

“HANDS UP, DON’T SHOOT”: THE USE OF DEADLY FORCE BY
POLICE AGAINST RACIAL MINORITIES IN THE UNITED STATES

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ABSTRACT

Recently, the U.S. has attracted negative attention because of the prevalence of the use of deadly force by police against Black Americans. The public—both national and international—have criticized the U.S.’s culture of police impunity, claiming that it is in violation of various international human rights treaties. This Comment analyzes the U.S.’s international obligations under the ICCPR, CERD, and CAT as they pertain to police use of lethal force. It examines whether U.S. domestic laws are in compliance with those international standards, and whether the U.S. is complicit in human rights violations at the hands of its law enforcement officers because of use of force policies as practiced. This Comment examines the fatal shooting of Michael Brown by Officer Darren Wilson as one example. Ultimately, the Comment concludes that the U.S. is in violation of international law for illegal police use of deadly force against racial minorities. It suggests two solutions through which to bring the U.S. back into compliance with its obligations—implementation of recently updated international documents into law enforcement policies and practices and creation of an international investigative body assigned specifically to the U.S.

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I. INTRODUCTION

In 2015, the United States came up on Universal Periodic Review (UPR).¹ Participating nations on the Human Rights Council repeatedly raised the prevalence of the use of lethal force, particularly against racial minorities, by municipal police departments.² A separate submission to the United Nations Working Group of Experts on People of African Descent, entitled *Excessive Use of Force by Police Against Black Americans in the United States*, reported similar concerns.³ It reported that between January and December 2015, police officers killed over 1100 people in the U.S. Black Americans represented a grossly disproportionate number of those victims.⁴ The report noted that, “[s]tatistically, Black Americans are significantly more likely to die at the hands of police than white, Latino, and Asian Americans.”⁵ Yet, U.S. law enforcement officers are rarely held accountable for their actions. Investigations and prosecutions for the illegal use of lethal force by police are the exception.⁶ On the rare occasions when officers do face criminal charges, they are often acquitted.⁷ This pattern of police violence and discrimination against minorities—a cycle of impunity and lack of accountability—led to intense criticism of the U.S. during its UPR.⁸

Because the U.S. has ratified various international treaties, it must uphold the legal obligations embodied in those documents. The treaties include the International Covenant of Civil and Political Rights,⁹ the International Convention on the Elimination of All Forms of Racial

¹ Human Rights Council, Nat’l Rep. submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, U.N. Doc. A/HRC/WG.6/22/USA/1, Feb. 15, 2015; see also Universal Periodic Review, U.S. DEP’T OF STATE, <https://www.state.gov/j/drl/upr/> (“The Universal Periodic Review (UPR) is a process through which the human rights records of the United Nations’ 193 Member States are reviewed and assessed. This review, conducted through the UN Human Rights Council (HRC), is based upon human rights obligations and commitments expressed in . . . [various] human rights instruments to which the State is party[.] . . . [T]he United States [is] scheduled for its second review in May 2015.”).

² M. David & Jackson Marciana, *US Called Out for Police Brutality and Human Rights Violations by UN Review*, COUNTER CURRENT NEWS (Sept. 29, 2015, 7:53 AM), <http://countercurrentnews.info/2015/09/us-police-and-human-rights-violations-by-un-review/>.

³ ROBERT F. KENNEDY HUMAN RIGHTS ET AL., EXCESSIVE USE OF FORCE BY THE POLICE AGAINST BLACK AMERICANS (2015).

⁴ *Id.* at 2.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ David & Marciana, *supra* note 2.

⁹ International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR].

Discrimination,¹⁰ and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.¹¹ This then begs the following question: Do these instances of police use of lethal force against racial minorities in the U.S. constitute human rights violations, placing the U.S. in violation of its international obligations under the ICCPR, CERD, and CAT?

The answer to this is complex. First, the U.S.’s version of upholding the aforementioned treaties must account for the fact that the relationship between its state and federal governments exists within the framework of federalism. However, federalism—the decentralization of government—is not a concept unique to the U.S. and the challenge of overseeing local governance does not excuse the nation from its international obligations.¹² Second, the U.S., like many other countries, has limited its ratifications of the above-cited international treaties through the inclusion of reservations, understandings, and declarations (RUDs).¹³ Yet, while altering the U.S.’s obligations, the RUDs neither completely lift them nor absolve the U.S. of the responsibility to ensure that remedies are available for violations. Third, even if the U.S. were willing to change its behavior, the international arena faced deficiencies of its own. Procedures for investigating illegal police use of force had not been adapted to reflect recent technological and scientific advancements.¹⁴ In 2016, however, the U.N. appointed two Working Groups and an Advisory Panel to revise the Model Protocol for a Legal Investigation of Extra-Legal, Arbitrary and Summary Executions.¹⁵

This Comment considers whether the United States is in violation of its

¹⁰ International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, S. Treaty Doc. 95-18, 660 U.N.T.S. 195 [hereinafter CERD].

¹¹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 [hereinafter CAT].

¹² Vienna Convention on the Law of Treaties art. 19(c), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter The Vienna Convention] (“A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: . . . the reservation is incompatible with the object and purpose of the treaty.”).

¹³ See ALLYSON COLLINS, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES 113 (Cynthia Brown ed., 1998), available from <https://www.hrw.org/legacy/reports98/police/uspo38.htm> at 246. The U.S.’s principal RUD discussed in this Comment is that the treaties are not self-executing.

¹⁴ See, e.g., Office of the U.N. High Comm’r for Human Rights (OHCHR), *The United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions: The Minnesota Protocol on the Investigation of Potentially Unlawful Death*, U.N. Doc. E/ST/CSDHA/.12 (1991) [hereinafter Minnesota Protocol I].

¹⁵ Office of the U.N. High Comm’r for Human Rights (OHCHR), *The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016): The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, U.N. Doc. HR/PUB/17/4 (2017) [hereinafter Minnesota Protocol II].

treaty obligations under the ICCPR, CERD, and CAT. Then, this Comment proposes a two-part solution to the U.S.'s likely non-compliance with international law. First, the Minnesota Protocol II and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials should be held as the baseline standard, the minimum guarantee that all law enforcement policies must reflect. Thus, an analysis of all law enforcement policies regarding use of lethal force must be conducted, starting with the major U.S. metropolitan areas, where the problem is most prevalent.¹⁶ If the law enforcement policies do not meet these standards, these international procedures must be immediately incorporated into their policies. The Department of Justice (DOJ) Civil Rights Division, which, until recently, had been spearheading the investigations into these incidents, should also analyze their policies against the international procedures and incorporate the procedures if their policies are not up to the minimum standard. Second, an independent investigative body should be appointed under the supervision of the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions to conduct both the analysis of policies and uninvestigated fatal shootings of racial minorities by police in the U.S.

This Comment hopes to advance a discussion that has only recently garnered national and international attention beyond the tightknit human rights community. Section II will analyze the cultural backdrop against which this controversial topic arises. Section III will outline the existing international legal regimes that govern police use of lethal force. Section IV will apply this framework to U.S. domestic law. Section V will offer a case study, applying the legal frameworks outlined in the prior two sections. Section VI will offer the above-outlined, two-part solution as a way to bring the U.S. back into compliance with its international obligations.

II. BACKGROUND AND EMPIRICAL SUPPORT

On August 9, 2014, Officer Darren Wilson shot and killed Michael Brown.¹⁷ Over Officer Wilson's radio transmitter came a description of two individuals involved in a convenience store theft just as Officer Wilson encountered Brown.¹⁸ Brown matched the description of one of the suspects, so Officer Wilson approached Brown in his police car.¹⁹ He intended to exit

¹⁶ David Klinger, et al., *Race, Crime, and the Micro-Ecology of Deadly Force*, 15 *Criminology & Pub. Pol'y* 193, 211 (2016).

