perception of CCWs, as non-lethal, has resulted in weaker or non-existent controls over their deployment. Officials are not convicted because accountability systems often lack transparency, allowing government officials to collude with offenders.⁴⁶⁸ The lack of an independent judiciary was noted

by many interviewees to be a significant impediment to any real accountability.

The experts shared that internal accountability for police misuse of force, or for injuries caused, was not evident and, most often, non-existent. On occasion, once-existing independent oversight systems have been deliberately dismantled. Therefore, human rights organisations engage in lawsuits on behalf of survivors and victims to seek accountability through the local or national judicial system. However, the lack of judicial independence and lack of independent investigation of individual officers hampers litigation. Even when there is a successful lawsuit, punishment of the offenders or reparations for the victims are limited and take an excessive amount of time to materialise. Although judicial accountability is often limited, lawsuits can serve other purposes, including bearing witness, naming the crimes, informing the public, and making sure it is clear that someone is watching. As one interviewee noted, “[w]e remind the government of their obligations.”⁴⁶⁹

464 *Id.*

465 *Id.*

466 *Id.*

467 *Id.*

468 *Id.*

469 *Id.*

Investigations of the misuse of force

When there are allegations of the misuse of force, investigations of those incidents are complicated and challenging. Research indicated that “[t]here is very little accountability in terms of police violence. There is very little transparency in terms of how and by what chain of command decisions are made.”⁴⁷⁰ The corporate culture of law enforcement institutions was also mentioned as a barrier to achieving justice because “it is police investigating police. [There is] really no independent oversight.”⁴⁷¹

Complex protocols for reporting police abuse, laws protecting law enforcement, corruption, a lack of independent accountability systems or judges, and a lack of evidence make accountability nearly impossible. There is also the difficulty of the “individualization of responsibilities” in the context of an assembly: it is difficult to name offending police officers because they are rarely identifiable by helmet numbers or identity badges. This is particularly problematic where law enforcement officials are either

masked with protective gear or have their faces covered. Some police officers also deliberately hide their name tags from view.

Evidence needed to investigate police use of force often comes from video recordings of the incidents, both by police and by activists. Regarding the use of police helmet-mounted or body-mounted video cameras for accountability purposes, most experts responded that cameras are typically used to document criminal activity by protestors but are not shared with the public when it is the law enforcement officers who have used force. “It is used to identify, arrest, intimidate, and prosecute protesters but it is not available to . . . civil society groups to highlight abuse or unlawful use of force by police.”⁴⁷² The use of mobile phone cameras by protesters and bystanders has become an increasingly effective method to document the management of assemblies, and the widespread availability of civilian-shot video on social media and news reports has the potential to improve police behaviour.

470 *Id.*

471 *Id.*

472 *Id.*

Case study

Deaths and severe injuries from police violence during protests against new criminal code

Indonesia

Between 23 and 29 September 2019, students in many cities in Indonesia protested against new legislation that reduces the authority of the Corruption Eradication Commission (KPK), and against several bills, including a new criminal code that penalizes extramarital sex and defamation against the president. In Jakarta and other cities, protesters clashed with the police, resulting in many injuries and some deaths.

Among the numerous deaths documented in the context of these protests, on 26 September, two students died of gunshot wounds after a violent clash between the protesters and police in front of the provincial legislative council building in Kendari, Southeast Sulawesi.

Immawan Randy, a 21-year-old student from Halu Oleo University, died after being hit in the chest by a bullet fired by police. A fellow protester, Yusuf Kardawi, who was 19-years-old and a student from the same university, died after being shot in his head.⁴⁷³ The police initially denied using live ammunition

or rubber bullets during the demonstration.⁴⁷⁴ Eventually, the police declared that six policemen had carried firearms during the protest and, as a consequence, they were suspended. Initially, only disciplinary proceedings⁴⁷⁵ were opened against the police officers, and light punishments were issued against them. Following widespread public protests over the lack of accountability, the authorities were obliged to initiate a criminal investigation. In the case of Immawan's death, the bullet fired at him matched the gun held by a policeman who was sentenced to four years in prison for the misuse of firearms. In Yusuf's death, the process is still ongoing due to numerous shortcomings in the investigation.

The police have claimed that they encountered several difficulties in the case's proceedings: no key witnesses, insufficient evidence, and no autopsy to establish Yusuf's cause of death. The family refused to allow an autopsy, as Yusuf had already been buried. The police used this refusal to justify the lack of a thorough investigation. Despite

473 LINE Indonesia, Pengumuman Terkait Penutupan LINE TODAY di Indonesia, accessible at <https://www.merdeka.com/teknologi/line-today-tutup-layanan-di-indonesia.html>.

474 IA Arbi, "One student dies, one in critical condition after protest turns violent in Kendari, Jakarta Post, (26 September 2019), accessible at: <https://www.thejakartapost.com/news/2019/09/26/one-student-dies-one-in-critical-condition-after-protest-turns-violent-in-kendari.html>.

475 Ikhwan Hastanto, "Police Officers Linked to Two Student Deaths in Indonesia Protests are Basically off the Hook," VICE, 31 October, 2019. <https://www.vice.com/en/article/3kxezv/police-officers-linked-to-two-student-deaths-in-indonesia-protests-are-basically-off-the-hook>



POLICE FIRED TEARGAS AND USED WATER CANNONS TO DISPERSE DEMONSTRATORS PROTESTING AGAINST GOVERNMENT REFORMS IN SEPTEMBER 2019. @FULLMOONFOLKS | TWITTER

the absence of an autopsy, some pieces of evidence, including a surveillance camera recording and the projectile itself, have been recovered and could be used to further the investigation.

Another student, Dicky Wahyudi, was gravely injured during the September 2019 protests. Dicky was struck by a police Barracuda armoured vehicle on 27 September while he was trying to escape the tear gas used to disperse protesters. The right side of his face was bruised and a wound was found on the right side of his chest. According to the South Sulawesi police chief, the massive armoured vehicle had accidentally crashed into Dicky. There is no further information about

the investigation by the police regarding this case.

These deaths add to the long ledger of impunity for police violence in the context of protests, a list that keeps growing due to unsolved cases and new ones that keep arising. The trend is clear: police use violence during protests and cause casualties, yet it is only low-ranking officers who are held accountable, to the extent there is any accountability at all. Typically, there is no chain of command accountability nor any evaluation as to how police should better manage and facilitate protests in the future.