

CONSTITUTIONAL AND INTERNATIONAL APPROACHES ON THE USE OF POLICE FORCE IN MEXICO AND THE UNITED STATES

José Luis CONTRERAS RAMÍREZ*
Isaac DE PAZ GONZÁLEZ**

ABSTRACT: *In order to accomplish the aim of this article, we discuss law enforcement in Mexico and the United States from three angles. The international principles approach on the issue, constitutional lines, and several cases from their corresponding Supreme Courts, as well as the existing framework and mechanisms of police procedures for institutional accountability. In the first section, we assume that international standards have a weak influence in shaping domestic approaches to law enforcement. In the second section, we describe how, through case law, constitutional principles expand or restrain police abuse. While in the third one, we deal with internal or external processes and mechanisms of accountability for the police. The analysis of these three aspects is not purely normative, it addresses background elements on how police abuse is defined, instigated, or tolerated, both by institutional and even “legal” practices.*

KEYWORDS: *Law enforcement in United States and Mexico, human rights, constitutional approaches, qualified immunity, police abuse.*

RESUMEN: *Para los efectos de este artículo, elegimos analizar las fuerzas policiales en Estados Unidos y México desde tres aristas. Una aproximación desde los principios internacionales sobre el tema, límites constitucionales y jurisprudencia selecta de sus correspondientes Cortes Supremas, así como el marco y los mecanismos existentes de procedimientos policiales para una rendición de cuentas institucional. En el primer apartado, intentaremos corroborar si las normas internacionales influyen en la configuración de sus enfoques nacionales de las fuerzas policiales. En el segundo apartado, estudiaremos los principios consti-*

* Research Professor at the Faculty of Law Tijuana, Autonomous University of Baja California. PhD University Carlos III de Madrid, LLM International Law, Universidad Complutense de Madrid. ORCID: <https://orcid.org/0000-0002-8308-155X>.

** Research Professor at the Faculty of Law Tijuana, Autonomous University of Baja California. PhD Fundamental Rights and Public Liberties Castile-La Mancha University (SNI 1). ORCID: <https://orcid.org/0000-0002-2267-5629>.

tucionales y jurisprudencia pertinente sobre fuerzas policiales y abuso policial. Mientras que, en el tercero, estudiamos los procesos y mecanismos internos o externos de rendición de cuentas de la policía. El análisis de estos tres aspectos no es puramente normativo, sino que muestra elementos de fondo sobre cómo se define, instiga o tolera el abuso policial, tanto por prácticas institucionales como incluso “legales”.

PALABRAS CLAVE: *Fuerzas policiales en Estados Unidos y México, derechos humanos, enfoques constitucionales, inmunidad calificada, abuso policiaco.*

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I. INTRODUCTION

Nowadays, States around the world should be much more obliged to conceive their police models in accordance to human rights, especially when people around the world are losing faith in those who are supposed to “serve and protect” our communities. The death of (unarmed) George Floyd under po-

lice custody in the state of Minnesota caused global outrage, resulting in massive protests and riots in several cities, clearly evidencing an already divided and angry society in the United States.¹ Worst of all, police brutality in that country appears to be the norm and not only a sporadic or exceptional unfortunate event. Similarly, in Mexico, there is evidence of lethality from police officers within the context of the narco-war and even against unarmed civilians under police custody or engaged in social protests. Within both police models of law enforcement, it seems highly difficult to adjust human rights standards to police models because there might not be a strong will to do so. Nevertheless, at least there are those who advocate a police system in which human rights are not something rhetorical or even marginal, but rather the backbone of proper police function.²

However, we must consider that since memorial times, the ruler and the ruled settled constitutional rationales on the exercise of power to protect individuals from harm, pain, theft, deprivation of liberty; but above all, the most precious value for human beings, life. These rights outline the main values in modern constitutional democracies, whereas arbitrariness is a factual situation provoked by autocrats who disregard modern values on the rule of law.³

Recent studies on the rule of law, terrorism and state of emergency, have focused on constitutional implications on the use of force for human rights,⁴ exceptional legislation, military actions, and counterterrorism measures, which create tension on both the rule of law and human rights at national and international levels.⁵ The war against terrorism has particularly intensified discussions on how police scrutiny has increased towards individuals,⁶ and how national responses have facilitated the introduction of intrusive leg-

¹ House Committee on the Judiciary, H.R. 7120, (2020).

² Sara Pastor Alonso, *Los derechos humanos en la función policial: Recetas para mejorar la formación y la rendición de cuentas en las fuerzas policiales*, 6 RIGHTS INTERNATIONAL SPAIN 3-29, 26 (2016).

³ BINGHAM captured the existing principles of the rule of law: the prohibition of torture, fair trial, and other legal and moral foundations, which are part of the customary law of the nations. TOM BINGHAM, *THE RULE OF LAW* 66, 90, 110 (Penguin Books, 2010).

⁴ GENEVIEVE LENNON, COLIN KING & CAROLE McCARTNEY (eds.), *COUNTER-TERRORISM, CONSTITUTIONALISM AND MISCARRIAGES OF JUSTICE: A Festschrift for Professor Clive Walker* (Hart Publishing, Bloomsbury 2018); ALAN GREENE, *PERMANENT STATE OF EXCEPTION AND THE RULE OF LAW. CONSTITUTIONS IN AN AGE OF CRISIS* (Hart Publishing, Bloomsbury, 2018); MORTON STEPHEN, *STATES OF EMERGENCY. COLONIALISM, LITERATURE AND LAW* 11 (Liverpool University Press, 2013).

⁵ FEDERICO FABBRINI & VICKI JACKSON (eds.), *CONSTITUTIONALISM ACROSS BORDERS IN THE STRUGGLE AGAINST TERRORISM* (Edward Elgar Publishing Ltd., 2016).

⁶ For example, the Patriot Act I and II in the United States, expanded the capacity of the Government to investigate and use personal data of its own citizens. This sacrifice of liberties has been criticized by DAVID COLE & JAMES DEMPSEY, *TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY* (The News Press 3rd ed., 2006); Fleur Johns, *Guantánamo Bay and the Annihilation of the Exception*, 16 *EUROPEAN JOURNAL OF INTERNATIONAL LAW*, 4, 613-635, (2005).

isolation, as well as public policies without administrative, political controls, nor human rights-based approaches.

The outrage unchained by law enforcement's lethal use of force can be perceived in several "democratic" countries in the American continent. From Bolivia, passing through Chile, Mexico, and the United States,⁷ police and even armed forces have carried on massive detentions and extrajudicial executions.

The central purpose of this article is to identify normative and factual limitations of law enforcement in the United States and Mexico. To achieve this aim, we will refer to the main features of the legal and jurisprudential framework of human rights in both countries, in order to unveil how the lack of accountability on the use of force in law enforcement could very well be tackled. Our hypothesis points out to the deep and historic problems related to police brutality—in the United States—and the political use of police officers in Mexico. Two factors converge in both countries, overall: a lack of application of human rights law within the context of the use of force, and a lack of accountability both in the administrative and criminal law fields. The issue is far more complex than a simple question of *cops vs thieves* or *shooters vs looters*. It requires analytic approaches, international attention, and concerns on the way we see our democracies beyond the electoral dimensions.

This article is organized in three parts. In the first one, we set the scene for international guidelines as well as the treaties on law enforcement, emphasizing the importance of recognizing the use of force under a strict application of legality, prevention, proportionality, and absolute necessity. In the second and third parts, we will highlight the existing issues in Mexico and the United States, and some constitutional guidelines provided by their corresponding Supreme Courts when matters related to law enforcement knock at their doors. To provide an accurate framework of current approaches on Mexico and the U.S., we will refer to contextual information on law enforcement, critical problems, and particularities from each country, which involve even political opportunism within an atmosphere of misconceptions on human rights, as well as a lack of internal and external accountability for violations committed by law enforcement agencies.

II. THE INTERNATIONAL PRINCIPLES ON LAW ENFORCEMENT

1. *Basic Principles on Law Enforcement*

Under constitutional and international law, we are entitled to human rights and fundamental freedoms which include the right to life and to our security and wellbeing, as well as to be free from torture and other cruel, inhuman,

⁷ INTER-AMERICAN HUMAN RIGHTS COMMISSION, ANNUAL REPORT (2019).

or degrading treatment or punishment. Mandatorily, these rights and freedoms require implementation in domestic legislations. Therefore, for States to guarantee respect and protection towards human rights, they need to “set up adequate rules and procedures governing whether, when, and in what manner the State is entitled to use force for law enforcement purposes”.⁸ And although many democratic countries have accepted and ratified a growing set of international human rights standards in relation to police work, unfortunately such acceptances and ratifications do not in themselves guarantee compliance with their content. To do so, it would be necessary to put in place specific and planned measures, ensuring that police activity is carried out respecting and promoting such international standards.

As Casey-Maslen & Conolly accurately explained, the overarching framework for the international law of law enforcement⁹ has developed from international human rights law, although “much of the detail of that body of law, at least insofar as it regulates police use of force, is found in a combination of customary rules and two general principles of law: necessity and proportionality”.¹⁰ The above-mentioned authors have defined these principles as follows: “Any force used must be only the minimum necessary in the circumstances (principle of necessity)”. Furthermore, “the force used must be proportionate to the threat (principle of proportionality)”.¹¹ Thus, law enforcement personnel are required to abide by these principles, as failure to do so “will usually mean that the victim’s human rights have been violated by the state”.¹² In recent times a third general principle of law enforcement has emerged: the principle of precaution, requiring “that states ensure that law enforcement operations are planned and conducted to minimize the risk of injury”.¹³

However, many of the rules on law enforcement were first established by means of two soft law instruments;¹⁴ the 1979 Code of Conduct for Law Enforcement Officials¹⁵ and the 1990 Basic Principles on the Use of Force and

⁸ UNITED NATIONS OFFICE ON DRUGS AND CRIME (UNODC), RESOURCE BOOK ON THE USE OF FORCE AND FIREARMS IN LAW ENFORCEMENT 6 (Criminal Justice Handbook Series, 2018).

⁹ STUART CASEY-MASLEN & SEAN CONOLLY, POLICE USE OF FORCE UNDER INTERNATIONAL LAW 79 (Cambridge University Press, 2017); Stuart Casey-Maslen, *Use of Force in Law Enforcement and the Right to Life: The Role of the Human Rights Council*, 6 ACADEMY IN-BRIEF 3-40, 5 (2016); STUART CASEY-MASLEN, WEAPONS UNDER INTERNATIONAL HUMAN RIGHTS LAW (Cambridge University Press, 2014).

¹⁰ Casey-Maslen & Sean Conolly (2017), *supra* note 9, at 79.

¹¹ *Id.*, at 82.

¹² *Id.*, Additionally, in *Douet v. France*, a case related to the use of force during the arrest of Mr. Gilbert Douet by French gendarmes, the Strasbourg Court found a violation on the right to freedom from inhuman treatment; because France failed to prove that the force used by the officers had been both necessary and proportionate. Case (*Douet v. France*), European Court of Human of Human Rights, paras. 38-39, (2013).

¹³ Casey-Maslen & Sean Conolly (2017), *supra* note 9, at 79.

¹⁴ *Id.*, at 79-80.

¹⁵ CODE OF CONDUCT FOR LAW ENFORCEMENT OFFICIALS (1979).

