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RUBBER BULLETS AND THE BLACK LIVES MATTER PROTESTS

by Tala Doumani* and
Jamil Dakwar**

Linda Tirado, a freelance photographer and activist, drove to Minneapolis from Nashville to photograph the protests that had erupted on May 26, 2020. She had just taken a photo and lowered her camera when she felt her face explode. Screaming “I’m press! I’m press!” Linda had been shot in the left eye by a rubber bullet. After being rushed into surgery, doctors told her she was not likely to regain the vision in her eye.¹

Stories like Linda’s have become common during the recent Black Lives Matter protests. Sparked by the horrific murder of George Floyd on May 25, 2020 and the killings of other Black people, protests erupted in more than 140 cities across the United States² and 40 countries around the world.³ Since May 26, 2020, there have been more than 400 instances of

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¹ Frances Robles, *A Reporter’s Cry on Live TV: ‘I’m Getting Shot! I’m Getting Shot!’*, N.Y. TIMES (May 30, 2020), <https://www.nytimes.com/2020/05/30/us/minneapolis-protests-press.html>.

² Weiwei Cai et al., *Photos From the George Floyd Protests, City By City*, N.Y. TIMES (June 1, 2020), <https://www.nytimes.com/interactive/2020/05/30/us/george-floyd-protest-photos.html>.

³ Savannah Smith et al., *Map: George Floyd Protests Around the World*, NBC News (June 9, 2020), <https://www.nbcnews.com/news/world/map-george-floyd-protests-countries-world-wide-n1228391>.

police detaining, assaulting, or otherwise preventing journalists from performing their duties.⁴ Protestors have experienced injuries, and sometimes death, from tear gas, pepper spray, rubber bullets, and other crowd-control tactics used by police.⁵

This Article argues that instances of peaceful Black Lives Matter protestors and journalists being targeted by rubber bullets are not only incompatible with international human rights law but often contradict, when available, police forces’ own internal policies. Comparing recent incidents of protestors targeted with rubber bullets with internal police department manuals on the use of force shows a clear disconnect between policy and practice. Drawing on international standards on the use of force, this Article further argues that, to protect First Amendment rights to peaceful assembly and association, the use of rubber bullets as a crowd-control weapon should be banned in the context of mass assembly.

I. BLACK LIVES MATTER PROTESTS

Rubber bullets have been used widely by law enforcement and in the majority of states where Black Lives Matter protests have been held. While there has been a lot of media coverage on the misuse and dangerous overuse of tear gas and pepper spray against protestors, far less attention has been paid to another weapon that is equally as harmful. The use of rubber bullets has often been indiscriminate, targeting protestors, journalists, and minors, and has resulted in serious and sometimes life-threatening injuries, including blindness, head fractures, and even loss of fertility. Journalist Scott Reynhout documented more than sixty-three instances of neck or head injuries from rubber bullets, of which thirty-two were eye injuries and thirteen led to a permanent loss of vision.⁶ Many of

⁴ Laurin-Whitney Gottbrath and Patrick Strickland, *Blinded, Arrested: Police Attack Journalists Covering U.S. Protests*, AL JAZEERA (June 16, 2020), <https://www.aljazeera.com/indepth/features/blinded-arrested-police-attack-journalists-covering-protests-200616023545157.html>.

⁵ ACLU Statement, *Interactive Dialogue with the UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association Statement by the American Civil Liberties Union at the 43rd Session of the UN Human Rights Council* (July 10, 2020).

⁶ Scott Reynhout, *Head Injuries From Less-Than-Lethal Rounds in the United States Since May 26*, <https://tinyurl.com/ShotIn-Face> (last updated June 23, 2020) (used with permission).

the victims are young, such as sixteen-year-old Brad Levi Ayala who was struck in the head with a rubber bullet fired by an Austin Police Department sniper, causing traumatic brain injury,⁷ and twenty-two-year-old Megan Matthews who suffered a broken nose and fractured facial bones after being hit while protesting in Denver, Colorado.⁸

Congress has typically played a minimal role in regulating the use of rubber bullets, and national law enforcement groups have repeatedly refused to address a set of policing standards. However, instances like these have led federal, state, and local governments, as well as civil society, to call for investigations into and limitations on police use of rubber bullets and other less-lethal weapons. In June 2020, thirteen U.S. Senate Democrats issued an unprecedented call for an immediate review of the safety of crowd-control weapons (CCWs), including rubber bullets, used during racial justice protests, as well as the use of force against peaceful protestors. Following the deployment of federal agents in Portland, Oregon and Washington, D.C., in July 2020, the Justice Department's Office of the Inspector General opened an investigation into allegations that DOJ personnel "improperly used force" in their role in responding to mass protests. The news of serious injuries resulting from the use of rubber bullets even led to a push in the United Kingdom to halt the export of tear gas and rubber bullets to the United States amid the Black Lives Matter protests.⁹