¹⁷ U.S. DEPT. OF JUSTICE, DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON 4 (2015) [hereinafter DOJ Report on Shooting of Michael Brown].

¹⁸ *Id.* at 6.

¹⁹ *Id.*

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the vehicle and upon swinging open the door, the door hit Brown’s body, preventing Officer Wilson from getting out.²⁰ Witnesses state that Brown reached into Officer Wilson’s car, punching and grabbing him.²¹ Officer Wilson responded by withdrawing his service firearm, stating that “he could not access less lethal weapons while seated inside the SUV.”²² Officer Wilson discharged his weapon from inside the vehicle.²³ Brown turned and ran from the car and Officer Wilson chased after him.²⁴ But Brown turned back toward Officer Wilson, who, at that moment, opened fire.²⁵ Officer Wilson fired a total of ten shots on the street and less than three minutes into their initial encounter, Michael Brown was dead.²⁶

On October 20, 2014, Officer Jason Van Dyke shot and killed Laquan McDonald.²⁷ At 9:47 p.m., a Chicago Police Department dispatcher radioed for response to where a suspect, McDonald, was being held after breaking into cars and stealing radios.²⁸ By 9:53 p.m., CPD officers, not including Officer Van Dyke, had responded to the scene.²⁹ In fact, Officer Van Dyke only encountered McDonald after 9:56 p.m.³⁰ Less than a minute after arriving at the scene, Officer Van Dyke opened fire on McDonald, who, though armed with a three-inch blade, was walking away from officers when the first shot was fired.³¹ It took Officer Van Dyke less than thirty seconds to empty a sixteen-round magazine into McDonald, killing him.³²

On July 6, 2016, Officer Jeronimo Yanez shot and killed Philando Castile.³³ Just four days earlier, two black males had robbed a convenience store and Officer Yanez had been one of the responding officers.³⁴ When he noticed Castile driving his car days after the robbery, he radioed in to another police officer stating that Castile looked like one of the suspects

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 7.

²⁵ *Id.*

²⁶ *Id.*

²⁷ People’s Factual Proffer in Support of Setting Bond at 2, *People of the State of the Illinois v. Jason Van Dyke*, No. 15-127823 (Ill. Cir. Ct. 2015).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 3.

³² *Id.*

³³ Compl. at 3, *State of Minnesota v. Jeronimo Yanez*, 2017 Minn. LEXIS 284 (D. Minn. 2016) (No. 0620373879).

³⁴ *Id.*

“because of his wide set nose.”³⁵ Officer Yanez pulled Castile over under the pretense of a routine traffic stop.³⁶ Castile’s girlfriend, Diamond Reynolds, and Reynold’s 4-year-old daughter were both in the car. When Officer Yanez approached the car, Castile informed him that he had a firearm on him.³⁷ Approximately one minute after the initial stop, Officer Yanez shot Castile seven times, killing him.³⁸

The stories of these three men, Michael Brown, Laquan McDonald, and Philando Castile, represent a number of similar incidents that did not make headline news in the U.S.³⁹ Two common facts emerge from these three stories: 1) the short time between the officers first meeting their victims and firing their initial shot, and 2) the number of shots fired. It is against this backdrop of racial tension between the police and the communities they are dispatched to serve that this Comment reaches its central question: Is the U.S. violating international law due to illegitimate instances of police use of deadly force against its citizens of color?

Professor Roland Fryer, of Harvard University, would probably say no.⁴⁰ Using data compiled from the New York City’s Stop, Question and Frisk Program⁴¹ and the Police-Public Contact Survey (PPCS),⁴² Professor Fryer “[found] no detectable racial differences” in officer-involved shootings.⁴³ However, Professor Fryer found that a “demonstrable difference [exists] in the use of *non-lethal* force by law enforcement based on the race of the ‘suspect.’”⁴⁴ This remained true even when accounting for a wide set of variables, such as demographics (e.g., age and gender) and encounter characteristics (e.g., whether individuals supplied identification or whether the interaction occurred in a high- or low-crime area).⁴⁵ Yet, when ratcheted up to use of lethal force, specifically officer-involved shootings, Professor

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ See MAPPING POLICE VIOLENCE, <https://mappingpoliceviolence.org> (last visited Jan. 15, 2018).

⁴⁰ See generally Roland G. Fryer, Jr., *An Empirical Analysis of Racial Differences in Police Use of Force* (Nat’l Bureau of Econ. Research, Working Paper 22399, 2016).

⁴¹ The New York City Stop, Question and Frisk Program is a practice of the New York City Police Department in which police stop and question a pedestrian, then allowing them to frisk the pedestrian for weapons and contraband. *Id.* at 2.

⁴² The Police-Public Contact Survey is a triennial national survey taken from a civilian perspective and containing descriptions of interactions with police, including use of force. *Id.* at 3.

⁴³ *Id.* at 5.

⁴⁴ *Id.* at 3 (“In raw data, blacks and Hispanics are more than fifty percent more likely to have an interaction with police which involves any use of force.”).

⁴⁵ *Id.*

Fryer’s empirical analysis detected no racial difference between victims.⁴⁶ The study argues that this is likely due to the higher costs police officers face when the incident is an officer-involved shooting relative to instances of non-lethal use of force. This suggests that officers conduct a quick mental cost-benefit analysis of potential consequences they will face for the varying degrees of force from which they may choose. It further suggests that the answer to above-posed question is, in fact, no.⁴⁷

In a responsive study to Professor Fryer’s findings, Dr. James W. Buehler, from Drexel University, also analyzed the racial and ethnic disparities in the use of lethal force by police in the U.S.⁴⁸ Dr. Buehler came to a radically different conclusion than Professor Fryer: Black and Hispanic American males were 2.8 and 1.7 times more likely, respectively, to die at

⁴⁶ *Id.* at 39.

⁴⁷ Professor Fryer’s study, however, also cited a number of potential methodological issues with its empirical analysis. First, the “primary obstacle to the study of police use of force” is the “lack of readily available data.” *Id.* at 2. Both the Stop and Frisk data and the PPCS data are flawed. The Stop and Frisk program is representative only of New York City and the data gives information only from the perspective of the officer. *Id.* The PPCS, though a national survey, reflects only the civilian perspective, contains no data on officer-involved shootings, and the civilian reporters are found through the pool of people who participate in the National Crime Victimization Survey (NCVS), see U.S. Dep’t of Justice, *Data Collection: Police-Public Contact Survey (PPCS)*, BUREAU OF JUSTICE STATISTICS, <https://www.bjs.gov/index.cfm?ty=dcdetail&iid=251#Methodology> (last visited Nov. 30, 2017). Given the crossover in participants between the PPCS and NCVS, the reporting concerns that exist about the NCVS carry over into the PPCS data, and transitively, into the data used by Professor Fryer. Second, all of the data sets analyzed were provided by “a select group of police departments,” see Fryer, *supra* note 40, at 5. Fryer notes that it is possible that these departments only volunteered the data because “they are either enlightened or were not concerned about what the analysis would reveal.” *Id.* Other organizations have also encountered the difficulty of gathering data on police use of force from the police departments themselves. For example, the University of Chicago Law School’s International Human Rights Clinic is currently working with Amnesty International, USA, on a project involving “police department use of force policies and data on the number of shots fired and people killed by police in the 20 largest U.S. cities.” See International Human Rights Clinic, *IHR Clinic Students Submit Comments to DOJ on National Use of Force Database*, UNIVERSITY OF CHICAGO (Dec. 9, 2016), <https://ihrclinic.uchicago.edu/news/ihr-clinic-students-submit-comments-doj-national-use-force-database> (last visited Jan. 16, 2017). Professor Claudia Flores, director of the Int’l Human Rights Clinic, has explained that students charged with requesting the data from the police departments have faced considerable resistance from some departments, while other departments have immediately volunteered the information, perhaps for the same reason underlying the potential methodological flaw in Professor Fryer’s study. Third, there is a concern about biased reporting; that is, police officers may present contextual factors (e.g., whether the victim was lunging at the officer or walking away from him at the time of the incident) in a biased manner, making it difficult to corroborate the veracity of the account without something like video footage. See Fryer, *supra* note 40, at 5.