Firearms by Law Enforcement Officials.¹⁶ Therefore, when it comes to international law ruling the use of force in law enforcement, we are compelled to address these two documents developed by the United Nations Crime Congress; an event that takes place every five years and gathers specialists to work on the agenda and standards of the UN on crime prevention and criminal justice.¹⁷

Regarding the 1979 Code of Conduct, it is relevant to highlight both articles 2 and 5 of the stated instrument. Article 2 *ad litteram* reads that: “[i]n the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons”. While Article 5 refers to the international crime of torture, establishing that:

...[n]o law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

Another relevant article arising from the 1979 Code of Conduct is article 3, as it relates to the use of force by law enforcement officials, who “may use force only when strictly necessary and to the extent required for the performance of their duty”. Subsequently, the 1990 Basic Principles deeply elaborated on the norms regarding the use of force,¹⁸ primarily in the General provisions section of the document. In other words, “the Basic Principles set out the core parameters to determine the lawfulness of use of force by law enforcement personnel and establish standards for accountability and review”.¹⁹

Although the rules of these two instruments have not been part of an international treaty, “many of the key norms they espouse are widely regarded today as constituting more generally binding international law.”²⁰ Additionally, both the European Court of Human Rights and the Inter-American Court of Human Rights have considered “the 1990 Basic Principles as authoritative statements of international rules governing use of force in law enforcement”.²¹ It is also important to consider that the Code of Conduct

¹⁶ BASIC PRINCIPLES ON THE USE OF FORCE AND FIREARMS BY LAW ENFORCEMENT OFFICIALS (1990).

¹⁷ CASEY-MASLEN (2016), *supra* note 9, at 5, footnote 4.

¹⁸ Casey-Maslen & Sean Conolly (2017), *supra* note 9, at 80.

¹⁹ UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 8, at 7.

²⁰ Casey-Maslen & Sean Conolly (2017), *supra* note 9, at 80; CASEY-MASLEN (2016), *supra* note 9, at 5.

²¹ Casey-Maslen & Sean Conolly (2017), *supra* note 9, at 80; CASEY-MASLEN (2016), *supra* note 9, at 5-6. *See also*, EUROPEAN COURT OF HUMAN RIGHTS, Benzer v. Turkey (2014). para.

and the Basic Principles apply to the acts of every organ of the state, when employing use of force in law enforcement operations, exercised by civil or military authorities (uniformed or not). In the words of Casey-Maslen & Conolly, these “rules govern not only the police but also any other law enforcement agency, state security force, paramilitary force (such as *gendarmérie*), or the military, whenever it is engaged in acts of law enforcement”.²²

The specific rights that will be analyzed in the next section require particular attention from law enforcement officials while performing their duties. “The meaning and scope of these rights, as well as how they shall be protected, should be well understood”²³ by law enforcement personnel. We are referring to the right to life; the right to freedom from torture and other forms of ill-treatment; the right to liberty and security of person; the right to a fair trial; the rights to freedom of peaceful assembly, association, and freedom of expression; and the right to an effective remedy.

2. *Human Rights within the Context of Law Enforcement*

Beginning with the fundamental right to life, it is accurately said that without life, the other rights would have no meaning or logic for existence. Therefore, the use of force combined with weapons and firearms could infringe on this right.²⁴ The right to life is enshrined in article 3 of the Universal Declaration of Human Rights (UDHR) and in article 6(1) of the International Covenant on Civil and Political Rights (ICCPR), establishing that: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life”.²⁵

Nonetheless, the last sentence of the prior paragraph implies that the right under analysis “is not absolute, as indeed some deprivation of life may be non-arbitrary”,²⁶ e.g., when in lawful circumstances in which a law enforcement official is forced to use his firearm to stop an armed suspect threatening innocent civilians. However, “even potentially violent suspects should be arrested, not killed, whenever it is reasonably possible to do so”.²⁷ Nevertheless, these “exceptional measures should be established by law and accompanied by effective institutional safeguards designed to prevent arbitrary deprivations of life. In international law, the right to life includes protection against arbi-

90; INTER-AMERICAN COURT OF HUMAN RIGHTS, Cruz Sánchez and others v. Peru, para. 264 (2015).

²² Casey-Maslen & Sean Conolly (2017), *supra* note 9, at 81.

²³ UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 8, at 11.

²⁴ *Id.*

²⁵ Article 6(1) of the *International Covenant on Civil and Political Rights (ICCPR)*. Additionally, the *American Convention on Human Rights (ACHR)*, where the right to life is found in article 4(1).

²⁶ UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 8, at 11.

²⁷ Casey-Maslen & Sean Conolly (2017), *supra* note 9, at 86.

trary deprivation of life by State security forces”.²⁸ Its status under customary international law is absolute and non-repealable. It must also be always respected; no exceptional circumstance, such as state or threat of war, internal political instability, or public emergency, may be invoked to justify an arbitrary deprivation of the right to life.²⁹

Additionally, the right to life is incorporated in the 1990 Basic Principles, where the instrument states that: “law enforcement officials have a vital role in the protection of the right to life, liberty and security of the person”. Furthermore, Principle 9 asserts that the use of lethal force “may only be made when strictly unavoidable in order to protect life”. Consequently, use of force resulting “in the death of a subject could ... depending on the circumstances, amount to a gross human rights violation”.³⁰

The right to freedom from torture and any other forms of cruel, inhuman, or degrading treatment is also an absolute right,³¹ and as such may not be restricted under any circumstances, either by way of limitations or derogations.³² Article 2(3) of the Convention Against Torture (CAT) clearly states that: “[a]n order from a superior officer or a public authority may not be invoked as a justification of torture”.³³ Therefore, law enforcement agents should always refrain from such acts, and the State must: “...keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture”.³⁴

The purpose for this absolute prohibition as reasoned by the Human Rights Committee “is to protect both the inherent dignity of the human person and his or her physical and mental integrity”.³⁵ Moreover, every State

²⁸ UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 8, at 11; UN HUMAN RIGHTS COMMITTEE (1982).

²⁹ UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 8, at 11; the *International Covenant on Civil and Political Rights (ICCPR)* article 4(2) and the *Convention Against Torture (CAT)* article 2(2).

³⁰ UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 8, at 11.

³¹ The prohibition of torture is binding on all States, as it is widely accepted as forming part of customary international law. *Id.*, 12. *See also*, INTERNATIONAL COURT OF JUSTICE, *Belgium v. Senegal*, para. 99 (2012).

³² UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 8, at 11. Additionally, this right is established in the *UDHR*, article 5; the *International Covenant on Civil and Political Rights (ICCPR)* article 7; the *Convention Against Torture (CAT)* article 2; the *European Convention on Human Rights (ECHR)* article 3; the *American Convention on Human Rights (ACHR)* article 5(2); and on article 5 of the *African Charter on Human and Peoples' Rights*.

³³ Article 2(3) of the *Convention Against Torture (CAT)*; UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 8, at 11.

³⁴ Article 11 of the *Convention Against Torture (CAT)*; UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 8, at 11.

³⁵ *Id.*, at 12; UN HUMAN RIGHTS COMMITTEE, para. 2 (1992).

must take whatever measure possible to protect those under its jurisdiction from either torture or ill-treatment, “whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity”.³⁶ States must also inform their populations, though especially law enforcement personnel, about the prohibition of torture and ill-treatment on a regular basis.³⁷

Furthermore, depending on the circumstances, the use of force and firearms in law enforcement activities could amount to torture or other forms of ill-treatment. On that note, article 1(1) of the CAT explains that torture or other forms of ill-treatment do “not include pain or suffering arising only from, inherent in or incidental to lawful sanctions”.³⁸ While in contrast, use of force resulting in severe pain and suffering that, under certain circumstances would be considered unjustified, disproportionate, or excessive, could very well amount to a form of ill-treatment.³⁹ Consequently, the use of force by enforcement officials, both when the subject is under their control (arrest, detention) and in cases of incident control (during riot control) may amount to torture (if the use of force is unlawful and falls under the definition of torture) or cruel, inhuman, and degrading treatment (if the lawful use of force is excessive, disproportionate and unjustifiable).⁴⁰

Another significant human right is the right to liberty and security of person. On the one hand, we have liberty of “freedom from confinement of the body (not general freedom of action)”, while on the other, “security of person concerns freedom from injury to the body and the mind, or bodily and mental integrity”.⁴¹ Pursuing this line of thought, the Human Rights Committee has expressed that, “the right to security of person protects individuals against intentional infliction of bodily or mental injury, regardless of whether the victim is detained or non-detained”,⁴² entailing “an obligation to prevent and redress unjustifiable use of force in law enforcement”.⁴³

³⁶ UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 8, at 12.

³⁷ *Id.*; article 10 of the *Convention Against Torture (CAT)*; UN HUMAN RIGHTS COMMITTEE, para. 10 (1992).

³⁸ Article 1(1) of the *Convention Against Torture (CAT)*; UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 8, at 12.

³⁹ *Id.* See also, REPORTS OF THE COMMITTEE AGAINST TORTURE (1997) (1999) (2001). On case law regarding “unjustified” and “excessive” use of force by police officers during apprehension, arrest, or detention of a suspect from the European Court of Human rights, see Manfred Nowak, *What Practices Constitute Torture? U.S. and UN Standards*, 28 HUMAN RIGHTS QUARTERLY 4, 809-841 (2006).

⁴⁰ UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 8, at 12. See also, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, Chapter 5 (2017).

⁴¹ UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 8, at 12.; UN HUMAN RIGHTS COMMITTEE, para. 3 (2014).

⁴² *Id.*, para. 9.

⁴³ UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 8, at 12. See also, UN HUMAN RIGHTS COMMITTEE, para. 9 (2014).

Article 9(1) of the ICCPR enshrines the right to liberty and security of person⁴⁴ as follows: “[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law”.

Additionally, “this right is to be read in conjunction with article 7 (prohibition of torture and other forms of ill-treatment) and article 10(1)”⁴⁵ of the above-mentioned instrument, establishing that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”.⁴⁶ Hence, the right to liberty and security of person gains relevance when it comes to law enforcement activities. “[A]s force may be applied (and misused) in arrest and detention operations and may as such lead to a violation of this right when the use of force was unlawful, excessive or disproportionate”.⁴⁷

Another highly important right is the right to a fair trial. This right is established in article 14(1) of the ICCPR and encompasses the principle of equality before the law by stating in its first sentence that, “[a]ll persons shall be equal before the courts and tribunals”.⁴⁸ The mentioned article also includes “the principle of presumption of innocence and the right of everyone to a fair hearing before a competent, independent and impartial tribunal established by law, in determination of a criminal charge”.⁴⁹ Although States are entitled to derogate this right “[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed”, such derogation should be made “to the extent strictly required by the exigencies of the situation”,⁵⁰ and “must not endanger the fundamental principles of fair trial”.⁵¹

A significant question to keep in mind when analyzing the right to a fair trial is that an inappropriate use of force by law enforcement officers could violate due process. For instance, any statement in a criminal proceeding “obtained as a result of a violation of the prohibition of torture or other forms

⁴⁴ A very complete study regarding this right under international law can be found in ALICE EDWARDS, *BACK TO BASICS: THE RIGHT TO LIBERTY AND SECURITY OF PERSON AND “ALTERNATIVES TO DETENTION” OF REFUGEES, ASYLUM-SEEKERS, STATELESS PERSONS AND OTHER MIGRANTS* 17-28, (UNHCR-Legal and Protection Policy Research Series, Division of International Protection, 2011).

⁴⁵ UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 8, at 12.

⁴⁶ Article 10(1) of the *International Covenant on Civil and Political Rights (ICCPR)*; UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 8, at 12.

⁴⁷ *Id.*, at 13.

⁴⁸ Article 14(1) of the *International Covenant on Civil and Political Rights (ICCPR)*; UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 8, at 13.

⁴⁹ *Id.*

⁵⁰ Article 4(1) of the *International Covenant on Civil and Political Rights (ICCPR)*.

⁵¹ UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 8, at 13.

of ill-treatment (e.g. confessions as a consequence of torture) may render the whole trial automatically unfair”.⁵²

The rights to freedom of peaceful assembly, association and freedom of expression could be affected by law enforcement. As stated by Casey-Maslen, “[t]he rights to freedom of peaceful assembly and association are integral to a democracy and are therefore repressed harshly in autocratic regimes. As a rule of thumb, it can be said that the freer a regime, the more civic space it offers”.⁵³ However, they are not absolute and could be limited under certain circumstances by the State, as long as these limitations are “in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others”.⁵⁴ Under similar circumstances may the right to freedom of expression be restricted, as established in article 19(3) of the ICCPR.

