



October 20, 2020

Dear Governor,

We write in our capacity as the executive directors of Human Rights Watch, Center for Civilians in Conflict, Amnesty International-USA, Physicians for Human Rights, and Human Rights First, five independent international organizations that monitor and advocate for human rights and the protection of civilians in conflicts worldwide, including in the United States.

Our organizations are closely monitoring the situation in the United States leading up to the November 3 general election, including protests that may occur before, during and after the election. In responding to any such protests, we urge you to use only forces that have adequate training and preparation in mass-protest and crowd-control environments, including with respect to the authorities' obligations under international human rights law to protect the rights to peaceful assembly and free expression, and to avoid using excessive force.

Our concern is heightened in the event you consider deploying your National Guard forces, or if the federal government requests or requires you to do so.

The deployment of National Guard units for crowd control this summer raised serious human rights concerns, including at least one incident in which a National Guard member used lethal force, the involvement of National Guard forces in violations of the rights to peaceful assembly and free expression, the misuse of military tactics (including the aggressive misuse of a helicopter to intimidate and harass protesters) and numerous incidents of excessive use of force by Guard members as well as the law enforcement officials they were supporting.

In interviews with media, National Guard members reported feeling uncomfortable and ill-prepared in their role, and some expressed reservations about supporting local law enforcement officials after witnessing the use of excessive force by local police during demonstrations. Center for Civilians in Conflict (CIVIC) contacted representatives from 23 activated National Guard units and found that, of those who responded to CIVIC's requests, none had provided guidance to their members on how to report or otherwise address excessive use of force by law enforcement officials whom they were supporting, nor had authorities provided adequate guidance to the public on how best to report any concerns they may have with National Guard personnel.

In light of this recent history, we urge you to request a comprehensive assessment from your Adjutant General regarding the types of law enforcement missions for which your Guard forces are currently adequately trained and appropriately equipped. Based on this assessment, you should ensure that any gaps in training or equipment that negatively affect the Guard's ability to assist law-enforcement officials in policing assemblies in a right-respecting way, should such a contingency arise, are urgently addressed. We also urge you to issue clear written public guidance to your National Guard, emphasizing the importance of training Guards and ensuring they act with a view to protecting human rights and safeguarding human life, consistent with US and international standards.

While we recognize the complex and unique environment in which your forces may be called to operate, we urge you to ensure that your applicable regulations and accountability mechanisms, and the training and instructions you provide to your state's National Guard, adhere at a minimum to the following standards:

- **Enable and Protect Peaceful Assembly:** Emphasize authorities' obligation, including the National Guard's chain of command, under international law, to protect the right of peaceful assembly, including by preparing and adopting measures to enable—not deter or punish—peaceful assemblies and protecting demonstrators from violence directed at them by counter-protests or individuals. Presume that all assemblies will be non-violent, even in cases where there may be isolated incidents of violence, or where small groups of external actors—such as counter-protesters—may engage in violence.
- **Minimize Arrests and Use of Force in Responding to Peaceful Protests:** National Guard units, and law enforcement agencies in general, should avoid the use of force to disperse peaceful protests, regardless of whether they deem the protests unlawful. Even in the event of violence, force should be used only if necessary and proportionate to address a genuine threat, and only as a last resort. National Guard units deployed in support of law enforcement objectives should be trained in de-escalation and equipped with “less-lethal weapons,” for which they should be properly trained to operate safely and in accordance with international standards, which limit their use only to such situations in which they are a last resort to disperse unlawful assemblies that are violent or pose a significant risk to the safety others, and even then, only when necessary and in proportion to the threat. Certain “less lethal weapons” such as kinetic impact projectiles, including rubber bullets, are not appropriate for crowd-control purposes. National Guard members should not intervene aggressively and disperse a demonstration simply in response to the actions of a small number of participants. Assemblies are often diverse gatherings, and participants do not lose their individual rights simply because a small number of people are behaving violently. National Guard members should also receive specific training on engaging marginalized or at-risk populations. Because of the heightened risk of Covid-19 for detainees and jail staff, authorities should refrain from custodial arrests for misdemeanors and low-level felony offenses that do not involve the infliction or threat of infliction of serious bodily injury or a known likelihood of physical harm.
- **Facilitate the Reporting and Investigation of Misconduct:** State and National Guard authorities should make clear the duty of Guard members to report observed or suspected incidents of misconduct, harassment, and violations of law by Guard members or other forces, including local law enforcement, and provide clear instructions on how to report misconduct. They should also disseminate public guidance for civilians who wish to report misconduct or violations. To facilitate reporting, accountability, and transparent civilian-military relations, you should ensure that clear and visible insignia and badges are worn at all times.