⁴⁸ James W. Buehler, *Racial/Ethnic Disparities in the Use of Lethal Force by U.S. Police, 2010-2014*, 104 Am. J. Pub. Health 295 (2017).

the hands of police than their white counterparts.⁴⁹ Dr. Buehler relied on statistics from the Center for Disease Control and Prevention's Wide-Ranging Online Data for Epidemiological Research (WONDER), looking specifically at deaths from "legal intervention" by police.⁵⁰ The study took a population-level approach and gathered its input data from an objective federal agency, rather than the police departments or victims involved in the incidents.⁵¹ Finally, the result was calculated based on death certificates from 2010 to 2014 identifying "legal intervention" as the cause of death,⁵² and using the indicated race/ethnicity to determine how many Black, Hispanic, and white male Americans were killed by police during that range.⁵³ Given the use of a more objective and comprehensive set of data, Dr. Buehler's study appears to be more reliable. However, it should be noted that the study's conclusion is not specific to officer-involved shootings, making it slightly more difficult to compare against Dr. Fryer's study.

As mentioned, despite their best efforts, both Professor Fryer's and Dr. Buehler's studies, and really every study of police use of force in the U.S., are inherently flawed due to lack of available and reliable data. The importance of this cannot be understated—"a primary obstacle to the study of police use of force [is] the lack of readily available data."⁵⁴ Currently, there is no nationwide database that tracks police use-of-force data.⁵⁵

⁴⁹ *Id.* at 295-96.

⁵⁰ Legal intervention, for the purposes of the study, included "injuries inflicted by the police or other law-enforcing agents, including military on duty, in the course of arresting or attempting to arrest lawbreakers, suppressing disturbances, maintaining order, and other legal action" by way of firearm discharge, explosives, gas, blunt objects, sharp objects, other specified means, or unspecified means. *Id.* at 295 (quoting World Health Organization, *External Causes of Morbidity and Mortality*, INTERNATIONAL STATISTICAL CLASSIFICATION OF DISEASES AND RELATED HEALTH PROBLEMS (2014), <http://apps.who.int/classifications/icd10/browse/2014/en#!Y35>). It specifically excluded deaths involving legal executions. *Id.* The race and ethnicity of the deceased were determined based on the data recorded on the death certificates, as logged in the WONDER database. *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Fryer, *supra* note 40, at 2.

⁵⁵ Sari Horwitz & Mark Berman, *Justice Department Takes Steps to Create National Use-of-Force Database*, *The Washington Post* (Oct. 13, 2016), https://www.washingtonpost.com/world/national-security/justice-department-takes-steps-to-create-national-use-of-force-database/2016/10/13/6d0ea7ac-9166-11e6-9c52-0b10449e33c4_story.html?utm_term=.f5cc7118f335. However, it should be noted that, despite the DOJ's announced intention to create precisely this type of database, the authors of this article predict that this may be put on hold for at least the next four years given the incoming administration, *Id.*

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III. GOVERNING INTERNATIONAL LAW

Discriminatory police violence is not a new phenomenon in the U.S.⁵⁶ Yet, the perception, nationally and internationally, is that little progress has been made. With swelling distrust for police accountability, this Comment argues that international pressure on the U.S. may lead to concrete changes to resolve the issue.

This Section examines several of the foundational international treaties that intersect with the issue of racially discriminatory police use of lethal force against minorities in the U.S. Specifically, this Section analyzes the UDHR, the ICCPR, CERD, and CAT.

A. *Universal Declaration of Human Rights*

The Universal Declaration of Human Rights (UDHR)⁵⁷ is generally agreed to be the foundation of international human rights law.⁵⁸ It was adopted in 1948, after World War II, and though it is not legally binding itself, most of its principles are legally binding after having been written into other international treaties. However, “[s]ome even argue that its provisions have the status of customary international law.”⁵⁹

Article 3 of the UDHR explicitly gives everyone the “right to life, liberty and security of person.”⁶⁰ The right to life and security of person is central to the discussion of human rights, so much so that it was codified in Article 6 of the ICCPR.⁶¹

Article 5 of the UDHR states, “No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.”⁶² This was considered to be so important that a separate treaty was devoted solely to the right to be free from torture—CAT.⁶³

Article 7 establishes that all people are equal before the law and “are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this

⁵⁶ ROBERT F. KENNEDY HUMAN RIGHTS ET AL., *supra* note 3, at 4..

⁵⁷ G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

⁵⁸ United Nations, *Human Rights Law*, <http://www.un.org/en/sections/universal-declaration/human-rights-law/>.

⁵⁹ Hurst Hannum, *The Status and Future of the Customary International Law of Human Rights: The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT’L & COMP. L. 287, 289 (1995).

⁶⁰ UDHR, *supra* note 57, art. 3.

⁶¹ ICCPR, *supra* note 9, art. 6.

⁶² UDHR, *supra* note 57, art. 5.

⁶³ CAT, *supra* note 11.

Declaration and against any incitement to such discrimination.”⁶⁴ Like the right to be free from torture, the right to be free from discrimination and to be recognized as an equal person under the law was considered a crucial right deserving of its own treaty. Article 7 was expanded and codified as CERD.⁶⁵

Though discussed in detail in Section IV, the U.S. Constitution contains the rights preserved in Articles 3, 5, and 7 of the UDHR. However, this alone does not mean that the U.S. is in compliance with its international obligations. The Constitution is nothing more than a piece of paper if the rights therein are not being safeguarded on the ground. The conduct of law enforcement officials directly reflects upon the state which they serve and it is the state that answers to the international community for their actors’ transgressions. Thus, whether the U.S. is in violation of the human rights outlined in the UDHR must be carefully analyzed under the legally binding international treaties that the U.S. has ratified, including the ICCPR, CERD, and CAT.

B. *International Covenant on Civil and Political Rights*

Two treaties were drafted to codify the rights embodied in the UDHR,⁶⁶ one of which was the ICCPR.⁶⁷ President Carter signed the ICCPR in 1977, but the U.S. did not ratify it until 1992.⁶⁸ It was not until nearly two decades after its entry into force that one of the key players in the drafting of the ICCPR, the U.S., finally bound itself to it. However, the U.S. qualified its ratification of this Covenant with various RUDs.⁶⁹

For this Comment, the most important RUD put in place by the U.S. announced that Articles 1 through 27 of the Covenant would be unenforceable in U.S. courts until and unless they were expressly approved of and implemented by Congress.⁷⁰ In international law, this is known as a non-self-executing right.⁷¹ Including this type of declaration is a staple move

⁶⁴ UDHR, *supra* note 57, art. 7.

⁶⁵ *See generally* CERD, *supra* note 10.

⁶⁶ Beth Simmons, *Civil Rights in International Law: Compliance with the Aspects of the “International Bill of Rights”*, 16 *IND. J. GLOBAL LEGAL STUD.* 437, 438 (2009).