Furthermore, as law enforcement officials are often called upon to facilitate assemblies and protests, it is crucial for them to fully understand the rights explored in the previous paragraph, particularly the very specific conditions under which they can be restricted.⁵⁵ An assessment of the appropriateness of using force in such contexts should be advisable to instruct law enforcement personnel “to facilitate assemblies in accordance with human rights law”,⁵⁶ incorporating training in “«soft skills» such as effective communication, negotiation, and mediation, allowing law enforcement officials to avoid escalation of violence and minimize conflict”.⁵⁷

Another important point within the context of law enforcement is the right to an effective remedy, which can be found in article 2(3) of the ICCPR, declaring that each State party accepts “to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity”.⁵⁸ Moreover, the same article urges States to ensure this right through their corresponding legal systems and develop the possibilities of a judicial remedy. It also requires States to guarantee that their competent authorities enforce such remedies when these are granted.⁵⁹

⁵² *Id.* See also article 15 of the Convention Against Torture (CAT).

⁵³ CASEY-MASLEN (2016), *supra* note 9, at 16.

⁵⁴ Article 21 of the *International Covenant on Civil and Political Rights (ICCPR)*; UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 8, at 13. Regarding restrictions on the right to freedom of association, see article 22(2) of the *International Covenant on Civil and Political Rights (ICCPR)*.

⁵⁵ UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 8, at 13-14.

⁵⁶ CASEY-MASLEN (2016), *supra* note 9, at 17.

⁵⁷ *Id.* See also the UN JOINT REPORT OF THE SPECIAL RAPPORTEUR ON THE RIGHTS TO FREEDOM OF PEACEFUL ASSEMBLY AND OF ASSOCIATION AND THE SPECIAL RAPPORTEUR ON EXTRAJUDICIAL, SUMMARY OR ARBITRARY EXECUTIONS ON THE PROPER MANAGEMENT OF ASSEMBLIES, para. 42 (2016).

⁵⁸ Article 2(3) of the *International Covenant on Civil and Political Rights (ICCPR)*.

⁵⁹ *Id.*

Undoubtedly, the use of force by law enforcement is an issue full of controversy around the world. Nevertheless, it surely exacerbates when it is focused on a country with increasing levels of forced disappearances and extra judicial executions such as Mexico, and the widespread and deeply ingrained corruption of its policing agencies.⁶⁰

3. *Inter-American Jurisprudence on the Use of Force*

From 2000 to 2020 at the Inter-American level, we can find several cases in which the IACtHR has been pointing out parameters and limits on the use of force in different contexts: political riots, extrajudicial executions, police brutality, immigration and so on. The first one was *Caso del Caracazo v. Venezuela* (2002), in which the Court condemned Venezuela for the extrajudicial executions of 44 individuals and for the lack of compliance with suspension of human rights in terms of Article 27 ACHR.⁶¹

Afterwards, in *Montero Aranguren v. Venezuela* (2006) the IACtHR established four principles: the prohibitions of firearms and lethal force against civilians to protect the right to life; the maximum limitation and (exceptional) use of force with adequate training and accountability rules as a matter of positive obligation.⁶² *Zambrano Vélez v. Ecuador* (2007) incorporated other principles: proper planning and implementation of operatives on the use of force, adequate control of legitimacy and accountability.⁶³ However, *Nadège Dorzema* was the case in which the Court set out a complete framework on the use of force in three stages: in the first one, as a duty to protect, States must consider the principles of legality and exceptionality. In the critical moment of the use of force (second stage), authorities must consider specific actions under the proportionality principle. In the consequent stage, States must carry on the due diligence principle respecting the right to life, personal integrity, and the humanity principle.⁶⁴

On the one hand, several facts of the abovementioned cases share common factors: despite accurate national legislation forbidding the use of force, political authorities, police bodies and military forces simply ignored

⁶⁰ For example, Carlos Silva Forné, *Uso excesivo de la fuerza policial en CDMX*, 37 ESTUDIOS SOCIOLOGICOS 109, 165-193 (2019); María José Bernal Ballesteros, *La función policial desde la perspectiva de los derechos humanos y la ética pública*, 13 REVISTA DEL INSTITUTO DE CIENCIAS JURÍDICAS DE PUEBLA-IUS 44, 251-275 (2019).

⁶¹ *Caso del Caracazo*, Inter-Am. Ct.H.R., (ser. C) No. 58 at 1 (c) (d), 42, 43. (Nov. 11, 1999).

⁶² *Montero Aranguren & Others (Retén de Catía)*, 2006 Inter-Am. Ct.H.R., (ser. C) No. 150, at 68-79 (Jul. 5, 2006).

⁶³ *Zambrano Vélez & Others*, 2007 Inter-Am. Ct.H.R., (ser. C) No. 166, at 83-88 (Jul. 4, 2007).

⁶⁴ *Nadège Dorzema & Others*, 2012 Inter-Am. Ct.H.R., (ser. C) No. 251, at 79-98 (Oct. 24, 2012).

such legislation and applied the political doctrine of “internal enemies” and “national security”. On the other hand, the Inter-American Court followed its legal reasoning according to the Principles on the Use of Force and Firearms by Law Enforcement Officials, as well as its previous doctrine on the matter.

Recent judgments show increasing trends of gross human rights violations. For instance, in *Rodríguez Vera y otros (Desaparecidos del Palacio de Justicia) v. Colombia* (2014), the Court left aside the possibility of punishing an excessive use of force employed by the armed forces during an operative to recover Colombia’s Palace of Justice (disproportionate measures and lack of planning on the use of force, which left at least 95 dead people, and many others were subjected to forced disappearance).⁶⁵ This case is useful to understand the judicial limitations to provide an appropriate solution to situations of extreme violence perpetrated by both: State and civilian armed groups.

One case that emphasized the Inter-American doctrine on the use of force is *Cruz Sánchez y otros v. Perú*. Again, the IACtHR remastered the principles of legality, absolute necessity and proportionality, while now adding the principles of international humanitarian law: the IACtHR interpreted those victims of the case had the right to be treated humanely in all circumstances, without any adverse distinction, according to the rules of Article 3 of the four Geneva Conventions. However, the Court highlighted that those criminal prosecutions on individuals are a matter of States internal procedures.⁶⁶

The Inter-American Court of Human Rights has been defining accurate conditions on the use of force and general obligations within three aspects: an accurate regulation of law enforcement, setting guidelines on training of police bodies based on human rights approaches and development of mechanisms of accountability.⁶⁷

Specifically, the Inter-American Court of Human Rights has judged Mexico’s lack of police control⁶⁸ in the case of *Women victims of sexual torture in Atenco*. In the specific guidelines on the use of force, the IACtHR remarked the core principles when carrying on an operative:

- Legality: the use of force *must* be aimed at achieving a legitimate objective, and there must be a regulatory framework that contemplates how to act in said situation.

⁶⁵ *Rodríguez Vera & Others*, 2014 Inter-Am. Ct.H.R., (ser. C) No. 287, at 93-106 (Nov. 14, 2014).

⁶⁶ *Cruz Sánchez & Others*, Inter-Am. Ct.H.R., (ser. C) No. 292, at 276-280 (Apr. 17, 2015).

⁶⁷ *Mujeres Víctimas de Tortura Sexual en Atenco v México*, 2018, Inter-Am. Ct.H.R., (ser. C) No. 371, at 161 (Nov. 28, 2020).

⁶⁸ However, Mexico has been condemned for using military forces against civilians and in the context of the narco-war, causing forced disappearances, rape of indigenous women and torture. See for instance *Alvarado Espinoza et al. v. México* (2018); *Rosendo Cantú v. México* (2010).

- Absolute necessity: the use of force must be limited to the non-existence or unavailability of other means to protect the life and integrity of the person or situation that it seeks to protect, in accordance with the circumstances of the case.
- Proportionality: the means and method used must be in accordance with the resistance offered and the existing danger. Thus, the agents must apply a criterion of differentiated and progressive use of force, determining the degree of cooperation, resistance or aggression on the part of the subject to whom it is intended to intervene and with it, employ tactics of negotiation, control or use of force, as appropriate.⁶⁹

The Inter-American Court ordered Mexico to investigate the levels of responsibility of superior hierarchies, in order to find out with accuracy, the origin of the orders given to exercise an excessive use of force in Atenco. However, the case of *Women victims of sexual torture in Atenco* shows the importance of an administrative and legal recognition of the police “chain of command,” to unveil the level of criminal and political responsibility of those who ordered the police operative against civilians, in the context of a social protest.

Overall, the Inter-American parameters on the use of force are the most advanced at a jurisprudential and normative level. There are two reasons of such accomplishment: the first one is the systematic and multilevel interpretation of the ACHR and International law, while the second is the increasing recognition of the IACtHR’s legitimacy judging the abuse of political orders in a context of weak national judiciaries and authoritarianism in our recent Latin American history.

III. LAW ENFORCEMENT AND POLICE ABUSE. THE CASE OF MEXICO

1. *Critical Human Rights Violations by Police Forces in Mexico*

Law enforcement in Mexico is an old and controversial issue. The lack of legal rationales, accountability, and political control over police forces, both within national and local levels, can be tracked since the eighties in Mexico City, where a police boss carried on politically motivated prosecutions against the opposition, while controlling gangs, local mafia bosses and the whole prison system.⁷⁰ During the nineties, police regulations and legislation were enacted to set accurate rules on federal and local competences. Nevertheless, police corruption worsened in the context of the war against cartels, which began in a previous stage in 2001, and had a second wave after 2006.

⁶⁹ *Mujeres Víctimas de Tortura Sexual en Atenco*, *supra* note 67, at 162.

⁷⁰ JOSÉ GONZÁLEZ GONZÁLEZ, *LO NEGRO DEL NEGRO DURAZO* (Editorial Posada, 1983).

As an infamous example of continuous arbitrary behavior from police officers, in June 2020 the cases of Giovanni (a man) and Alexander (a teenager) emerged: they were both shot-dead by police officers in different municipalities for not wearing masks in the context of Covid-19. The cases sparked protests and illegal detentions while exhibiting that, despite accurate constitutional guidelines, in the field/praxis nothing has changed in terms of law enforcement. Paradoxically, regarding budgetary concerns on security, between 2005-2018, under both opacity and lack of accountability, the executive branch increased funds in every single year, although criminal activities continued to rise.⁷¹

2. *Legal Changes and Factors Undermining Professional Capacities of Police Officers in Mexico*

From 2000 to 2008, there were important constitutional changes concerning police principles, legislation, and institutional reforms, which tried to create a new federal police force without clear purposes or professional capacity. These changes in Article 123 (B, XII) of the Mexican Constitution (MC), from June 18, 2008, deprived police officers of due process of law, while focusing only in the advantages of institutions deciding who would continue in the police forces, and who would be fired under discretionary circumstances.

The outcome was twofold: firstly, it promoted unequal treatment for all members of police corporations working at any level of the government (federal, local, and municipal), with no right to labor stability nor social security, in addition to a lack of fair rules to continue working in the police body. Secondly, police officers were intimidated, pushed away and gradually adopted by cartels to work along with them in corruption contexts.⁷² The overall outcome was that the ousted police officers were now an integral element of the highest levels of violence, while actively participating in drug cartel activities.

From a legal-human rights perspective, Mexico has been dealing with the *Narco* war in terms of a humanitarian tragedy, unleashed by the government of Felipe Calderón.⁷³ According to Rodiles, “the war metaphor is used to activate

⁷¹ Fernando Gaona Montiel & Guillermo Martínez Atilano, *Presupuesto público, violencia y gestión en México, 2000-2012*, 72 *REVISTA DE CIENCIAS SOCIALES Y HUMANIDADES* 33, 89-108 (2012). Regarding the opacity of Peña Nieto’s security budget, see Tania Montalvo, *Gobierno de Peña gasta 20 veces más en seguridad y además oculta en qué invierte los recursos*, *ANIMAL POLÍTICO* (May. 8, 2017), <https://www.animalpolitico.com/2017/05/seguridad-partida-dinero-opacidad/>.