II. HISTORY OF RUBBER BULLETS AS IT RELATES TO CONTEMPORARY USE

The use of rubber bullets against protestors is not unique to the present Black Lives Matter protests. Kinetic impact projectiles (KIPs), which includes rubber bullets, are regularly used in response to popular protests around the world. Initially developed by the British military to ensure distance between law enforcement personnel and the individual or group they were trying to control, KIPs are now marketed to police and private security forces in nearly every country with "little or no regulatory oversight or accountability."¹⁰ Over the past thirty years, production of KIPs has spread from a few manufacturers in the United States and the United Kingdom to dozens of producers throughout the world.¹¹ In the United States, the lethal ammunition market will be worth \$1,106 million by 2023.¹²

Rubber bullets were introduced in the United States to suppress the civil rights and anti-Vietnam War protests in the 1960s.¹³ However, it was not until the 1990s that police departments began using rubber bullets en masse. In the following decades, rubber bullets were often deployed in the context of civil unrest such as the 1992 Los Angeles Rodney King uprising.¹⁴ Protestors of color are more often met with disproportionate force, especially when protestors are expressing grievances about racial injustice, as evidenced by the use of rubber bullets against protestors in Ferguson, Missouri in 2014 and similarly against

⁷ Rhea Mahbubani, 'My Face Exploded': Police Firing Rubber Bullets Have Wounded and Permanently Disabled Protestors and Journalists, INSIDER (June 2, 2020), <https://www.insider.com/black-lives-matter-protesters-journalists-hurt-disabled-police-rubber-bullets-2020-6>.

⁸ Liz Szabo et al., *Fractured Skulls, Lost Eyes: Police Break Their Own Rules When Shooting Protestors with 'Rubber Bullets'*, USA TODAY (Sep. 11, 2020), <https://www.usatoday.com/in-depth/news/nation/2020/06/19/police-break-rules-shooting-protesters-rubber-bullets-less-lethal-projectiles/3211421001/>.

⁹ Callum Keown, *Boris Johnson Urged to Halt U.K. Exports of Tear Gas and Rubber Bullets to the U.S. Amid George Floyd Protests*, MARKETWATCH (June 3, 2020), <https://www.marketwatch.com/story/boris-johnson-urged-to-condemn-us-police-and-halt-uk-exports-of-tear-gas-and-rubber-bullets-heres-his-response-2020-06-03>.

¹⁰ Rohini J. Haar et al., *Lethal in Disguise*, Int'l Network Civ. Liberties Orgs., <https://www.inclo.net/pdf/lethal-in-disguise.pdf> (last visited Nov. 10, 2020).

¹¹ *Id.*

¹² *Less Lethal Ammunition Market Worth \$1,106 Million by 2023*, PR NEWSWIRE (Feb. 11, 2019), <https://www.prnewswire.com/news-releases/less-lethal-ammunition-market-worth-1-106-million-by-2023---exclusive-report-by-marketsandmarkets-300792976.html>.

¹³ *What Are Rubber Bullets?*, SLATE (Oct. 4, 2000), <https://slate.com/news-and-politics/2000/10/what-are-rubber-bullets.html>.

¹⁴ *Health Impacts of Crowd-Control Weapons: Kinetic Impact Projectiles (Rubber Bullets)*, Physicians Hum. Rts. (Jan. 1, 2017), <https://phr.org/our-work/resources/health-impacts-of-crowd-control-weapons-kinetic-impact-projectiles-rubber-bullets/>.

Indigenous peoples and other demonstrators at Standing Rock, North Dakota in 2016.¹⁵

As a result of the proliferation of law enforcement use and abuse of CCWs against popular protests around the world, the International Network of Civil Liberties Organizations (INCLO) and Physicians for Human Rights (PHR) partnered in 2014 to document the health consequences of CCWs and their use in protest contexts. The report titled, *Lethal in Disguise*, details case studies of misuse of CCWs, including KIPs in Egypt, South Africa, Israel, and Argentina. In assessing the health effects of KIPs, the report found during a systematic review of medical literature that KIPs cause serious injury, disability, and death. Therefore, despite their status as “less lethal weapons” the prevalence of morbidity and mortality associated with KIPs indicate they are significantly dangerous.¹⁶ Other CCWs such as tear gas, which has also been widely used against BLM protestors in the last several months, were also condemned due to its indiscriminate nature and potentially life-threatening effects on respiratory function.