⁶⁷ ICCPR, *supra* note 9, pmb1.

⁶⁸ 138 Cong. Rec. S4781-01 (Apr. 2, 1992). *See also* JIMMY CARTER, U.S. Finally Ratifies Human Rights Covenant, CARTER CENTER (June 28, 1992), <https://www.cartercenter.org/news/documents/doc1369.html>

⁶⁹ *Id.*

⁷⁰ *Id.* at S4784. The United States includes in its declarations an assertion that the treaty is not self-executing; this means that the treaty cannot be enforced without Congress first enacting a law that provides for the means to enforce the treaty.

⁷¹ *See* Curtis A. Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 *AM. J. INT’L L.* 540, 540 (2008).

by the U.S. Moreover, at the time of ratification, the executive branch often specifically states that no implementing legislation is necessary. In other words, the U.S. claims that its laws already adequately protect the rights embodied in the treaty, even when this may not necessarily be true.⁷² However, at least on paper, the U.S. has assured the international community that the ICCPR has been incorporated into its domestic law.⁷³

Despite the U.S.'s RUDs, Section 2 of Article 4 of the ICCPR classifies certain rights included in the Covenant as "non-derogable."⁷⁴ A non-derogable right is one that "even in the worst period, when there is a real need for recourse to the state of emergency, i.e. when the State authorities will be entitled to disregard the generally accepted human rights, there are some rights which can never be infringed upon."⁷⁵ Some non-derogable rights may be "reserved," though this is only true if the reservation does not offend the object and purpose of the right.⁷⁶ The non-derogable right pertinent to this Comment, one which may not be reserved because of its status as a peremptory norm (*jus cogens*), is enshrined in Article 6.

Article 6 protects the cornerstone of rights, from which all other rights flow—the individual's inherent right to life.⁷⁷ It requires that "this right shall be protected by law. No one shall be arbitrarily deprived of his life."⁷⁸ The first step in determining whether a State Party has violated the right to life is to determine whether that state has laws governing the bounds of police use of force on the books. The second step closely follows: determining whether those laws, if any, sufficiently protect the individual's right to life consistent with international standards. Under international standards, "law enforcement officers should only use force when there are no other means that are likely to achieve the legitimate objective and that the amount of force must be proportionate to the seriousness of the harm it is aiming to prevent, . . . minimiz[ing] damage and injury."⁷⁹ An individual's right to life

⁷² *Shielded from Justice: Police Brutality and Accountability in the United States*, HUMAN RIGHTS WATCH (JULY 1, 1998), <https://www.hrw.org/report/1998/07/01/shielded-justice/police-brutality-and-accountability-united-states>.

⁷³ See U. S. DEPARTMENT OF STATE, FOURTH PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE UNITED NATIONS COMMITTEE ON HUMAN RIGHTS CONCERNING THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS para. 5 (2011), <https://www.state.gov/j/drl/rls/179781.htm>.

⁷⁴ ICCPR, *supra* note 9, art. 4, para. 2.

⁷⁵ Claude Klein, Book Review, EUR. J. INT'L L. 134, 136 (1993).

⁷⁶ 138 Cong. Rec. S4781-01 (Apr. 2, 1992).

⁷⁷ ICCPR, *supra* note 9, art. 6, para. 1.

⁷⁸ *Id.*

⁷⁹ AMNESTY INTERNATIONAL, DEADLY FORCE: POLICE USE OF LETHAL FORCE IN THE UNITED STATES (2015), https://www.amnestyusa.org/wp-content/uploads/2017/04/aiusa_deadlyforcereportjune2015.pdf.

should be safeguarded in all instances, with the only exception being immediate necessity to protect and preserve the life of another, either the officer's or a member of the public.⁸⁰

Additionally, the right to life requires a system of accountability be in place for when this right is transgressed. The duty to investigate is an essential part of this.⁸¹ It is triggered at the moment "the State knows or should have known of any potentially unlawful death, including where reasonable allegations of a potentially unlawful death are made."⁸² It includes all cases where the State is "alleged or suspected" to have caused a death, "for example, where law enforcement officers used force that may have contributed to the death."⁸³ The duty to investigate is satisfied only if the investigation is: prompt, effective and thorough, independent and impartial, and transparent.⁸⁴ Overall, the ICCPR's right to life is clearly implicated in the cases examined by this Comment given that the issue analyzed is police use of *deadly* force.

C. *International Convention on the Elimination of All Forms of Racial Discrimination*

The genesis of CERD came from a UN sub-commission's examination of data relating to manifestations of anti-Semitism and other forms of racial prejudice and religious intolerance.⁸⁵ The process began in 1961 and the Convention was adopted by the General Assembly a short four years later.⁸⁶ Though the U.S. signed CERD in 1966, it only ratified it in 1994.⁸⁷

⁸⁰ An issue here is that the statement often put out by the officers (or their representatives) is that they believed it was immediately necessary to preserve their life or the lives of others. This belief may stem from unperceived implicit biases, which training may be able to adequately bring to the surface and then appropriately address. Such a solution is discussed in Section VI.

⁸¹ Minnesota Protocol II, *supra* note 15, II(A)(8)(c) at 4. ("Where an investigation reveals evidence that a death was caused unlawfully, the state must ensure that identified perpetrators are prosecuted and, where appropriate, punished through a judicial process. A failure to respect the duty to investigate breaches the right to life.")

⁸² *Id.*, II(C)(15) at 5.

⁸³ *Id.*, II(C)(16).

⁸⁴ *Id.*, II(D)(1) at 7; *Id.*, at 7 n.59 (citing Human Rights Committee, General Comment No. 31, *op. cit.*, § 15; UN Fact-Finding Mission on the Gaza Conflict, § 1814; UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials [hereinafter Basic Principles on the Use of Force and Firearms], Principles 22 and 23).

⁸⁵ G.A. Res. 1510 (XV) (Dec. 12, 1960). *See also Audiovisual Library of International Law*, UNITED NATIONS <http://www.un.org/law/avl/> (last visited Jan. 18, 2018).

⁸⁶ G.A. Res. 2106 (XX) (Dec. 21, 1965).

⁸⁷ *Convention on the Elimination of All Forms of Racial Discrimination*, U.S. HUMAN RIGHTS NETWORK, <https://www.ushrnetwork.org/our-work/issues/cerd> (last visited Feb. 11, 2018).

Unsurprisingly, the U.S. curtailed its ratification of CERD with the same non-self-executing declaration as was used for the ICCPR, the biggest difference being that the U.S. declared that CERD, in its entirety, was non-self-executing.⁸⁸

Article 1 of the Convention defines the term “racial discrimination” as:

[A]ny distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment, or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural, or any other field of public life.⁸⁹

As seen in this definition, the power of CERD is that, even if there is no discriminatory intent, discriminatory effect is still a violation of the treaty.⁹⁰

The enforcement mechanisms of the Convention lie in Articles 2(1) and 5(b). As state actors are not brought to answer for their violations in the international community, the actor’s conduct reflects upon the member state, which must either hold the actor accountable at a domestic level or the member state must answer to the international community for failing to uphold its obligations. Thus, outlining how member states must hold their actors accountable, Article 2(1) mandates that: “State Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races.”⁹¹ From there, it lists three different positions State Parties must adopt in order to comply with Article 2(1).

First, State Parties must avoid any affirmative action or practice of racial discrimination against “persons, groups of persons or institutions.”⁹² It must also ensure that all public authorities and public institutions (national and local) conform to this obligation.⁹³ Second, State Parties must avoid sponsoring, defending, or supporting racial discrimination by any person or

⁸⁸ UNITED NATIONS TREATY COLLECTION, *Chapter IV: Human Rights, Section 2: International Convention on the Elimination of All Forms of Racial Discrimination*, <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsgno=IV-2&chapter=4&lang=en#EndDec> (last visited Feb. 11, 2018).