We enclose a summary of the key obligations and guiding principles under international human rights law regarding the freedom of peaceful assembly and the use of force by officials acting in a law enforcement capacity. We would be pleased to discuss these recommendations with you or your staff. Please do not hesitate to reach out to Madeline de Figueiredo, Crisis and Conflict Associate at Human Rights Watch, at [defigum@hrw.org](mailto:defigum@hrw.org).

Sincerely,

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## International Legal Standards and Recommendations on Law Enforcement in the Context of Assemblies

### The Right to Peacefully Assemble

Both the United States Constitution and the International Covenant on Civil and Political Rights (ICCPR), to which the United States is a party, provide for the right to peaceful assembly.<sup>1</sup> Under international law, authorities are obligated to facilitate the exercise of this right, including by promoting “an enabling environment... and put[ting] in place a legal and institutional framework within which the right can be exercised effectively.”<sup>2</sup> Authorities also have an obligation to protect participants in peaceful demonstrations from possible violence directed at them by counter-protests or individuals.<sup>3</sup>

The burden to establish that a restriction on the right to peaceful assembly is warranted rests with the government.<sup>4</sup> Such restrictions are only permissible when they are necessary and proportionate “in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.”<sup>5</sup> Restrictions need to be provided for in law, may not impair the essence of the right, must be the least intrusive means to achieve the goal, and may not be discriminatory. Temporary disruptions, including to traffic, are not sufficient grounds to prevent or disperse an assembly.

Under international human rights law, authorities should presume assemblies to be peaceful.<sup>6</sup> Violence by authorities or outside actors, or isolated violence by some participants in a protest, should not lead to an otherwise peaceful assembly being declared unlawful.<sup>7</sup>

In the context of protests, where a restriction on assembly is necessary, authorities should first use the “least intrusive measures” available in response. They should limit arrests and detention as far as possible; arbitrary arrests themselves violate international human rights standards.<sup>8</sup>

Assemblies may only be dispersed in “exceptional cases” such as where “the assembly as such is no longer peaceful, or if there is clear evidence of an imminent threat of serious violence that cannot be reasonably addressed by more proportionate measures.”<sup>9</sup> In that event, officials acting in a law enforcement capacity should first give protesters ample opportunity to disperse, with clear instructions and open pathways.

### Use of Force

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<sup>1</sup> International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> (accessed October 19, 2020). The US ratified the ICCPR in 1992. The ICCPR applies to federal, state, and local governments. ICCPR, art. 50.

<sup>2</sup> UN Human Rights Committee, General Comment 37, Right of Peaceful Assembly, CCPR/C/GC/37, para. 24, <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsrdB0H1I5979OVGGB%2bWPAXj3%2bho0P51A AHSqSubYW2%2fRxcFiagfuwxyuvi40wJfdPLI9%2fcedeDWBX%2fij2tgqDXgdjqx8wTKKbloySyDPtsMO> (accessed October 19, 2020). The United Nations Human Rights Committee is the institution charged with issuing authoritative interpretations of the ICCPR.

<sup>3</sup> *Ibid.*, para. 24.

<sup>4</sup> *Ibid.*, para. 36.

<sup>5</sup> ICCPR, art. 21. See also UN Human Rights Committee, General Comment 37, Right of Peaceful Assembly, CCPR/C/GC/37, paras. 36 et seq.

<sup>6</sup> *Ibid.*, para. 17.

<sup>7</sup> *Ibid.*, paras. 17-18.

<sup>8</sup> ICCPR, art. 9.

<sup>9</sup> UN HRC, General Comment 37, para. 85.

Use of force is understood as using physical means to influence behavior or damage property, including by the use of “less-lethal” weapons such as batons, electroshock weapons, handheld and launched chemical irritants, water cannons, kinetic impact projectiles, and lethal weapons.