III. LACK OF COMPLIANCE WITH INTERNATIONAL LEGAL STANDARDS

While guidelines on the use of rubber bullets by police, military, or manufacturers are limited, according to international law use of force guidelines, instances like those described above fall short of international standards. First, international norms dictate that the use of less lethal weapons by law enforcement is subject to strict requirements of *non-discrimination*, *necessity* and *proportionality*.¹⁷ For example, the European Court of Human Rights (ECtHR) has repeatedly held that unnecessary or excessive use of force in the context of demonstration constitutes inhumane and degrading treatment or even torture in the most severe circumstances.¹⁸ As a result, regional courts like the ECtHR have traditionally applied a “strict proportionality” test when evaluating law enforcement offi-

cers’ use of force.¹⁹ Second, international legal frameworks call for heightened precaution in the particular context of policing assemblies. The use of less lethal weapons in the context of assemblies should take into account freedoms of assembly and of expression and, therefore, “law enforcement officials shall avoid the use of force or, where that is not practicable, shall restrict such force to the minimum extent necessary.”²⁰ In particular, the International Covenant on Civil and Political Rights provides that “no restrictions may be placed on the exercise of the right to peaceful assembly other than those imposed in conformity with the law and which are necessary in a democratic society” with limited exceptions and specific grounds.²¹ Third, international norms have strictly delineated protections for the methods in which less lethal weapons are deployed. According to recent guidelines on the use of less lethal weapons, which have been adopted by the Office of High Commissioner on Human Rights, KIPs “should generally be used only in direct fire with the aim of striking the lower abdomen or legs of a violent individual and only with a view to addressing an imminent threat of injury to either a law enforcement official or a member of the public.”²²

These international norms have been largely disregarded by domestic law enforcement departments, which has led to international condemnation for the use of excessive force by United Nation human rights experts and the Inter-American Commission

¹⁵ ACLU Statement, *supra* note 5.

¹⁶ Rohini J. Haar et al., *supra* note 10.

¹⁷ G.A. Res. 34/169, Code of Conduct for Law Enforcement Officials (Dec. 17, 1979).

¹⁸ Abdullah Yaşa and Others v. Turkey, App. No. 44827/08, ¶¶ 48, 50 (July 16, 2013), <http://hudoc.echr.coe.int/eng?i=001-122874>.

¹⁹ Anzhelo Georgiev and Others v. Bulgaria, App. No. 512 84/09, ¶ 66 (Sept. 30, 2014), <http://hudoc.echr.coe.int/eng?i=001-146567>.

²⁰ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, *adopted by* G.A. Res. 45/121 (Dec. 14, 1990), <https://www.ohchr.org/en/professionalinterest/pages/useofforceandfirearms.aspx> [hereinafter Basic Principles on the Use of Force]; *see also* Human Rights Council Res. 25/38, U.N. Doc. A/HRC/RES/25/38, ¶ 9 (Apr. 11, 2014).

²¹ International Covenant on Civil and Political Rights art. 21, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171.

²² Off. of the United Nations High Comm’r for Hum. Rts., GUIDANCE ON LESS-LETHAL WEAPONS IN LAW ENFORCEMENT, 35 (2020), https://www.adh-geneve.ch/joomlatools-files/docman-files/LLW_Guidance.pdf

on Human Rights (IACHR).²³ According to a report published by the International Human Rights Clinic at the University of Chicago Law School, “none of the police use of lethal force policies from the 20 largest U.S. cities during 2017-2018 complied with basic international human rights law and standards.”²⁴ The report found that every city fell short of the international standard for legality and most failed to fully satisfy basic accountability measures for officers who fired KIPs. Additionally, the report found that “[n]one of the policies are constrained by a state law that complies with human rights law and standards. And too many police departments allow the use of lethal force in response to a non-lethal threat, thereby sanctioning unnecessary and disproportionate use of force.”²⁵

IV. LACK OF COMPLIANCE WITHIN INTERNAL POLICE DEPARTMENT POLICIES

Over 18,000 law enforcement agencies “establish their own rules for when [rubber bullets] should be used, who is allowed to fire them, and how to hold their officers accountable.”²⁶ The fact that policies regarding the use of force are largely piecemeal, differing from department to department, reflects the lack of a cohesive federal policy. In reviewing police manuals and general policies of various police departments that have been using less lethal weapons it is apparent that the police are often violating their own rules and

regulations surrounding the use of force and the use of rubber bullets more specifically.