⁸⁹ CERD, *supra* note 10, art. 1, ¶ 1.

⁹⁰ The discriminatory effect prong can be seen in the “effect of nullifying or impairing the recognition, enjoyment, or exercise, on an equal footing, of human rights” language included in Article 1(1).

⁹¹ CERD, *supra* note 10, at art. 2, ¶ 1.

⁹² *Id.* at art. 2, ¶ 1(a).

⁹³ *Id.*

organization.⁹⁴ A failure by a member state to meet its obligations under the first and third parts of Article 2(1) would likely constitute sponsorship and support of racial discrimination. Third, each State Party has an affirmative duty “to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists[.]”⁹⁵

Article 5 ties the duties of Article 2 to the right to life (and therein included, the right to security of the person) as guaranteed by the ICCPR. It mandates that “State Parties undertake to prohibit and to eliminate racial discrimination in all its forms” and to guarantee the right of everyone to “security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.”⁹⁶ This article is directly linked to the analysis of the ICCPR’s right to life, simply tying in the element of racial discrimination.

D. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment

Like with CERD, the U.S. signed CAT before finally ratifying it in 1994.⁹⁷ Like with the ICCPR and CERD, the U.S. declared Articles 1 through 16 of CAT to be non-self-executing.⁹⁸ This directly impacts Articles 1 and 4, the two most important articles that protect racial minorities against abusive and extra-legal police use of lethal force.

Article 1 gives a comprehensive definition of torture:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as . . . punishing him for an act he or a third person has committed or is suspected of having committed, . . . or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by . . . a public official[.]⁹⁹

Article 1 expressly carves out an exception for “pain or suffering arising only from, inherent in or incidental to lawful sanctions.”¹⁰⁰ Additionally, the U.S. restricted its ratification of Article 1 with an

⁹⁴ *Id.* at art. 2, ¶ 1(b).

⁹⁵ *Id.* at art. 2, ¶ 1(c).

⁹⁶ *Id.* at art. 5(b).

⁹⁷ Congressional Research Service, U.N. Convention Against Torture (CAT): Overview and Application to Interrogation Techniques, at 4 (Jan. 26, 2009), available at <https://fas.org/sgp/crs/intel/RL32438.pdf>.

⁹⁸ Human Rights Library, *supra* note 68.

⁹⁹ CAT, *supra* note 11, at art. 1, ¶ 1.

¹⁰⁰ *Id.*

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understanding that “sanctions” would include judicially imposed sanctions and other enforcement actions authorized by U.S. law or by judicial interpretation of such law.¹⁰¹ It further “understood” Article 1 to mean “noncompliance with applicable legal procedural standards does not *per se* constitute torture.”¹⁰² Article 1 would be meaningless without Article 4, which imposes an affirmative obligation on State Parties to ensure that all acts of torture, attempts to commit torture, and complicity or participation in torture are criminal offenses under the penal code of the nation.¹⁰³

When thinking of torture, what most often comes to mind is heightened forms of interrogation, such as waterboarding. It is not often thought of in conjunction with police use of lethal force against a victim. However, given the definition of torture cited above, this Comment offers two theories under which an officer who unjustifiably uses lethal force, and a State that tacitly sanctions such conduct, is in violation of CAT.

Under the first theory, the officer has undoubtedly subjected the victim to an act of severe physical pain and suffering (for example, a gunshot wound resulting in death) and, in cases where the victim is the suspect of some crime, the pain was inflicted for the purpose of punishing him for an act the victim is suspected of committing. The argument against it constituting torture is that the *purpose* of the shooting was not to punish, but to apprehend. The perpetrator, or the State, may also invoke the Article 1 exception, claiming that the use of lethal force constituted “lawful sanctions.” The success of this argument depends on the definition of “sanctions.” If sanctions include only those that are judicially imposed, then the killing constitutes an extrajudicial execution. And, of course, there is a question of whether the use of lethal force was actually justifiable. The taking of life is only justified when necessary to prevent the taking of another life, either the officer’s or someone in the public.

The second theory under which a case could arise is “an act of severe [physical] pain or suffering” for any reason based on discrimination of any kind, when inflicted by or at the instigation of a public official. There is no question in these cases that the elements of physical suffering and infliction by public official are satisfied. Whether it is based on discrimination, specifically racial discrimination, is often hotly contested. Any case going forward on this theory would be wise to also claim violation of CERD, relying on that analysis to satisfy the discrimination element here.

Unlike with the ICCPR and CERD, the connection between CAT and police use of lethal force against minorities is not as obvious. However, given the expansive definition of torture in international law, and two

¹⁰¹ Human Rights Library, *supra* note 68.

¹⁰² *Id.*

¹⁰³ CAT, *supra* note 11, art. 4, ¶ 1.

approaches to it explored herein, the relationship between the two does exist. Because of this, the U.S. may be more vulnerable to claims that it is violating international law before of its police use of deadly force against minorities than it had originally anticipated. This is further explored in Section IV.

IV. THE EXISTING DOMESTIC LAW FRAMEWORK

In examining the issue of police use of lethal force against minorities in the U.S. through an international lens, there are two ways for the U.S. to be in violation of international law. First, its laws do not meet international standards. Second, its laws meet international standards, but are not being enforced or employed in practice. This section will examine U.S.'s laws that form the basis of protection for the international human rights that the U.S. is legally bound to uphold. Furthermore, it will examine whether the laws, if in line with international obligations on paper, are being adequately applied on the ground.

A. *The U.S. Constitution*

The U.S. was once thought of as a global leader in human rights, and its constitution “a source of inspiration and ideas.”¹⁰⁴ Included in the U.S. Constitution are certain inalienable rights afforded to every U.S. citizen. There are three ways in which the U.S. Constitution may violate international law: 1) the text does not provide sufficient guarantees of the rights which the U.S. is obligated to uphold under international law (that is, effectively there is no law on the books); 2) the case law interpreting the text has restricted the rights to the point that they are no longer sufficiently protective (that is, the law on the books has been interpreted too narrowly); or 3) the text and the case law are sufficiently protective, but the rights are not being protected in practice (that is, the law on the books is not being enforced on the ground). Most applicable to this Comment are the Fourth,¹⁰⁵ Fifth,¹⁰⁶ and Fourteenth Amendments¹⁰⁷ of the U.S. Constitution. Unless otherwise noted herein, this Comment assumes that the text and case law of these constitutional amendments, when taken together, meet the U.S.'s international obligations under the ICCPR, CERD, and CAT.¹⁰⁸

¹⁰⁴ Heinz Klug, *Model and Anti-Model: The United States Constitution and the “Rise of World Constitutionalism”*, 2000 WISC. L. REV. 597, 598 (2000).

¹⁰⁵ U.S. Const. amend. IV.

¹⁰⁶ *Id.* at V.

¹⁰⁷ *Id.* at XIV.