⁷² Miquel Ruíz Torres & Elena Azaola Garrido, *Cuadrar el delito. Corrupción institucional y participación de policías en el secuestro en México*, 22 *PERFILES LATINOAMERICANOS* 91-112 (2014).

⁷³ Alejandro Rodiles, *Law and Violence in the Global South: The Legal Framing of Mexico’s “NARCO WAR”*, 23 *JOURNAL OF CONFLICT & SECURITY LAW* 271 (2018). This study points out the problem of labelling the “narco war” as an internal armed conflict, subject to scrutiny under International Human Rights Law.

the idea that a situation of exception is taking place which justifies the recourse to exceptional measures against the enemy to be defeated rather than the criminal offenders to be prosecuted”.⁷⁴ Hence, since 2006 Mexico has been involved in arbitrary detentions, extrajudicial executions, excessive use of force, public security problems and gross human rights violations.⁷⁵ After 16 years of police abuse and critical problems linked to forced disappearances and extrajudicial executions, a comprehensive framework separating different issues of a true state of emergency, internal threat or public order is needed more than ever.⁷⁶

In its concluding observations from 2019, the UN Human Rights Committee was concerned “about reports of widespread use of torture, ill-treatment and excessive use of force by the police, armed forces and other public officials, particularly during arrests and the initial period of detentions”.⁷⁷ To make matters worse, from 2006 to 2020 Mexican police forces have been signaled as perpetrators of gross human rights crimes.⁷⁸ At the same time, police perception among society is negative,⁷⁹ a situation that could influx the levels of impunity.

Some of the most well-known cases are linked to social protests, while others are an outcome of law enforcement in the context of the narco-war.⁸⁰ An infamous case that presented unusual levels of degrading treatment within an environment of social protest was the sexual torture of women in Atenco in 2006. There are thousands of local and federal police officers carried out massive detentions and sexually tortured eleven women who were also prosecuted within a context of false evidence and due process violations.

In 2017, the case of *Women Victims of Sexual Torture in Atenco v. Mexico* reached the Inter-American Court. In late 2018, the judgment established that Mexican authorities violated the right to personal integrity on a gender basis. On the one hand, the operative carried out by local and federal police agencies (which was even broadcasted in real time by the media) showed a coordinated

⁷⁴ *Id.*, at 274.

⁷⁵ REPORT OF THE SPECIAL RAPPORTEUR ON EXTRAJUDICIAL, SUMMARY OR ARBITRARY EXECUTIONS IN FOLLOW-UP TO HIS MISSION TO MEXICO (2016).

⁷⁶ Before the war against narcos, scholars had warned on the lack of accurate definitions and potential abuse of power. See for instance Hector Fix-Zamudio, *Los Estados de excepción y la defensa de la Constitución*, 37 BOL. MEX. DE DER. COMP. 111, 817-819 (2004).

⁷⁷ UNHRC, CONCLUDING OBSERVATIONS ON THE SIXTH PERIODIC REPORT OF MEXICO, para. 30 (2019).

⁷⁸ Different perspectives on the matter can be found in LAURA ATUESTA & ALEJANDRO MADRAZO LAJOUS, *LAS VIOLENCIAS. EN BUSCA DE LA POLÍTICA PÚBLICA DETRÁS DE LA GUERRA CONTRA LAS DROGAS* (CIDE, 2018).

⁷⁹ Aurea Grijalva Eternod & Esther Fernández Molina, *Efectos de la corrupción y la desconfianza en la policía sobre el miedo al delito. Un estudio exploratorio en México*, 62 REVISTA MEXICANA DE CIENCIAS POLÍTICAS Y SOCIALES 231, 167-198 (2017).

⁸⁰ David Pion-Berlin, *Military Use in Public Security Operations: Is it Ever Advisable?* 13 REVISTA IUS 13-28 (2019).

attack on the population of San Salvador Atenco between May 3 and 5 2006; there were massive detentions, inhuman treatment, illegal trespass of properties by police and generalized violence against men and women, who were also illegally prosecuted afterwards. On the other hand, *Atenco* revealed the federal government's intentions to suppress political protest and incarcerate leaders from San Salvador Atenco for not selling their land to build an airport.⁸¹ The most concerning issue was the perpetration of sexual torture as a method of social control and punishment inflicted against several women by police officers.⁸² The most important question and lesson for Mexico as a member State of the ACHR is to identify and prosecute the "chain of command" unveiling who, how and under which circumstances the orders were given to all police bodies to carry on with the operative in that context.

Overall, during the period of 2006-2018, the Mexican panorama of "police performance" had been dominated by abuse and extrajudicial executions in the context of the narco war. If we look around emblematic non-judicial complaints at the CNDH⁸³ and local human rights commissions, most of the individual and collective complaints refer to police brutality and illegal law enforcement at the states and municipal level.⁸⁴

We can find cases showing high levels of disproportionality on the use of lethal force by law enforcement, such as the Massacre of Tanhuato (2015), which reported at least 22 extrajudicial executions.⁸⁵ In its final report on the case, the CNDH found that police officers violated the principles of legality, necessity, proportionality and breached the right to personal integrity and the right to life.⁸⁶ Apart from the external outcome concealing the participation of police officers, another key problem unchained by extrajudicial executions is the lack of due process of law, in addition to reducing to zero any possibility of creating effective measures against cartels, because they are seen as enemies of the State, rather than ordinary criminals to be prosecuted within the rule of law.

Criminalizing social protest is a second type of police abuse. Emblematic cases demonstrate the lack of constitutional means-objectives, the non-articulated operatives, and the political reasons behind the police abuse in Mexico. The most well-known case is the forced disappearance of 43 students in Iguala Guerrero (Ayotzinapa), in September 2014, which was carried out by local police officers with the participation of the federal police, and under the sight of military forces, but without a chain of command.⁸⁷ In 2018, a landmark

⁸¹ *Mujeres Víctimas de Tortura Sexual en Atenco*, *supra* note 67, paras. 56-65 (2018).

⁸² *Id.*, para. 222.

⁸³ COMISIÓN NACIONAL DE DERECHOS HUMANOS (CNDH).

⁸⁴ HUMAN RIGHTS WATCH (2019); SILVA FORNÉ, *supra* note 60, at 165-193.

⁸⁵ COMISIÓN NACIONAL DE DERECHOS HUMANOS (2018).

⁸⁶ *Id.*, paras. 508-509.

⁸⁷ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, INFORME FINAL, MECANISMO ESPECIAL DE SEGUIMIENTO AL ASUNTO AYOTZINAPA, paras. 118-180 (2018).

amparo judgment was issued by a federal court showing the arbitrary detentions, forced disappearances, lack of preventive detention control, illegal procedures on evidence gathering,⁸⁸ as well as an institutionalized practice of torture, which police officers conducted to build the “legal truth”, instead of a real investigation with all hypotheses, data, considerations, and with next of kin victim participation.⁸⁹

Currently, *Ayotzinapa* is in progress with a Truth Commission (“*Comisión de la verdad para el caso Iguala*”) working along with the judiciary to investigate the whereabouts of the 43 students and discover both the material and the intellectual perpetrators.⁹⁰ Lethal use of force by police against social protests provokes extrajudicial executions on a regular basis.

In June 2016, four communities in Oaxaca were attacked by “unknown members” of the police. Members of the communities suffered violations on their personal integrity (women, children and elderly people). The CNDH’s concluding observations on the issue pinpointed failures and lack of methods to control the protest before, during and after the operation. Firstly, events in Nochixtlan and other three communities showed that the federal and local government hid the type of police officers-corporations involved in the event.⁹¹ Secondly, police officers coming from multilevel bodies participated using violent means (tear gas, rubber bullets, guns, and short rifles) as primarily tactic-objective⁹² to undermine a social protest avoiding dialogue and negotiation techniques.⁹³

Between 2006 and 2018, and at municipal levels from 2018 to date, we can find patterns of police abuse and lack of control when armed officers confront people and suspected criminals, revealing several issues:

- i) When exercising lethal force, police bodies do not distinguish between preventive interventions in contexts of social protest and effective threats, which could lead to abuses in the use of such force.
- ii) It is a commonplace that law enforcement encounters against drug cartels lead to extrajudicial executions, manipulation of facts/evidence, and excessive use of force, with negative consequences for due process and an effective prosecution of possible offenders.⁹⁴

⁸⁸ Existing literature coincides on this topic: *the criminal process was built on a series of shady and artificially articulated facts*. RUIZ TORRES *et al.*, *supra* note 72, at 103.

⁸⁹ PRIMER TRIBUNAL COLEGIADO AUXILIAR DE TAMAULIPAS, paras 359, 548-550, 1091-1094, 1113-1115 (2017).

⁹⁰ Under the principles of immediate, effective, impartial, and independent investigations, and with the participation of the National Human Rights Commission. *Id.*, paras. 1034, 1126, 1127, 1128.

⁹¹ COMISIÓN NACIONAL DE DERECHOS HUMANOS, paras. 500-505 (2017).

⁹² *Id.*, paras. 507, 516.

⁹³ *Id.*, para. 512.

⁹⁴ COMISIÓN NACIONAL DE DERECHOS HUMANOS, paras. 601-610 (2018).

- iii) Mexican law enforcement agencies do not follow constitutional or international guidelines on proportionality, legality, professionalism, objectivity, efficiency, and honesty, at any stage of police intervention.
- iv) There are inexistent accountability measures to supervise or punish police abuse individually, and there are no political or administrative responsibilities towards the “chain of command”, allowing police officers to act above the constitutional mandate.
- v) There are no external watchdogs providing feedback of improvements in the police development, both at local and federal levels. At a very practical level, these problems could be solved if the municipal, local and federal governments create a complete new structure and institutional capacities based on the four dimensions pointed out by Llanos Reynoso et al.: the operative-organizational dimension; the human factors that include better strategies of recruitment, salaries and improvement of physical and intellectual skills; the technological dimension, which provides relevant information to prevent-control crime; and the ethical values of the police, which could improve the way they see themselves before society and *vice versa*.⁹⁵ At the normative level, there is no national or local implementation of international or Inter-American parameters on the use of force by police. Such mistake provokes a non-uniformed national approach and divergence among all agencies and administrative rules for police bodies. Recent literature highlights that Mexican security agencies require legal and formal levels of coordination beyond personal leadership.⁹⁶

Unfortunately, the debate on the ways in which local and federal police agencies must be reformed in the current Mexican scenario of police brutality is and has been overlooked. One essential consideration is that police officers are first responders in any event of violence, social protest, or emergency situations, and that the role of law enforcement cannot be —by definition— to prosecute criminals while avoiding constitutional and international law. But the institutional convenience, at least from 2006 to 2018, was to justify detentions and diminish criminal organizations, even if it meant avoiding due process of law.

3. *Constitutional Approaches in Mexico: The Role of the Supreme Court*

Between 2011 and 2015, there were isolated pronunciations in the Mexican Supreme Court of Justice (SCJN) on the principles of law enforcement,

⁹⁵ Luis Felipe Llanos Reynoso et al., *La eficacia de la policía en México: un enfoque cualitativo*, 13 POLIS 107-138 (2017).

⁹⁶ GERARDO RODRÍGUEZ SÁNCHEZ LARA, *SEGURIDAD NACIONAL EN MÉXICO Y SUS PROBLEMAS ESTRUCTURALES*, COLECTIVO DE ANÁLISIS DE LA SEGURIDAD CON DEMOCRACIA 147-150 (Editorial UDLAP, 2017).

according to international law (absolute necessity, legality, proportionality, and the exceptional use of lethal force).⁹⁷ None of these judgments had general effects on the legal and institutional framework of the multilevel police bodies across the nation. However, from 2016 to date, the SCJN made various judgments on the use of force, national security, prevention of crimes, and intervention of armed forces in security activities, as well as local police departments against drug cartels.