- In Dallas, Texas, Brandon Saenz was shot in the face with a projectile. According to his lawyer, Brandon was peacefully protesting. Dallas Police Department (DPD) rules state that police can only use less-lethal projectiles when someone shows “active aggression” or to control someone “physically resisting” with a weapon.²⁷ Additionally, according to the Dallas police manual, officers are required to immediately report when a plastic or rubber bullet is fired and they are not to aim at a person’s head.²⁸ In the aftermath of the incident, a local newspaper reported that “No one from DPD has made a public statement about this.”²⁹ However, as a result of the complaint filed by Brandon’s lawyer, a U.S. district judge signed a 90-day injunction barring the Dallas Police Department from using “less-than lethal weapons” to disperse protesters.³⁰
- In Denver, Colorado, Megan Matthews was peacefully demonstrating before being shot in the eye. Denver police policy forbids officers from targeting the “head, eyes, throat, neck, breasts of a female, genitalia or spinal column.”³¹ Additionally, officers are generally not allowed

²³ Press Release, Inter-Am. Comm’n H.R., *The IACHR Expresses Strong Condemnation for George Floyd’s Murder, Repudiates Structural Racism, Systemic Violence Against Afro-Americans, Impunity and the Disproportionate Use of Police Force, and Urges Measures to Guarantee Equality and NonDiscrimination in the United States* (June 8, 2020), https://www.oas.org/en/iachr/media_center/PReleases/2020/129.asp; *Human Rights Office Decries Disproportionate Use of Force in US Protests*, UNITED NATIONS NEWS, (July 24, 2020), <https://news.un.org/en/story/2020/07/1068971>.

²⁴ Univ. Chi. L. Sch. Glob. Hum. Rts. Clinic, *Deadly Discretion: The Failure of Police Use of Force Policies to Meet Fundamental International Human Rights Law and Standards* 19 (2020), <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1014&context=ihrcl>.

²⁵ *Id.*, at 37.

²⁶ Liz Sazbo et al., *Fractured Skulls, Lost Eyes: Police Often Break Own Rules Using ‘Rubber Bullets’*, KAISER HEALTH NEWS (June 19, 2020), <https://khn.org/news/rubber-bullets-protesters-police-often-violate-own-policies-crowd-control-less-lethal-weapons/> [hereinafter *Fractured Skulls*].

²⁷ *Id.*

²⁸ Nic Garcia, *Texas Police Deployed Less-Lethal Ammunition to Control Protests. Now Policymakers Want to Ban the Weapons*, THE DALLAS MORNING NEWS (June 9, 2020, 11:31 AM), <https://www.dallasnews.com/news/2020/06/09/texas-police-deployed-less-lethal-ammunition-to-control-protests-now-policy-makers-want-to-ban-the-weapons/>.

²⁹ Tyler Hicks, *Brandon Saenz, Who Lost Eye in Peaceful Protest, Wants to Know Who Shot Him*, DALLAS OBSERVER (July 1, 2020, 4:00 AM), <https://www.dallasobserver.com/news/brandon-saenz-dallas-police-protests-foam-bullets-11922860>.

³⁰ Paige Phelps, *Dallas Police Prohibited For 90 Days From Using Tear Gas During Protests, Judge Rules*, KERA NEWS (June 12, 2020, 12:56 PM), <https://www.keranews.org/news/2020-06-12/dallas-police-prohibited-for-90-days-from-using-tear-gas-during-protests-judge-rules>; *Meet Brandon Saenz: Dallas Protester Who Lost Eye After Police Shot Him with ‘Less Lethal’ Projectile*, DEMOCRACY NOW (June 23, 2020), https://www.democracynow.org/2020/6/23/brandon_saenz_dallas_police.

³¹ *Fractured Skulls*, *supra* note 26.

to deploy projectiles indiscriminately into a crowd.³²

- In Los Angeles, California, C.J. Montano was shot in the face as he was left standing in a “no man’s land” between retreating protestors and an advancing police line.³³ The Los Angeles Police Department (LAPD) explicitly prohibits police from using projectiles against people who are passively resisting or disobeying. Projectiles can only be fired if “an officer reasonably believes that a suspect or subject is violently resisting arrest or poses an immediate threat of violence or physical harm.”³⁴ Additionally, projectiles “shall not be used to target the head, neck, face, eyes, or spine unless lethal force is authorized.”³⁵

In general, most police department policy guidelines on the use of rubber bullets follow the concept that officers should deploy the minimum amount of force necessary in any given situation. And while often the guidelines for the use of lethal force (e.g. firing a gun) are clear — although often at odds with international norms on use of force — the guidelines for the use of less-lethal weapons, which can have just as devastating an effect, are less straightforward.