¹⁰⁸ This topic—whether the text and case law of the U.S. Constitution is compliant with international legal obligations—is too expansive to be covered in this Comment. However, this

The Fourteenth Amendment protects against the abridgment of privileges or immunities of U.S. citizens, affords due process of law prior to deprivation of life, liberty or property, and guarantees equal protection of U.S. citizens under the laws.¹⁰⁹ However, these rights are not without limits. First, the Privileges and Immunities Clause has been significantly limited by case law, leaving victims (and their families) with one less recourse through which to bring a claim against law enforcement in a domestic arena.¹¹⁰ Second, unless the police department’s policy is facially discriminatory, in order to prove discrimination under the Fourteenth Amendment, discriminatory effect is not itself sufficient.¹¹¹ That is, a law or policy that appears to apply equally to all people on its face must have been enacted with the intention that it would actually subtly discriminate against a particular group of people in order to qualify as a violation of the Equal Protection Clause of the Fourteenth Amendment. This standard creates an incredibly high bar for the plaintiff to meet, one more stringent than international law requires, which allows cases to proceed on the basis of discriminatory effect alone.¹¹² Overall, this means that pure discriminatory effect cases, which otherwise pass international muster, are weeded out under the domestic law test. This provides support to a claim that the U.S. is violating CERD.¹¹³

B. Related Federal Statute

The federal criminal statute that enforces the constitutional limits on the use of force by law enforcement officers provides, in relevant part: “Whoever, under color of any law, . . . willfully subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected

Commentator believes a full treatment of this question would be a useful contribution to international law scholarship since the Constitution was drafted well before the development of the body of international law. This is an area ripe for future scholarly treatment.

¹⁰⁹ U.S. Const. amend. XIV.

¹¹⁰ For further discussion of the Privileges and Immunities Clause, see Timothy Sandefur, *Privileges, Immunities, and Substantive Due Process*, 5 NYU J. L. & LIBERTY 115, 115 (2010) (“The [Slaughter-House] decision entombed, if it did not actually kill, the Privileges and Immunities Clause, rendering it for all intents and purposes void.”).

¹¹¹ See *Washington v. Davis*, 426 U.S. 229, 239 (1976) (holding that, in order to prove a violation of the Equal Protection Clause under the Fourteenth Amendment, a facially neutral law requires a showing of intentional discrimination, not just discriminatory impact).

¹¹² CERD, *supra* note 10, art. 1, ¶ 1.

¹¹³ In its 1994 report, the U.S. asserted that the Fifth, Thirteenth, Fourteenth, and Fifteenth Amendments provide initial protections against racial discrimination. It further asserted that the right to be free from racial discrimination is sufficiently safeguarded in conjunction with the Civil Rights Act, the Voting Rights Act, and the Fair Housing Act. See Senate Report with U.S. Reservations, Understandings, and Declarations, Section VI, at 6-7 (Jun. 2, 1994).

by the Constitution or laws of the United States [shall be guilty of a crime].”¹¹⁴ This statute criminalizes state-sanctioned abuse that would only be otherwise remediable through civil process.¹¹⁵ The elements that the prosecution must prove beyond a reasonable doubt are:

- (i) the victim was an inhabitant of a state when the alleged violation occurred;¹¹⁶
- (ii) the defendant acted under color of any law;¹¹⁷
- (iii) the defendant’s conduct deprived the victim of some right secured or protected by the U.S. Constitution;¹¹⁸ and
- (iv) the defendant acted willfully (that is, with specific intent to violate the protected constitutional right).¹¹⁹

For the U.S. to meet its international obligations, having 18 U.S.C. § 242 on the books is better than having no such law. However, the statute offers considerable protection to the person being prosecuted. For example, the final element, “willfulness,” is quite a high threshold to meet. It requires “proof that the officer acted with the purpose ‘to deprive a person of a right which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them.’”¹²⁰ Does this require the officer to be thinking “in constitutional terms” when deciding whether to use force? No, but the officer “must know what he is doing is wrong and decide to do it anyway.”¹²¹ That is, mistake, panic, misperception, or even poor judgment by a police officer exempt from prosecution under this statute.¹²²

¹¹⁴ 18 U.S.C. § 242 (1970).

¹¹⁵ *Id.*

¹¹⁶ Alison M. Smith, *Overview of Selected Federal Criminal Civil Rights Statutes*, at 5, available at <https://www.fas.org/spp/crs/misc/R43830.pdf>.

¹¹⁷ *Id.* at 5 & n. 6 (“Acts under ‘color of any law’ include actions within or beyond the bounds of lawful authority”, citing *Screws v. United States*, 325 U.S. 91, 111 (1945) (stating that “[a]cts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it.”)).

¹¹⁸ *Id.* at 5 & n. 7 (“Includes the right not to be deprived of life or liberty without due process of law, namely the right to be free from physical ... assaults”) (citing *United States v. Lanier*, 520 U.S. 259 (1997)).

¹¹⁹ *Id.* at 5 & n. 8 (“Examples where courts have found specific intent include *United States v. Ramsey*, 336 F.2d 512 (4th Cir. 1964) ... and *Apodaca v. United States*, 188 F.2d 932 (10th Cir. 1951).”).

¹²⁰ DOJ Report on Shooting of Michael Brown, *supra* note 17, at 79 (citing *United States v. Lanier*, 520 U.S. 259, 267 (1997); *Screws v. United States*, 325 U.S. 91 (1945)).

¹²¹ *Id.* (citing *Screws*, 520 U.S. at 106-107).

¹²² *Id.* (citing *United States v. McClean*, 528 F.2d 1250, 1255 (2d. Cir. 1976) (finding that inadvertence or mistake negates willfulness for purposes of 18 U.S.C. § 242)).

A Section 242 analysis of police use of lethal force would likely be approached as follows. First, the victims must be inhabitants of a state. The statute does not require the victim to be a U.S. citizen or even a lawful permanent resident, but simply an *inhabitant* of a state. Second, the defendant—in this case, the police officer—must act under color of law when he invokes state authority (police department policy, state law, status as an law enforcement officer) when perpetrating the conduct for which he is now on trial (killing the victim). Third, the police officer must allegedly have deprived the victim of some constitutional right.¹²³ This could be the right to life, the right to security of person, the right to due process, or the right to be seen as and treated equally under the law. Fourth, and finally, the police officer must have acted willfully in depriving the victim of his constitutional right(s). This is probably the most difficult element to prove. Given the difficulty of overcoming the willfulness element, officers are not being held accountable for the shootings that may violate international law, even though they may be in compliance with domestic law. Therefore, as applied, Section 242 may not actually be sufficiently protective of the rights the U.S. is obligated to uphold under the ICCPR, CERD, and CAT. Additionally, Section 242 is not often charged,¹²⁴ another possible violation of those treaties.

There do not appear to be any state laws that parallel Section 242. Amnesty International, in its *Deadly Force* report, outlined laws from each of the fifty states governing use of lethal force.¹²⁵ What was not included in it was a discussion on the laws outlining the criminal penalties for police officers who act outside the bounds of permissible use of lethal force. This is because such laws do not exist. If a police officer’s use of deadly force is determined to be unjustified, the case, if pursued at all, is prosecuted under some version of the state’s homicide law. This dis-incentivizes prosecutors to charge these cases because they must, then, prove two cases rather than just one—first that the law enforcement officer’s use of lethal force was

¹²³ Criminal liability under Section 242 may only be imposed if in the light of pre-existing law the unlawfulness of the conduct under the Constitution is] apparent—i.e., it is a “clearly established” right; that the offender is given “fair warning” of the unconstitutional nature of the conduct. *See United States v. Lanier*, 520 U.S. 259, 271-72 (1997).

¹²⁴ 18 U.S.C. § 242 was originally enacted in 1866. *See United States v. Price*, 383 U.S. 787, 791 (1966). Based on the Commentator’s Westlaw search, since its enactment, the statute has been cited in fewer than 2,000 judicial opinions. This is compared to 42 U.S.C. § 1983, a civil remedy statute often invoked by victims in cases of police use of excessive force. Section 1983 was enacted in 1871 and has been cited in over 10,000 judicial opinions, again based on this Commentator’s Westlaw search.