An important decision was made in 2016 in which the SCJN declared void several articles allowing the use of force as “first option”, and a provision that might determine a discretionary use of force due to potential cruel and unusual punishment. Nevertheless, despite the levels of discretionary considerations on such concepts, the SCJN recognized a certain provision on “disabling weapons”, and the use of force on public gatherings to re-establish public order.⁹⁸ In late 2018, the SCJN declared the participation of armed forces in public security tasks null and void, as it was envisaged in “Ley de Seguridad Interior”, enacted by former president Peña Nieto.⁹⁹

Regarding the administrative regime of the Mexican police members of security bodies, when a case reaches the SCJN, they usually ratify restrictions on police officers’ rights, imposed based on different regimes of labour rights, derived from Article 123 (B, XVIII) of the Mexican Constitution.¹⁰⁰ These restrictions do not contribute to the professionalization of police bodies and the recognition of their individual dignity. In fact, such conditions demonstrate discrimination compared to other public servants. On the contrary, restrictions contribute to an atmosphere of stigmatization and overwhelming levels of corruption from police corporations, both at federal and local levels.

As noted in this part, so far, the SCJN has only addressed peripheral aspects on security issues and law enforcement, but it is far from analyzing profound police problems on corruption and abuse within the context of social protests and the limits on the use of force against drug cartels. Additionally, the judicial approach taken by the SCJN in 2009 on the case of *Women victims of sexual torture in Atenco* was an example of how the SCJN settled constitutional restrictions to investigate gross human rights violations, allowing discretionary levels on the use of force.¹⁰¹ To date, despite the accurate guidelines of the IACtHR, not one police officer has been convicted for sexual torture;

⁹⁷ MEXICAN SUPREME COURT OF JUSTICE, 52 (2011).

⁹⁸ MEXICAN SUPREME COURT OF JUSTICE, Acción de Inconstitucionalidad 25/2016.

⁹⁹ MEXICAN SUPREME COURT OF JUSTICE, Acción de Inconstitucionalidad 6/2018.

¹⁰⁰ MEXICAN SUPREME COURT OF JUSTICE, 1277 (2019).

¹⁰¹ On the importance of gross human rights violations and the levels of responsibilities left aside by the SCJN in the *Atenco* case, see, Alberto Suárez Ávila, *La investigación de las violaciones graves a los derechos humanos en México, antes y después de la reforma constitucional de 2011*, in HISTORIA Y CONSTITUCIÓN, TOMO I: HOMENAJE A JOSÉ LUIS SOBERANES FERNÁNDEZ 463-491 (Miguel Carbonell & Oscar Cruz Barney eds., UNAM-IJ, 2015).

local authorities from the State of Mexico have been blocking the federal investigation,¹⁰² and there is no significant progress in the case.

From 2018 to 2021, the judiciary overall, and the SCJN face several issues related to public security, human rights, torture and forced disappearances that create a wide range of tasks.¹⁰³ Currently, there are four constitutional proceedings challenging the “Ley de la Guardia Nacional” issued by president López Obrador in May 2019. The national ombudsperson and other political actors challenged the so-called militarization of the civil body “Guardia Nacional” and the participation of armed forces into ordinary security tasks. Several emerging arguments against the law come from the lack of consideration of the SCJN precedents and the lack of (constitutional) legitimacy of the executive power to legislate in security matters. Hence, the SCJN must solve the set of “acciones de inconstitucionalidad” 62/ 2019, 63/2019 and amparos against the law. Meanwhile, the rates of violence are high: 21.1 millions of victims in 2020, prevalence of crimes in metropolitan zones, perception of insecurity,¹⁰⁴ assassination of journalists, and disputing grounds to armed cartel organizations in Michoacán and other regions of the country.

In June 2021, the First Chamber of the SCJN settled an important precedent that could be a turning point to improve collaboration among the police, attorneys and the judiciary to reduce the high levels of forced disappearances, due to Mexico’s acceptance of the International Convention for the Protection of All Persons from Enforced Disappearance. The Chamber established that all urgent actions ordered by the UN Committee on Enforced Disappearances are legally binding for Mexican authorities and the consequent judicial supervision to ensure an urgent, coordinated, objective and impartial investigation.¹⁰⁵

Throughout 2021, the balance of security in Mexico had remained the same as in previous years. One visible problem is the lack of accurate information and coordination from the three existing levels of government: federal, states and municipalities. Centro Pro, an organization dedicated to protecting human rights in Mexico, stressed some urgent actions that must be carried out by actors involved in security matters in all levels: judicial review on security laws, account of information —and external watchdog— on the use of force, request

¹⁰² See, CENTRO DE DERECHOS HUMANOS MIGUEL AGUSTÍN PRO JUÁREZ, *Mujeres del caso Atenco presentan amparo contra fiscalía de EdoMex por obstaculizar investigación penal*, CENTRO PRODH, (Sep.13, 2020), <https://centroprodh.org.mx/2020/09/13/mujeres-del-caso-atenco-presentan-amparo-contr-fiscalia-de-edomex-por-obstaculizar-investigacion-penal/>.

¹⁰³ Javier Jankelevich, *Poder judicial y desaparición de personas en México*, in DESDE Y FRENTE AL ESTADO; PENSAR, ATENDER Y RESISTIR LA DESAPARICIÓN DE PERSONAS EN MÉXICO 129-230 (Javier Jankelevich coord., Centro de Estudios Constitucionales, Suprema Corte de Justicia de la Nación, 2017).

¹⁰⁴ ENCUESTA NACIONAL DE VICTIMIZACIÓN Y PERCEPCIÓN SOBRE SEGURIDAD PÚBLICA (EN-VIPE), 2021.

¹⁰⁵ Amparo en revisión 1077/2019, First Chamber of the SCJN, June 16, 2021.

for a civil commander for the “Guardia Nacional”, while incorporating civil personnel in medium and low levels of command, and participation of the Office of the UN High Commissioner for Human Rights in monitoring the use of force.¹⁰⁶ All the points stressed by Centro Pro are timely and essential to reorganize the use of force in Mexico. However, we have to consider the deep roots of the historical lack of accountability in police bodies and the use of force.

The most notorious example of deep levels of police corruption from high public agencies in Mexico emerged when former public security secretary Genaro García Luna (the highest rank for a member of former president Calderon’s government, just below him), was accused of receiving bribes from the Sinaloa Cartel, and is now facing prosecution in the U.S. on the basis of “International Cocaine Distribution Conspiracy” and “Conspiracy to Distribute and Possess with Intent to Distribute Cocaine”.¹⁰⁷ Garcia Luna’s case represents the worst case of corruption within the Mexican police and top security agencies, while also unveiling the high levels of corruption in the forefront of police chain of command.

A summary of the current problems of police abuse in Mexico necessarily pinpoints two considerations: the first one is the lack of structural and legislative proposals aimed at avoiding corruption, while generating compliance of constitutional principles envisaged in Article 21 of the Mexican constitution, required by local and municipal police bodies. At the same time, the second one represents the lack of attention from the federal Congress on the issue, which causes a non-integrated approach on police bodies from federal entities and municipalities. In this regard, it is urgent to review each constitutional obligation to provide security within the territory.

IV. CONTROVERSIAL ISSUES ON LAW ENFORCEMENT IN THE UNITED STATES

1. *The U.S. Original sin on Law Enforcement: Police Brutality through Racial Profiling*

Trust between law enforcement agencies and the people they vow to serve and protect is more than essential in any democratic system. However, a country

¹⁰⁶ See Centro de Derechos Humanos Miguel Agustín Pro Juárez, *Presentamos informe sobre la Guardia Nacional y los riesgos de perpetuar la militarización*, CENTRO PRODH, (July 1, 2021), <https://centroprodh.org.mx/2021/07/01/presentamos-informe-sobre-la-guardia-nacional-y-los-riesgos-de-perpetuar-la-militarizacion/>.

¹⁰⁷ UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK, *United States v. Genaro García Luna* (2019). To date (February 2022), at least four front men of the Mexican top security agencies in the Calderon era are being prosecuted for torture and drug trafficking at the U.S. and México: Luis Cárdenas Palomino, Facundo Rosas, Ivan Reyes Arzate and Porfirio Javier Sánchez Mendoza.

such as the United States is far from exempt when it comes to highly controversial issues within its police forces, and these problems —brutality, racial discrimination, corruption and opacity— which are considered endemic to policing in the U.S., have persisted for more than 50 years.¹⁰⁸ As established by Sekhon, “[t]his has occurred notwithstanding the advent of modern constitutional criminal procedure and countless judicial opinions applying it to the police”.¹⁰⁹ Not to mention the international legal framework on law enforcement developed from international human rights law —addressed in part one of this investigation—, which is apparently often taken for granted by police forces throughout the world. And although the history of policing in the United States since the 1830’s¹¹⁰ has been plagued by controversies and shameful events,¹¹¹ the situation for law-and-order agencies has continued to decay to levels where they now encounter serious criticism and profound scrutiny from the population. In sum, the American police forces are facing a crisis of legitimacy.¹¹²

To better understand the issue of race related police brutality in the U.S.,¹¹³ it is necessary to undertake a historical analysis of law enforcement since the very origins of the nation in the 1700s, in the times of the thirteen colonies. Furthermore, there is an interesting but highly revealing fact which differentiates what originated American policing in the Northern *vis-à-vis* the Southern states in those colonies,¹¹⁴ an evident racial bias perpetuating throughout time, until our very present days.¹¹⁵ I am referring to the infamous “Slave Patrol”, the first of which was created in the Carolina colonies

¹⁰⁸ Nirej Sekhon, *Police and the Limit of Law*, 119 COLUM. L. REV. 1711 (2019).

¹⁰⁹ *Id.*

¹¹⁰ The idea of a centralized municipal police department in the United States emerged in the 1830’s. “By the 1880’s all major U.S. cities had municipal police forces in place”. GARY POTTER, *THE HISTORY OF POLICING IN THE UNITED STATES 2* (Eastern Kentucky University, 2013). *See also*, SIDNEY HARRING, *POLICING A CLASS SOCIETY: THE EXPERIENCE OF AMERICAN CITIES, 1865-1915* (Haymarket Books, 2d. ed., 2017).

¹¹¹ A brief but comprehensive work on the historical evolution of the police in the U.S. can be found in Potter, *supra* note 110, 2-15. A much more documented investigation on this matter is found in CAROL ARCHBOLD, *POLICING: A TEXT/READER* (Sage Publications, 2012).

¹¹² “No Justice, no peace. No racist Police!”, was the chant echoed during weeks by thousands of protesters across U.S. streets, making one thing very clear: “The American police face a crisis of legitimacy”. Amanda Taub, *Police the Public, or Protect It? For a U.S. in Crisis, Hard Lessons from Other Countries*, THE NEW YORK TIMES, (June 11, 2020), <https://www.nytimes.com/2020/06/11/world/police-brutality-protests.html>.

¹¹³ An interesting article on this issue can be found in DEVIN CARBADO & PATRICK ROCK, *What Exposes African Americans to Police Violence?* 51 HARV. C.R.-C.L. L. REV. 159-187 (2016).

¹¹⁴ According to WALKER: “[d]iscussions of American police history should generally distinguish between the southeastern states and the rest of the country”. Samuel Walker, *Governing the American Police: Wrestling with the Problems of Democracy*, 2016 THE UNIVERSITY OF CHICAGO LEGAL FORUM 15, 624 (2016).