V. RECOMMENDATIONS

Police response to protests and other mass assemblies should not involve violent displays of force. According to international legal standards, the use of force by law enforcement agents should be proportional in response and only when absolutely necessary and use of firearms or deadly force is only justified against imminent threat of serious bodily injury or death.³⁶ In addition to posing serious risks to people’s health and safety, according to the ACLU, the indiscriminate use of crowd control weapons almost by definition

“violate[s] [protestor rights] to due process and will seldom, if ever, constitute the least restrictive means available to regulate unlawful conduct in the context of a protest or mass assembly.”³⁷ This goes to the very heart of protecting First Amendment rights to freedom of peaceful assembly and of association. Police in a democratic society should not use violence to control the crowd or silence those they disagree with. Because of this, the use of rubber bullets as a crowd-control weapon should be banned in the context of mass assembly.³⁸ Instead, the most successful law enforcement approach to unlawful conduct at a mass assembly focuses on de-escalation, effective communication, and crowd management, not crowd control. Additionally, increased accountability measures and transparency within police departments are crucial to protecting public safety.

As people across the United States and the world have been protesting policing practices and are reimagining the role of police in society, now is the time to shed a critical spotlight on these issues and demand change on both the domestic and international levels. Last June, the UN Human Rights Council adopted resolution 43/1 after an historic urgent debate on racist police violence.³⁹ The resolution mandated the Office of the High Commissioner for Human Rights to examine police violence and structural racism as well as “government responses to anti-racism peaceful protests, including the alleged use of excessive force against protesters, bystanders and journalists.”⁴⁰ The

³² Denver, Colo., Police Dep’t Operations Manual, Use of Force Policy § 105.00 (2020).

³³ *Fractured Skulls*, *supra* note 26.

³⁴ Los Angeles, Cal., Police Dep’t Use of Force-Tactics Directive, Directive No. 6.3, 1 (July 2018).

³⁵ *Fractured Skulls*, *supra* note 26.

³⁶ Geneva Acad., *Use of Force in Law Enforcement and the Right to Life: The Role of the Human Rights Council*, Academy In-Brief No. 6, 6-9 (November 2016), https://www.geneva-academy.ch/joomlatools-files/docman-files/in-brief6_WEB.pdf; Basic Principles on the Use of Force, *supra* note 20, at principle 9, 13-14.

³⁷ Am. Civ. Liberties Union, *Interactive Dialogue with the UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association*, Statement, 44th Session of the UN Human Rights Council (July 10, 2020), <https://www.aclu.org/hearing-statement/aclu-statement-interactive-dialogue-un-special-rapporteur-rights-freedom-peaceful?redirect=hearing-statement/aclu-statement-interactive-dialogue-unsr-rights-freedom-peaceful-assembly-and>.

³⁸ A categorical ban on the use of rubber bullets, rather than just in mass assembly contexts, would potentially lead to worse health outcomes since a categorical ban may lead law enforcement to resort to even more lethal style of weapons, such as live rounds.

³⁹ Human Rights Council Res. 43/1, U.N. Doc. A/HRC/RES/43/1 (June 30, 2020). *See also* Sejal Parmar, *The Internationalisation of Black Lives Matter at the Human Rights Council*, EJIL: TALK! (June 26, 2020), <https://www.ejiltalk.org/the-internationalisation-of-black-lives-matter-at-the-human-rights-council/>.

⁴⁰ *Id.*

High Commissioner's report will be an opportunity to push UN Member States to adopt measures to ban the use of rubber bullets and other life-threatening crowd control weapons especially in the context of assemblies. The UN just published a call for input to inform the report which will be presented to the Council in June 2021.⁴¹

As this topic continues to gain momentum, activist groups such as the Irish group Relative For Justice have been reaching out to civil society groups in the United States like the ACLU to find new allies in the struggle against the use of rubber bullets. No one should have to risk their life to protest injustice. By continuing to allow the use of rubber bullets and other CCWs in mass assembly contexts, the United States is flagrantly violating fundamental freedoms in a democratic society. It is time to find meaningful accountability measures, regulate the use of CCWs, and protect protestor rights in the United States and around the world.

⁴¹ Implementation of Human Rights Council Resolution 43/1, OFF. HIGH COMM'R FOR HUM. RTS., <https://www.ohchr.org/EN/Issues/Racism/Pages/Implementation-HRC-Resolution-43-1.aspx>.