¹²⁵ Amnesty International, *Deadly Force: Police Use of Lethal Force in the United States*, at 34-102 (Jun. 18, 2015), available at <http://www.amnestyusa.org/research/reports/deadly-force-police-use-of-lethal-force-in-the-united-states>.

unjustified, and second they must prove the homicide charge.¹²⁶ This is one significant factor contributing to the cycle of police impunity in cases of unjustified police use of lethal force.

C. U.S. Supreme Court Precedent

The seminal case outlining the bounds of permissible use of force by law enforcement is *Tennessee v. Garner*.¹²⁷ At approximately 10:45 p.m. on October 3, 1974, two Memphis police officers were dispatched to answer a “proowler inside call.”¹²⁸ Upon arriving on the scene, Officer Hymon “saw someone run across the backyard” of the house to which they were called.¹²⁹ The officer chased the “fleeing suspect,” a 15-year-old, 5’4”, approximately 110-pound eighth grader named Eric Garner. Garner stopped at a fence at the edge of the yard.¹³⁰ Officer Hymon could see no weapon and “was ‘reasonably sure’ that Garner was unarmed.”¹³¹ At the standoff, the officer called for Garner stop, but according to Officer Hymon’s account, Garner began to climb over the fence in order to continue his escape.¹³² To prevent Garner from getting away, Officer Hymon fatally shot Garner in the back of the head.¹³³

The U.S. Supreme Court then faced the difficult decision of determining the constitutionality of the use of deadly force to prevent the escape of an apparently unarmed suspected felon.¹³⁴ Ultimately, the Supreme Court held that “the use of deadly force is [not] a sufficiently productive means of accomplishing [various goals] to justify the killing of nonviolent suspects.”¹³⁵ The holding still stands: “The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape.”¹³⁶ This holding seems very much in line with the U.S.’s

¹²⁶ See Hennepin County Attorney, Legal Standard – Police Use of Deadly Force, <http://www.hennepinattorney.org/~media/Attorney/NEWS/2016/jamar-clark-case/speech-legal-standards-explanation-3-30-16.pdf?la=en> (last visited Jan. 15, 2017).

¹²⁷ See *Tennessee v. Garner*, 105 S.Ct. 1694, 1697 (1985).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 1697 & n. 2.

¹³¹ *Id.* at 1697.

¹³² *Id.*

¹³³ *Id.* at 1697 & n. 3 (“When asked at trial why he fired, Hymon stated: ‘Well, first of all it was apparent to me . . . that he was going to get away.’ . . . [A]nd that Garner, being younger and more energetic, could have outrun him.”).

¹³⁴ *Id.* at 1697.

¹³⁵ *Id.* at 1700.

¹³⁶ *Id.* at 1701.

international obligations under the ICCPR and CAT.¹³⁷

Based on the holding of *Garner*, police are not justified in killing a suspected fleeing felon. It should follow, then, that they are also not justified in killing a suspected felon remaining still in front of them, a suspected fleeing misdemeanor, a suspected misdemeanor standing before them, or an individual who is not a suspect of any kind, regardless of whether they are fleeing.¹³⁸ These permutations align with the ICCPR’s right to life, especially the standard calling for proportionality, minimizing injury, and balancing competing objectives. Additionally, limits on the constitutional use of deadly force in connection with the suspect of a crime would limit the U.S.’s exposure to a claim under the first CAT theory proposed here.

Despite the rule issued in *Garner*, the stories of Black Americans that have lost their lives at the hands of police indicates that the law is not being adequately enforced in practice.¹³⁹ When Officer Wilson met Michael Brown, Brown was suspected of robbing a convenience store, and when he killed him, he was an unarmed fleeing felon at most. So how did the DOJ determine there was no prosecutive merit in his case? They determined that Officer Wilson did not act “willfully” under Section 242. Whether this would hold up under international standards is a separate question answered in Section V.

V. CASE STUDY

A. *Michael Brown*

1. No prosecutive merit was found under U.S. federal law.

The Criminal Section of the DOJ Civil Rights Division investigated the Michael Brown shooting in order to determine whether the shooting violated federal law.¹⁴⁰ The DOJ ultimately determined that the case “lack[ed]

¹³⁷ CERD may also be implicated here, depending on the races of Garner and Officer Hymon; however, this Commentator has chosen to leave out this component in the analysis because of the Supreme Court’s explicit omission of the races of the parties involved in its opinion. Cf. Justin Driver, *Recognizing Race*, 12 COLUM. L. REV. 404 (2012) (discussing when, why, and how judges choose to discuss race in their judicial opinions).

¹³⁸ *Garner*, 105 S.Ct. at 1702 (“Most American jurisdictions also imposed a flat prohibition against the use of deadly force to stop a fleeing misdemeanor[.]”). The premise asserted is true only so far as other variables are held constant. For example, other variables include whether the suspect is armed, what type of weapon the suspect is carrying, and whether there is more than one suspect.

¹³⁹ See Section II, *supra*.

¹⁴⁰ DOJ Report on Shooting of Michael Brown, *supra* note 17, at 4.

prosecutive merit and should be closed.”¹⁴¹ The government concluded that Officer Wilson’s actions did not constitute prosecutable violations under 18 U.S.C. § 242, as his use of deadly force was not “objectively unreasonable,” as defined by the U.S. Supreme Court.¹⁴²

As explained in Section IV, a conviction under 18 U.S.C. § 242 requires proof beyond a reasonable doubt of four elements.¹⁴³ Michael Brown was an inhabitant of Missouri, thereby establishing the first element. And, in satisfaction of the second element, “[t]here is no dispute that Wilson, who was on duty and working as a patrol officer for the [Ferguson Police Department], acted under color of law when he shot Brown, or that the shots resulted in Brown’s death.”¹⁴⁴ The determination whether to prosecute ultimately came down to the final two elements: whether the defendant’s conduct deprived the victim of some right secured or protected by the Constitution and whether the defendant acted willfully.¹⁴⁵

Whether Officer Wilson’s conduct deprived Brown of a constitutional right depended on his custodial status at the time that he was shot.¹⁴⁶ Because Officer Wilson had attempted to “stop and possibly arrest Brown,” Brown’s rights were analyzed under the Fourth Amendment.¹⁴⁷ This meant that Officer Wilson *might* face criminal prosecution, but only if his use of deadly force was “objectively **un**reasonable” under the facts and circumstances known to him at the time that he decided to use physical force.¹⁴⁸ Moreover, each instance of deadly force used must be found to not have been objectively unreasonable in order to avoid violation of the law. In this case, that means that each shot that Officer Wilson fired must have been deemed not objectively unreasonable.¹⁴⁹ The DOJ found that each shot that Officer Wilson fired at Brown was objectively reasonable under Fourth Amendment precedent, and thus not a violation of § 242.¹⁵⁰

Officer Wilson’s willfulness was also in question, though the above finding would already mean that the DOJ would find no prosecutive merit in the case.¹⁵¹ Officer Wilson’s account was that he intended to shoot Michael Brown only in response to a perceived deadly threat.¹⁵² In order to convict

¹⁴¹ *Id.* at 86.

¹⁴² *Id.*

¹⁴³ *See* Section IV(B), *supra*.

¹⁴⁴ DOJ Report on Shooting of Michael Brown, *supra* note 17, at 79.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 80.

¹⁵⁰ *Id.* at 80-85.

¹⁵¹ *Id.* at 79.

¹⁵² *Id.* at 86.