¹¹⁵ DAVID HARRIS, *Racial Profiling: Past, Present, and Future?* 34 CRIMINAL JUSTICE 11 (2020).

in 1704.¹¹⁶ This demonstrates “that the police have traditionally served the will of the dominant white majority”.¹¹⁷ As expressed by Harris, “[h]istorically, racial targeting by police did not start in the late twentieth century. It has constituted a fact of life for African Americans as long as there have been organized police forces in the United States —indeed, even before that, with the slave patrols of the American Antebellum South—”.¹¹⁸ These patrols had “three primary functions: (1) to chase down, apprehend and return to their owners runaway slaves; (2) to provide a form of organized terror to deter slave revolts, and (3) to maintain a form of discipline for slave-workers who were subject to summary justice, outside the law, if they violated any plantation rules”.¹¹⁹ By the end of the Civil War (1865), these “vigilante-style organizations” evolved into modern Southern police departments, especially targeting freed slaves and “enforcing «Jim Crow» segregation laws,¹²⁰ designed to deny freed slaves equal rights and access to the political system”.¹²¹

Meanwhile, in the Northern states, the first police forces were being created. The city of Boston was the first one in 1838, then came New York City in 1845, and Chicago in 1851, to name a few. By the 1880s all major U.S. cities had their own agencies.¹²² These modern police forces emerged as a response to “disorder”, and not necessarily to fight crime.¹²³ Among the main characteristics shared by them was that “they were notoriously corrupt and flagrantly brutal”.¹²⁴ According to Walker, “[p]hysical brutality was routine and unpunished. (Shootings by police officers were uncommon, for the simple reason that handguns did not become common until the twentieth century)”.¹²⁵ Furthermore, the agencies “were dominated by local politics with no commitment to public service or to the rule of law”.¹²⁶ In a nut-

¹¹⁶ POTTER, *supra* note 110, at 3; Philip Reichel, *The Misplaced Emphasis on Urbanization in Police Development*, 3 POLIC. SOC. 1-12 (1992).

¹¹⁷ WALKER, *supra* note 114, at 624.

¹¹⁸ HARRIS, *supra* note 115, at 11.

¹¹⁹ POTTER, *supra* note 110, at 3.

¹²⁰ Regarding the controversial “Jim Crow laws”, which separated Black people from association and contact with White people in the U.S., we have the work of CATHERINE LEWIS & RICHARD LEWIS, *JIM CROW AMERICA: A DOCUMENTARY HISTORY* (University of Arkansas Press, 2009); David Martin, *The Birth of Jim Crow in Alabama, 1865-1896*, 13 NATIONAL BLACK LAW JOURNAL 184-197 (1993); RICHARD WORMSER, *THE RISE AND FALL OF JIM CROW* (St. Martin’s Press, 2003).

¹²¹ POTTER, *supra* note 110, at 3.

¹²² *Id.*, at 2. See also, HARRING, *supra* note 110.

¹²³ POTTER, *supra* note 110, at 3.

¹²⁴ *Id.*, at 5.

¹²⁵ WALKER, *supra* note 114, at 626.

¹²⁶ *Id.*, at 624. In this corrupt environment, Potter describes how the police forces protected politicians, as well as their gambling, prostitution and drug distribution endeavors. POTTER, *supra* note 110, at 5-10.

shell, the problems that today still exist in controlling police use of force while equally protecting all people and groups, have been well established since the nineteenth century.¹²⁷

Until 1931, by means of the Wickersham Commission report, the U.S. had its first systematic investigation of abusive police tactics, also known as *Lawlessness in Law Enforcement*.¹²⁸ While in 1935, the ongoing discrimination from police forces against African Americans became more visible, after the publication of *Mayor LaGuardia's Commission on the Harlem Riot*, which occurred that same year.¹²⁹ During the next twenty years, many efforts for a needed professionalization of the police forces were made. This movement would bring deep reforms within the police in assimilating military models of organization and discipline.¹³⁰ Some desired goals were to eliminate political influence from policing, to appoint highly qualified individuals as police chiefs, introduce principles of modern management into police departments and develop specialized units to address specific crime problems.¹³¹ The publication of O.W. Wilson's book titled *Police Administration* in 1950, served as a benchmark for this movement.¹³² However, this professionalization lacked attention to the conduct of police officers on the streets, such as "the use of all forms of force; the conduct of searches, seizures and interrogations; and systemic racism in all police activities".¹³³ This tendency in law enforcement agencies carried on for at least two more decades,¹³⁴ and became highly problematic when in the 60s it collided with massive social and political changes.

The Civil Rights movement and the many riots throughout the U.S., highlighted the frustration of African Americans suffering from systemic discrimination, as well as an elusive dream for racial equality. As described by Walker, this historic movement challenged these aspects of police actions:

...fatal shootings of citizens, particularly African Americans; the use of excessive physical force; racially discriminatory stop-and-arrest practices; aggressive crime fighting strategies and tactics that alienated African American communities; inadequate procedures for handling citizen complaints against police officers; and race discrimination in police employment practices.¹³⁵

¹²⁷ WALKER, *supra* note 114, at 626.

¹²⁸ *Id.*, at 626-627. *See also*, NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT (1931).

¹²⁹ WALKER, *supra* note 114, at 627.

¹³⁰ *Id.*, at 628-631; POTTER, *supra* note 110, at 11.

¹³¹ WALKER, *supra* note 114, at 628-629.

¹³² *Id.*, at 629; POTTER, *supra* note 110, at 11.

¹³³ WALKER, *supra* note 114, at 629.

¹³⁴ The Fourth Edition of Wilson's book, *Police Administration* published in 1977, was still missing those relevant topics. *Id.*, at 629-630.

¹³⁵ WALKER, *supra* note 114, at 632.

Ultimately, police suppression of the Civil Rights movement “often by brute force did irreparable damage to American policing”,¹³⁶ a damage that continues until this day. As a response to the continuous civil unrest and violence the U.S. was experiencing, in July 1967 president Lyndon Johnson announced the creation of the National Advisory Commission on Civil Disorders, also known as The Kerner Commission.¹³⁷ Nevertheless, the Commission’s report emphasized on serious problems from black communities, such as segregated education, extreme poverty, and structural racism from the white society, as well as ways to potentially solve these issues, the report was finally rejected from Johnson’s political agenda, due to —among other issues—, the costly Vietnam War.¹³⁸

2. *The U.S. Supreme Court and the Creation of Qualified Immunity*

Since those days of protests during the sixties and so far, the U.S. judiciary has continued supporting an excessive use of force by law officers. In this section, we will identify the background of qualified immunity and the legal shield granted to the police by the judicial system. Even though the analysis of these cases will not be exhaustive in this research, I must highlight the U.S. Supreme Court (SCOTUS) decisions in *Mapp v. Ohio*¹³⁹ (violation of the 4th amendment; unreasonable searches and seizures from the government) and *Miranda v. Arizona*¹⁴⁰ (violation of the 5th Amendment; which confers several rights applicable to either criminal or civil legal proceedings), as they brought the most significant reforms of the 60s imposing constitutional limits on the police. The cases affected “traditional police crime-fighting tactics of searches and seizures and interrogations”.¹⁴¹ Additionally, *Mapp* and *Miranda* forced law enforcement agencies to create internal policies governing critical police actions, such as the use of deadly force and the use of non-lethal force, among others.¹⁴² However, the Supreme Court’s decisions also sparked the creation of police unions.¹⁴³

During the subsequent two decades, strong efforts towards improving the police image in the American society were made. At the beginning of the

¹³⁶ POTTER, *supra* note 110, at 13.

¹³⁷ REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968); WALKER, *supra* note 114, at 632.

¹³⁸ In his research, Clayton described several factors considered by President Johnson which finally rejected the Report’s recommendations. Dewey Clayton, *Two Nations: Black and White, Separate and Unequal*, 1 NAT. REV. OF BLACK POLITICS 51-52 (2020).

¹³⁹ *Mapp v. Ohio*, 367 U.S. 643 (1961).

¹⁴⁰ *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹⁴¹ WALKER, *supra* note 114, at 641.

¹⁴² *Id.*, at 642.

¹⁴³ *Id.*, at 644.

80s, the concepts of community policing and problem-oriented policing emerged.¹⁴⁴ The aim of these approaches was to gain confidence between the police forces and the communities across the nation.¹⁴⁵ It also contributed to advances on police policymaking, citizen oversights: auditors, monitors and inspectors general,¹⁴⁶ as well as community police commissions to supervise the work and effectiveness of the police, while developing law enforcement policies.¹⁴⁷

The 80s would also bring two landmark decisions from the SCOTUS regarding the use of force by law enforcement officers; both of the victims were Black Americans; *Tennessee v. Garner*,¹⁴⁸ where lethal use of force went under scrutiny, and *Graham v. Connor*,¹⁴⁹ where excessive use of force came into play. These cases have generated many high-profile acquittals, particularly the *Graham* precedent.¹⁵⁰ In the *Garner* decision, the Court argued that “[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable”.¹⁵¹

Nevertheless, it also held that under the Fourth Amendment, a police agent could resort to deadly force against an unarmed fleeing felon, when “the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others”.¹⁵² According to Greene, this reasoning forms “the backbone [of] modern jurisprudence commonly implicated in police shootings”.¹⁵³ In the *Graham* case, the Court established the “objective reasonableness standard” of police conduct, which

¹⁴⁴ *Id.*, at 644-645.

¹⁴⁵ POTTER, *supra* note 110, at 14.

¹⁴⁶ WALKER, *supra* note 114, at 644-650.

¹⁴⁷ *Id.*, at 652-659.

¹⁴⁸ *Tennessee v. Garner*, 471 U.S. 1 (1985). The case arises from the fatal shooting by police officers in accordance with Tennessee law of an unarmed young Black male (home burglary suspect), who was attempting to escape while climbing a fence. *Id.*, at 3-4; Corinthia Carter, *Police Brutality, the Law and Today's Social Justice Movement: How the Lack of Police Accountability Has Fueled #Hashtag Activism*, 20 C. U. N. Y. L. REV. 534 and footnote 89 (2017).

¹⁴⁹ *Graham v. Connor*, 490 U.S. 386 (1989). Originated by the arrest of a black man for suspicion of theft, although the ordeal ended up as a huge misunderstanding by the arresting officers, the victim suffered a broken foot and several other injuries. He then sued under §1983 for excessive use of force during the (unjustified) stop. *Id.*, at 388-390; Caroline Reinwald, *A One Two Punch: How Qualified Immunity's Double Dose of Reasonableness Dooms Excessive Force Claims in the Fourth Circuit*, 98 N. C. L. REV. 669 (2020).

¹⁵⁰ In the words of MARTIN AND KPOSOWA, *Graham v. Connor* had a large impact on the allowance and justification of police abuse. Martin & Kposowa, *Race and Consequences: An examination of Police Abuse in America*, 15 JOURNAL OF SOCIAL SCIENCES 2 (2019).

¹⁵¹ *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). See also, LINDA GREENE, *Before and After Michael Brown—Toward an End to Structural and Actual Violence*, 49 WASHINGTON UNIVERSITY JOURNAL OF LAW AND POLICY 37 (2015).

¹⁵² *Tennessee v. Garner*, 471 U.S. 1, 3 (1985); GREENE, *supra* note 151, at 37.

¹⁵³ *Id.*

determines “whether [an] officer’s actions are «objectively reasonable» considering facts and circumstances confronting them, without regard to their underlying intent or motivation”.¹⁵⁴ The *Graham* judgement practically “prohibits any second-guessing of the officer’s decision to use deadly force: no hindsight is permitted, and wide latitude is granted to the officer’s account of the situation, even if scientific evidence proves it to be mistaken”.¹⁵⁵ Although *Graham* set the standard for analyzing excessive force claims,¹⁵⁶ ironically the decision “itself provides limited guidance to law enforcement agencies regarding what constitutes excessive force”.¹⁵⁷

However, throughout these years cases of excessive use of force by police against the black population have kept emerging. In March 1991, the world witnessed the cruel (videotaped) beating of an unarmed Rodney King by four L.A.P.D. officers. A year later, the officers were tried on charges of police brutality; however, surprisingly enough neither of them was found guilty.¹⁵⁸ Within hours of the acquittals, the bloody L.A. riots and protests erupted.¹⁵⁹ Another case worth mentioning, which occurred in Ferguson, Missouri during the Obama administration, was the fatal shooting of unarmed eighteen-year-old Michael Brown by a white police officer in August 2014. This case also brought massive protests, riots, media attention and academic input,¹⁶⁰ in addition to the Final Report of the President’s Task Force on 21st Century Policing, a year later.¹⁶¹ The task force was charged “with identifying best practices and offering recommendations on how policing practices can promote effective crime reduction while building public trust”.¹⁶² Now the challenge has become to successfully apply the task force recommendations by means of the Implementation Guide¹⁶³ in the more

¹⁵⁴ *Graham v. Connor*, 490 U.S. 386, 397 (1989); CARTER, *supra* note 148, at 529.