Under the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Personnel, officials acting in a law enforcement capacity should make use of non-violent means before resorting to force and avoid the use of force to disperse non-violent protests, regardless of whether the authorities deem the protests illegal.<sup>10</sup> Any use of force by officials acting in a law enforcement capacity should be preceded by clear warnings and should only be used as a last resort. When using force, officials acting in a law enforcement capacity should exercise restraint and act proportionately, taking into account both the seriousness of the threat and the legitimate objective to be achieved.<sup>11</sup>

In the context of crowd-control, officials acting in a law enforcement capacity should plan for and prioritize the use and deployment of non-violent means of control and protection before resorting to force. Heavy displays of less-lethal and lethal equipment by officials acting in a law enforcement capacity may escalate tensions during peaceful assemblies and lead to violence. Officials acting in a law enforcement capacity should therefore “delay direct contact or engagement with members of the public if that would make the need to use force, or the potential for violent outcomes, less likely, and if the delay causes no danger to the individual posing the threat or to others.”<sup>12</sup>

### **Less-Lethal Force**

International norms on the use of “less-lethal weapons” for crowd control specify these should only be used as a means of last resort to disperse unlawful assemblies that are violent or pose a significant risk to the safety others, where necessary and in proportion to the threat.

Tear gas projectiles should be fired at a high angle and not directly at individuals or in closed spaces, where the lack of adequate ventilation increases the risk of asphyxiation.<sup>13</sup> Skip-firing projectiles off the ground carries an unacceptable risk of indiscriminate injury.<sup>14</sup> Pepper spray and other handheld chemical irritants should not be used in cases of passive resistance.<sup>15</sup>

In dispersing violent assemblies, firearms firing less-lethal rounds may only be used when other less-harmful means have proven ineffective and should only be used to the minimum extent necessary. Based on United Nations guidance on the use of “less-lethal weapons,” kinetic impact projectiles like rubber bullets should “generally only be used 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.”<sup>16</sup>

Officials acting in a law enforcement capacity should not use less-lethal projectiles that are inaccurate: “To meet international standards, impact projectiles should be capable of striking an individual to within a 10-centimetre diameter of the targeted point when fired from the designated range.”<sup>17</sup>

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<sup>10</sup> United Nations, Basic Principles on the Use of Force and Firearms by Law Enforcement, September 1990, arts. 4-5, <https://www.un.org/ruleoflaw/files/BASICP~3.PDF> (accessed October 19, 2020).

<sup>11</sup> *Ibid.*

<sup>12</sup> United Nations, Guidance on Less-Lethal Weapons in Law Enforcement, para. 2.6, [https://www.ohchr.org/Documents/HRBodies/CCPR/LLW\\_Guidance.pdf](https://www.ohchr.org/Documents/HRBodies/CCPR/LLW_Guidance.pdf) (accessed October 19, 2020).

<sup>13</sup> *Ibid.*, paras 7.3.2, 7.3.6, 7.3.7.

<sup>14</sup> *Ibid.*, para 7.5.4

<sup>15</sup> *Ibid.*, para 7.2.7

<sup>16</sup> *Ibid.*, para 7.5.2.

<sup>17</sup> *Ibid.*, para 7.5.4.

The guidance also states: “Multiple projectiles fired at the same time are inaccurate and, in general, their use cannot comply with the principles of necessity and proportionality.”<sup>18</sup>

### **Lethal Force**

Officials acting in a law enforcement capacity may only make lethal use of firearms when strictly unavoidable in order to protect life.<sup>19</sup> Live ammunition should not be used in crowd-control contexts unless required to protect life or prevent serious injury. The federal Standard Regulations on the Use of Force (SRUF), which allow for lethal force to be used in defense of critical infrastructure or against fleeing suspects, are too permissive.

All state regulations on the use of force should abide by international standards on the use of lethal force, limiting their use to instances where it is strictly unavoidable in order to protect life, and these should be clearly communicated to National Guard members prior to any demonstration. The National Guards’ chains of command should ensure that independent and transparent criminal investigations can be and are launched against National Guard members alleged to have used excessive force.

Preventing the excessive use of force during protests is a crucial part of the international obligations the United States helped shape throughout the world and to which it needs to adhere. State officials have a responsibility to ensure that National Guard under their jurisdiction and control are trained and operate in accordance with these obligations.

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<sup>18</sup> *Ibid.*, para 7.5.6

<sup>19</sup> United Nations, Basic Principles on the Use of Force and Firearms by Law Enforcement, September 1990, art. 9, <https://www.un.org/ruleoflaw/files/BASICP~3.PDF> (accessed October 19, 2020).