¹⁵⁵ CHASE MADAR, *Why it’s Impossible to Indict a Cop: It’s Not Just Ferguson—Here’s How the System Protects Police*, THE NATION, (Nov. 25, 2014), <https://www.thenation.com/article/archive/why-its-impossible-indict-cop/>; CARTER, *supra* note 148, at 535.

¹⁵⁶ REINWALD, *supra* note 149, at 669.

¹⁵⁷ Joanna Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1820 (2018).

¹⁵⁸ Abraham Davis, *The Rodney King Incident: Isolated Occurrence or a Continuation of a Brutal Past?*, 10 HARV. BLACKLETTER JOUR. 67 (1993).

¹⁵⁹ Cassandra Chaney & Ray Robertson, *Racism and Police Brutality in America*, 17, J. AFR. AM. STUD. 484 (2013).

¹⁶⁰ GREENE, *supra* note 151, at 3-4. In addition to Jebadiha Potterf & Jason Pohl, *A Black Teen, a White Cop, and a City in Turmoil: Analyzing Newspaper Reports on Ferguson, Missouri and the Death of Michael Brown*, 34 J. CONTEMP. CRIM. JUSTICE (2018); MICHAEL OSHIRO & PAMELA VALERA, *Framing Physicality and Public Safety: A Study of Michael Brown and Darren Wilson*, 20 *Equality, Crime and Health Among African American Males*, RESEARCH IN RACE AND ETHNIC RELATIONS 207-228 (2018).

¹⁶¹ FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING (2015).

¹⁶² *Id.*, at 1.

¹⁶³ PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING IMPLEMENTATION GUIDE (2015).

than 18,000 law enforcement departments throughout the nation. The Trump administration never showed interest in advancing the program.¹⁶⁴ What will Biden do on this matter? Only time will tell.

Nevertheless, in our present times police brutality against minorities in the U.S. is far from being a solved issue.¹⁶⁵ Ever since the above-mentioned Rodney King brutal beating at the beginning of the nineties, the increase in technology and media coverage have given rise to many more videos as undeniable evidence of police brutality and excessive use of force.¹⁶⁶ One of the latest incidents, the case of George Floyd, has brought strong condemnation and rejection not only within the U.S., but also across the world. While being filmed by bystanders, a white police officer from Minneapolis had Floyd handcuffed and faced down in the street with his knee on Floyd's neck for almost nine minutes. Floyd repeatedly begged for his life with the words: "I can't breathe!" until he became motionless; he had been killed while in police custody.¹⁶⁷ Since his death, there have been many mass protests and violent riots both all over the U.S. and abroad. Floyd's last words have become a slogan for the Black Lives Matter (BLM) movement,¹⁶⁸ and resonated in every corner of the planet. A few weeks after Floyd's death, in another videotaped incident, Rayshard Brooks was shot and killed in Atlanta, Georgia, by a police officer. In June 2021, Derek

¹⁶⁴ STEPHEN MENENDIAN, RICHARD ROTHSTEIN & NIRALI BERI, *The Road Not Taken: Housing and Criminal Justice 50 Years After the Kerner Commission Report*, OTHERING AND BELONGING INSTITUTE 17 (2020).

¹⁶⁵ We have evidence arising from the vast academic articles and books recently published on the matter: Hasan Arslan, *The Impact of Police Shootings in the United States on Police Community Relations*, in POLICING AND MINORITY COMMUNITIES 105-124 (James Albrecht, Garth den Heyer & Perry Stanislas eds., 2019); JENNIFER COBBINA, HANDS UP, DON'T SHOOT!: WHY THE PROTESTS IN FERGUSON AND BALTIMORE MATTER, AND HOW THEY CHANGED AMERICA 288 (NYU Press, 2019); Corey Miles, *How a Democracy Killed Tamir Rice: White Racial Frame, Racial Ideology, and Racial Structural Ignorance in the United States*, in GENDER SEXUALITY AND RACE IN THE DIGITAL AGE 99-111 (Nicole Farris, D'Lane Compton & Andrea Herrera eds., 2020); Amanda Graham et al., *Race and Worrying About Police Brutality: The Hidden Injuries of Minority Status in America*, 15 VICTIMS AND OFFENDERS 5, 549-573 (2020); Matthew Platt, *Hoodies on the Floor: Exploring Black Members' Legislative Response to Police Brutality*, 1 NATIONAL REV. OF BLACK POLITICS 69-79 (2020); Hannah McManus et al., *Will Black Lives Matter to the Police? African Americans' Concerns About Trump's Presidency*, in CRIME AND JUSTICE IN THE TRUMP ERA 1040-1062 (FRANCIS CULLEN & AMANDA GRAHAM eds., 2019).

¹⁶⁶ As described for example in MARTIN & KPOSOWA, *supra* note 150, at 1-9.

¹⁶⁷ Ironically, after Floyd's death (25th of May 2020), three other (past) cries of "I can't breathe!" recordings of black men who died shortly after having interactions with police have surfaced: Eric Garner (died in 2014), JAVIER AMBLER (died in 2019), and MANUEL ELLIS (died in March 2020). JASON HANNA, *3 Recordings. Three Cries of "I Can't Breathe". 3 Black Men Dead After Interactions with Police*, CNN, (June 10, 2020), <https://edition.cnn.com/2020/06/10/us/cant-breathe-deaths-javier-ambler-george-floyd-manuel-ellis/index.html>.

¹⁶⁸ Regarding the Black Lives Matter movement (BLM), see for example, CARTER, *supra* note 148, at 523, 525, 541, 546, 550.

Chauvin was found guilty of Floyd's murder and sentenced to 22 and half years in prison.

3. *Police Officers' Accountability and Qualified Immunity in U.S. Courts*

When it comes to police brutality, why is it so difficult to prosecute law enforcement officers in U.S. Courts? The answer to this dilemma can be found in the Supreme Court's controversial development of the "qualified immunity" doctrine, "as part of its interpretation of the Civil Rights Act of 1871".¹⁶⁹ As expressed by Novak, "Qualified immunity is a judicially created legal doctrine that shields government officials performing discretionary duties from civil liability in cases involving the deprivation of statutory or constitutional rights".¹⁷⁰ Supporters of qualified immunity have considered that "it plays an important role in affording police officers some level of deference when making split-second decisions about whether to, for example, use force to subdue a fleeing or resisting suspect".¹⁷¹ At the same time, critics have considered the doctrine's doubtful origins,¹⁷² in addition to giving "too much deference to the police", jeopardizing accountability while eroding criminal suspects' constitutional rights.¹⁷³

In pragmatic terms, qualified immunity has been employed as an "unwritten defense"¹⁷⁴ to civil rights lawsuits brought against state and local police officers under the statute 42 U.S.C. § 1983. The Statute known as "Section 1983" "was first enacted during Reconstruction as a section of the 1871 Ku Klux [Klan] Act, part of a suite of «Enforcement Acts» designed to help combat lawlessness and civil rights violations in the southern states".¹⁷⁵ The statute "provides a cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" by any person acting "under color of statute, ordinance, regulation, custom, or usage, of any State or Territory".¹⁷⁶ When it comes to police officer's conduct, "Section 1983 provides a legal remedy for individuals claiming that their constitutional rights, such as the right to be free from

¹⁶⁹ WHITNEY NOVAK, *Policing the Police: Qualified Immunity and Considerations for Congress*, CONGRESSIONAL RESEARCH SERVICE 1 (2020). See also, the CIVIL RIGHTS ACT OF 1871, also known as "The Ku Klux Klan Act."

¹⁷⁰ NOVAK, *supra* note 169, at 1.

¹⁷¹ *Id.* See also, *Baxter v. Bracey et al.*, 590 U.S. 23-26 (2019).

¹⁷² William Baude, *Is Qualified Immunity Unlawful?* 106 CALIF. L. REV. 55 (2018).

¹⁷³ NOVAK, *supra* note 169, at 1.

¹⁷⁴ BAUDE, *supra* note 172, at 45, 50, 66, 77.

¹⁷⁵ *Id.*, at 49.

¹⁷⁶ NOVAK, *supra* note 169, at 2; BAUDE, *supra* note 172, at 49. See also the Statute 42 U.S.C. § 1983.

excessive force under the Fourth Amendment, were violated by state or local police”.¹⁷⁷

However, qualified immunity as counterweight to “Section 1983”, was first decided by the SCOTUS in the case *Pierson v. Ray* in 1967.¹⁷⁸ The Court described it “as grounded in common law defenses of good faith and probable cause that were available for state-law false arrest and imprisonment claims”¹⁷⁹ to police officers. Even so, there are scholars who have shown that history does not support the Court’s claim of its common-law foundations.¹⁸⁰ Nonetheless, in the case *Harlow v. Fitzgerald* of 1982, the Court established the “modern qualified immunity test”, granting it “to those government officials whose conduct «does not violate clearly established statutory or constitutional rights of which a reasonable person would have known»”.¹⁸¹ In other words, this standard shields law enforcement from constitutional violations, unless they infringe “clearly established law”.¹⁸²

After the *Harlow* decision, the SCOTUS has been “refining and expanding” the doctrine’s reach,¹⁸³ so it has become more and more difficult for plaintiffs to show a violation of “clearly established law” by government officials. In a recent study of eighteen qualified immunity cases that the Court heard from 2000 to 2016 —many of which involved police use of excessive force in violation of the Fourth Amendment—, in 16 of them the Court granted qualified immunity, stating that “they did not act in violation of clearly established law”.¹⁸⁴ Now, what constitutes clearly established law? The SCOTUS has stated that, “it depends substantially upon the level of generality at which the relevant «legal rule» is to be identified”.¹⁸⁵ In a very recent case, the Court held that “the clearly established right must be defined with specificity ... That is particularly important in excessive force cases”.¹⁸⁶ This means that, “even minor differences between the case at hand and the case in which the relevant legal right claimed to be violated was first estab-

¹⁷⁷ NOVAK, *supra* note 169, at 2. *See also*, *Graham v. Connor*, 490 U.S. 386 (1989).

¹⁷⁸ *Pierson v. Ray*, 386 U.S. 547 (1967).

¹⁷⁹ “The Court in *Pierson* appeared to focus on common-law defenses available in Mississippi at the time the case was filed”. SCHWARTZ, *supra* note 157, at 1801.

¹⁸⁰ *Id*; BAUDE, *supra* note 172, at 55; Kit Kinports, *The Supreme Court’s Quiet Expansion of Qualified Immunity*, 100 MINNESOTA LAW REV. HEADNOTES, 78 (2016); JAMES PFANDER, *CONSTITUTIONAL TORTS AND THE WAR ON TERROR* 16-17 (Oxford University Press, 2017); David Engdahl, *Immunity and Accountability for Positive Government Wrongs*, 44 UNIVERSITY OF COLORADO LAW REVIEW 14-21 (1972).

¹⁸¹ NOVAK, *supra* note 169, at 3; Baude, *supra* note 172, at 53.

¹⁸² *Id.*, at 45-46, 53. More on this matter can be found in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

¹⁸³ NOVAK, *supra* note 169, at 3. *See also* Kinports, *supra* note 180, at 62-78.

¹⁸⁴ NOVAK, *supra* note 169, at 3; KINPORTS, *supra* note 180, at 63 and footnote 6.

¹⁸⁵ *Anderson v. Creighton et al.*, 483 U.S. 635, 639 (1987); NOVAK, *supra* note 169, at 3.

¹⁸⁶ *City of Escondido v. Emmons*, No. 16-55771 (2019).

lished, can immunize the defendant police officer”.¹⁸⁷ The Court’s reasoning has scholars considering that, it “severely restrict[s] the ability of individuals to recover for constitutional violations that they suffer at the hands of law enforcement”,¹⁸⁸ jeopardizing the purpose of Section 1983.¹⁸⁹

Even some Justices have raised concerns about the damage the doctrine is causing to the Constitution.¹⁹⁰ In the recent case *Ziglar v. Abbasi*, Justice Thomas criticized the historic background from where supposedly qualified immunity arises, “and for being defined by «precisely the sort of free-wheeling policy choice[s]’ that we have previously disclaimed the power to make»”.¹⁹¹ Adding that, “[i]n an appropriate case we should reconsider our qualified immunity jurisprudence”.¹⁹² While in dissenting opinions “[i]n 2015 [*Mullenix v. Luna*], and again in 2018 [*Kisela v. Hughes*], Justice Sotomayor expressed concern that the Court’s qualified immunity decisions contribute to a culture of police violence”.¹⁹³ In her words, “[b]y sanctioning a «shoot first, think later» approach to policing, the Court renders the protection of the Fourth Amendment hollow”.¹⁹⁴ Sotomayor’s reasoning may be supported by a recently developed study, which reveals that appellate courts —especially in excessive force cases— have been increasingly granting qualified immunity to law officers.¹⁹⁵ For example, from 2005 to 2007, “44 percent of courts favored police in excessive force cases. That number jumped to 57 percent ... from 2017 to 2019”.¹⁹⁶

After Floyd’s tragic death, the debate overqualified immunity has intensified.¹⁹⁷ There is already a discussion on which branch of government is

¹⁸⁷ NOVAK, *supra* note 169, at 3.

¹⁸⁸ Stephen Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court’s Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICHIGAN LAW REVIEW 1245 (2015).

¹⁸⁹ NOVAK, *supra* note 169, at 3.

¹⁹⁰ The Supreme Court’s decision in *Mullenix v. Luna*, “provoked Justice Sotomayor’s expression of concern about the damage qualified immunity does to the Constitution”. SCHWARTZ, *supra* note 157, at 1816.

¹⁹¹ See, *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871 (2017).

¹⁹² *Id.*, at 1872; SCHWARTZ, *supra* note 157, at 1798.

¹⁹³ *Id.*, at 1799; NOVAK, *supra* note 169, at 4. In *Mullenix*, Sotomayor reasoned that, “the majority ignored the longstanding and well-settled Fourth Amendment rule that there must be a governmental interest not just in seizing a suspect, but in the level of force used to effectuate that seizure”. SUPREME COURT OF THE UNITED STATES, *Mullenix v. Luna*, 577 U.S. 7, 136 S. Ct. 305 (2015) (Sotomayor, J., dissenting). See also, *Kisela v. Hughes*, 584 U.S. 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting, joined by Ruth Bader Ginsburg).

¹⁹⁴ *Mullenix v. Luna*, 577 U.S. 7, 136 S. Ct. 305 (2015) (Sotomayor, J., dissenting).

¹⁹⁵ Andrew Chung et al., *For Cops who Kill, Special Supreme Court Protection*, REUTERS INVESTIGATES, (May 8, 2020); NOVAK, *supra* note 169, at 4.

¹⁹⁶ *Id.*

¹⁹⁷ See for example, Michael Dorf, “Would Eliminating Qualified Immunity Substantially Deter Police Misconduct?,” VERDICT-JUSTIA, June 10, 2020.

more suitable to reform the failed doctrine.¹⁹⁸ Since qualified immunity is judicially created, the SCOTUS is entitled to assume the task of revising it, as it has done in the past, although creating more confusion and problems.¹⁹⁹ However, even after the current social unrest of the nation spawned by a systematic police abuse of citizens, the Court has recently declined to weigh in on the doctrine shielding law enforcement.²⁰⁰

So, everything now points to the U.S. Congress to provide for a damages remedy²⁰¹ for the many victims of police abuse of power. Considering that, “qualified immunity is a product of statutory interpretation, Congress has wide authority to amend, expand or even abolish the doctrine”.²⁰² The “Ending Qualified Immunity Act” or H.R. 7085, introduced by Congressman Justin Amash, is a proposed legislation aimed for that objective, and could potentially amend “Section 1983 by abolishing both the «good faith defense» and the defense that the law was not clearly established at the time of the alleged misconduct”.²⁰³ Following this crescendo trend, the “Justice in Policing Act of 2020”, has emerged as a promising proposal destined “to cases brought against local law enforcement and state correctional officers”.²⁰⁴ Both of these efforts could potentially eliminate the judicially created qualified immunity defense in Section 1983 litigation.²⁰⁵ As possible alternatives to “scale back qualified immunity to limited circumstances”, Novak has proposed the following examples: Congress could limit the reach of the doctrine to certain government actors, excluding law enforcement agencies, or limit the application of the doctrine to Fourth Amendment excessive use of force claims, or it could “abrogate recent Supreme Court jurisprudence requiring specificity for a finding of «clearly established law». Or Congress could explore eliminating other doctrines that might be viewed as insufficiently policing law enforcement misconduct”.²⁰⁶

In sum, the qualified immunity doctrine invented by the SCOTUS has two effects in terms of constitutional rights: Firstly, it has created a non-existent right in the U.S. Constitution, instead of promoting an accurate legislation

¹⁹⁸ See for example, Scott Michelman, *The Branch Best Qualified to Abolish Immunity*, 93 NOTRE DAME LAW REVIEW 1999-2020 (2018); NOVAK, *supra* note 169, at 4.

¹⁹⁹ MICHELMAN, *supra* note 198, at 2000.

²⁰⁰ Jamie Ehrlich, Ariane de Vogue & Devan Cole, *Supreme Court Declines to Weigh In on Legal Doctrine that Shields Law Enforcement*, CNN (June 15, 2020), <https://edition.cnn.com/2020/06/15/politics/supreme-court-qualified-immunity/index.html>.

²⁰¹ MICHELMAN, *supra* note 198, at 2001.

²⁰² NOVAK, *supra* note 169, at 4; MICHELMAN, *supra* note 198, at 2001.

²⁰³ NOVAK, *supra* note 169, at 4; HOUSE COMMITTEE ON THE JUDICIARY, H.R. 7085, (2020).

²⁰⁴ NOVAK, *supra* note 169, at 4; HOUSE COMMITTEE ON THE JUDICIARY, H.R. 7120, (2020).

²⁰⁵ NOVAK, *supra* note 169, at 4.

²⁰⁶ “Such as the 1978 Supreme Court decision in *Monell v. Department of Social Services*, which significantly limits municipalities’ liability for police misconduct”. *Id.*, at 4-5; *Monell v. Department of Soc. Svcs.*, 436 U.S. 658 (1978).

to regulate the use of force, according to international standards. Secondly, it has created a “disturbing trend regarding the use of this Court’s resources”,²⁰⁷ apart from making it very complicated for victims of excessive use of force by law enforcement officers, to obtain the much-desired justice and reparation in U.S. courts. However, in a recent move towards the right direction, Governor Polis of the state of Colorado, has signed into law a broad Police Accountability Bill, ending —among other issues— qualified immunity defense for law enforcement agents in that state.²⁰⁸ Let’s just hope this represents a genuine turn of the tide for the rest of the states in that nation.

4. *Concerns of the Inter-American Commission towards U.S. Policy*

United States signed but did not ratify the Inter-American Convention on Human Rights; hence, it is not part of the compulsory jurisdiction of the Inter-American Court. However, the Inter-American Commission on Human Rights can monitor human rights situations in the U.S. directly. Under this mandate, a report from 2018 unveiled concerns on excessive use of force, discrimination and killings perpetrated by the police against African Americans.²⁰⁹ The three key issues detected by the IACHR are racial profiling, excessive use of force, and (qualified) immunity, generating impunity for police officers, in addition to the use of military techniques and weapons in police departments.²¹⁰ Current use of lethal force as first response, even in the context of social protests, reveals a wide state of affairs that breach international guidelines on the use of force in the U.S., with no possibilities for a remedy under its domestic framework.²¹¹ Concluding observations of the IACHR highlight —as a matter of urgency— the need to make a reform in domestic law, as well as to review local protocols on the use of force; this includes the prohibition of racial profiling and the implementation of international standards on the use of force, the adoption of measures to reverse militarization, and provide remedies on accountability and due diligence.²¹²

Essentially, the Inter-American findings on historic racial discrimination do not differ from the internal pictures of police abuse in the U.S. Hopefully,

²⁰⁷ *Kisela v. Hughes*, 584 U.S. 138 S. Ct. 1148 (2018), Sotomayor, J., dissenting, Justice Sotomayor, with whom Justice Ginsburg joins, 14.

²⁰⁸ LI COHEN, *Colorado Passes Sweeping Police Reform Bill*, CBS NEWS, (June 19, 2020), <https://www.cbsnews.com/news/colorado-passes-sweeping-police-reform-bill/>.

²⁰⁹ The report also reveals a wide range of segregation, poverty, lack of political participation, inequality on access to justice and other socio-legal problems faced by African Americans. INTER-AMERICAN COMMISSION ON HUMAN RIGHTS (African Americans), paras. 45-50 (2018).

²¹⁰ *Id.*, paras. 69, 88, 105.

²¹¹ *Id.*, paras. 213, 239.

²¹² *Id.*, paras. 308-318.

the House of Representatives takes into consideration the largely identified problems of policing practice and accountability. Street demonstrations by the American public calling for reforms must show the democratic spirit of all branches of government involved in the issue.

V. CONCLUSIONS

Despite the importance of the police in providing security, contributing to the rule of law, combating crime and strengthen confidence within communities, Mexico's police bodies and their institutional framework need to be studied thoroughly, while acknowledging the level of participation of each branch of the government. In the United States, despite the extensive scholar inputs on police brutality, qualified immunity for police officers, unreasonable searches and seizures from the government, as well as racial profiling concerns, problems on police performance remain very much the same.

Notwithstanding the wide range of specific guidelines explaining principles of legality, prevention, proportionality and absolute necessity, neither Mexico nor the United States has implemented international principles in a level playing field, aimed at reforming police institutions and preventing abuse, while creating accountability mechanisms that allow the public to be an active participant of these reforms.

In Mexico, constitutional guidelines on police principles have no influx in police bodies and their chain of command. The solution must be triggered by a national dialogue to propose legislative and administrative work at the federal, local, and municipal levels, accompanied by professionals on police sustainability, legal, social and scholars from the humanities. Every Mexican political branch has a constitutional duty and is aware of the situation, but a thorough police reform demands political and dialogical participation within federal, local, and municipal governments. The great opportunity for the federal government, which might translate in concrete steps to emancipate a police reform aimed at building a peaceful society.

In the United States, the main concerns I am obliged to highlight when dealing with law enforcement are corruption, brutality, and lack of accountability. Nevertheless, an aggravating factor eroding the police system, while shaking the very foundations of American democracy is the historically ingrained racial discrimination within its forces, emerging as one of the main reasons why police agencies are currently facing a severe legitimacy crisis. To make matters worse, the "qualified immunity" doctrine created by the SCOTUS has denied access to justice in police brutality cases against racial minorities, weakening both the constitutional promise of equal protection under law and the principles of international human rights law. Ultimately, only the American people will force the government to change, just as only the American people will continue to demand equality for all.

In this globalized world, we do not need an aggressive and fearsome police force. What we really need is better trained and much more humane law enforcement bodies, professional and capable of meeting the already complicated challenges that democratic societies are facing. From our perception, there is a gap between the approaches on state of exception/emergency and lack of accountability for the executive branch at national levels, in terms of a constitutional and democratic exercise of power. Police abuses might have different origins and backgrounds, but the outcome is the same: deprivation of life and subsequent loss of public trust in the exercise of power, resulting in outrage while igniting both political tension and riots.

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