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Officer Wilson, DOJ would have had to disprove his stated intent, which they had determined was consistent with the evidence (physical and testimonial) in the case.¹⁵³ Therefore, because the DOJ found that “[Officer] Wilson did not act with the requisite criminal intent,” he could not be prosecuted under Section 242.¹⁵⁴ Overall, this meant that, to the DOJ, the case of the killing of Michael Brown should be closed. The outcome would not be the same at the international level.

2. The findings under domestic law are inconsistent with international standards.

A case against the U.S. on behalf of Michael Brown, such as in the Inter-American Court of Human Rights upon referral by the Inter-American Commission on Human Rights, could be brought under the ICCPR, CERD, and CAT. First, pertaining to the ICCPR, in conjunction with the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials¹⁵⁵ and Minnesota Protocol II,¹⁵⁶ the U.S. would be alleged to have violated Article 6, the right to life. Second, under CERD, the U.S. would be accused of violating Article 2(1), failing to condemn racial discrimination and undertaking to pursue all appropriate means to eliminate racial discrimination in all its forms. The U.S. would also be in violation of CERD’s Article 5: failure to guarantee everyone, without distinction to race, equality before the law. Third, and finally, the case would claim that the U.S. violated Article 1 of CAT, by failing to uphold Brown’s right to be free from torture.

Bolstering the claim that the U.S. is in violation the above-mentioned international treaties are the results of the DOJ’s investigation of the Ferguson Police Department (FPD), the employer of Officer Darren Wilson (defendant).¹⁵⁷ The FPD investigation paralleled the investigation of the shooting of Michael Brown.¹⁵⁸ The DOJ’s investigation revealed “a pattern or practice of unlawful conduct within the Ferguson Police Department that violates the First, Fourth, and Fourteenth Amendments to the United States

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Basic Principles on the Use of Force and Firearms, *supra* note 84.

¹⁵⁶ Minnesota Protocol II, *supra* note 81.

¹⁵⁷ Department of Justice, *Investigation of the Ferguson Police Department*, at 1 (Mar. 4, 2015) [hereinafter DOJ Report on FPD].

¹⁵⁸ The investigation into the Ferguson Police Department was initiated on September 4, 2014, just under a month after the investigation into the Michael Brown shooting began. Both DOJ reports were released on March 4, 2015. *See id.* at 1; *see also* DOJ Report on Shooting of Michael Brown, at 1.

Constitution,” in part due to racial discrimination.¹⁵⁹ Given the assumption in Section IV, that the text of the U.S. Constitution meets international standards under the treaties analyzed herein, a finding that the FPD is in contravention of the Constitution is equivalent to finding it in violation of international law. Therefore, as the U.S. is responsible for the conduct of its state agencies, the U.S. would also be in violation of the same international law.

The most obvious argument that Brown’s right to life was violated was that his interaction with a state actor, Officer Wilson, resulted in his death. Both the state of Missouri and the federal government investigated Officer Wilson’s decision to use deadly force—though how impartial the investigation was, at least at the state level, is unclear. Additionally, there is a saying in the U.S. that indictments are so easy for prosecutors to get that “any good prosecutor can get a grand jury to indict a ham sandwich.” Yet, somehow the prosecutors in Missouri were unable to indict Officer Wilson. Given the ease with which prosecutors get indictments, it is most likely that either the prosecutors did not adequately pursue the charges against Officer Wilson or the laws governing use of force in Missouri are incredibly relaxed such that almost any “justification” given is sufficient. Either of these versions would still fail to uphold the individual’s right to life under the ICCPR. It signifies that either there was a failure in the system of accountability (the prosecutors did not adequately pursue the charges) or the laws are not sufficiently protective of the rights guaranteed (if the laws governing use of force are broad enough to cover nearly all conduct by police officers). Regardless, both result in erosion of the right to life which the U.S. must preserve and protect.

Assuming the latter theory to be true, the international standard that exists requires that *proportionate* force be used and only when there are no other means that are likely to achieve the legitimate objective.¹⁶⁰ Officer Wilson claimed that when Brown turned to face him again once the officer was out of his SUV, he felt the need to protect himself lest Brown charge him. Brown was unarmed, but Officer Wilson chose to shoot him in the head anyways. The officer’s actions here are clearly not proportionate to the risk of harm when Officer Wilson could probably have shot Brown in another part of his body, incapacitating him. Nor is it proportionate to have fired ten bullets when fewer would likely have achieved the same end.

Assuming the former theory about the prosecution’s incentives to be true, there was never a chance of holding Officer Wilson accountable because of the interdependent relationship between the Ferguson prosecutors and FPD. Plus, the investigation of the shooting conducted would have been

¹⁵⁹ DOJ Report on FPD, *supra* note 157, at 1.

¹⁶⁰ Amnesty International, *Deadly Force*, *supra* note 79, at 5.

by FPD which had a glaring conflict of interest—either implicate their fellow officer, betraying him and reflecting poorly on the entire department, or poorly investigate the shooting, undermining the department’s credibility and impartiality. This would be another ICCPR violation—this time of the duty to investigate.

As it pertains to CERD, the DOJ determined that FPD’s practices “reflect and exacerbate racial bias, including racial stereotypes.”¹⁶¹ Moreover, the DOJ found that “Ferguson’s own data establish clear racial disparities that adversely impact African Americans.”¹⁶² As discussed in Section III, proof of discriminatory effect would be sufficient to show a violation of Article 1 of CERD.¹⁶³ However, the DOJ went on to say that, “[t]he evidence shows that discriminatory intent is part of the reason for these disparities.”¹⁶⁴ A finding of discriminatory intent, though not needed to prove a violation under CERD, simply strengthens the case that the U.S. has failed in its international obligations, especially in the case of Michael Brown.

Moreover, the fact that the DOJ only investigated the FPD after the Brown shooting highlights two other failings: 1) the failure to “pursue all appropriate means and without delay” to eliminate racial discrimination (Article 2(1)); and 2) the failure to guarantee equality before the law (Article 5). First, depending on how long the FPD was in violation of the Constitution, there is a relatively good case that the U.S. did not act “without delay,” especially if no significant changes have been made since the report was published in early 2015. Second, the finding that the FPD practices racial discrimination is a *per se* violation of Article 5, for which the U.S. could be made to answer.

If the discrimination argument under CERD is successful, then proving the violation of CAT becomes rather straightforward. Officer Wilson inflicted severe physical pain—death—on Brown when he killed him and this conduct was based on racial discrimination. Because Officer Wilson is undoubtedly a public official, as he was acting in the capacity of a law enforcement officer, all of the elements of the definition of torture are satisfied.¹⁶⁵ Of course, the U.S., on behalf of Officer Wilson, would invoke the “lawful sanction” exception, but, given the international community’s

¹⁶¹ DOJ Report on FPD, *supra* note 157, at 2.

¹⁶² *Id.* at 4-5 (“Data collected by the Ferguson Police Department from 2012 to 2014 shows that African Americans account for 85% of vehicle stops, 90% of citations, and 93% of arrests made by FPD officers, despite comprising only 67% of Ferguson’s population. . . . Nearly 90% of documented force used by FPD officers was used against African Americans.”).

¹⁶³ See Section III(C), *supra*.

¹⁶⁴ DOJ Report on FPD, *supra* note 157, at 2.

¹⁶⁵ See Section III(D), *supra*.

skepticism and concern as to the U.S.'s track record on police use of deadly force against minorities, among many other reasons, the U.S. is likely to be found in violation of Article 1 of CAT.

If the argument under CERD is unsuccessful, then proof of a CAT violation would have to proceed under the other of the two theories outlined in Section III.¹⁶⁶ Officer Wilson has already said that his purpose for shooting Brown was not to punish or to willfully violate his constitutional rights, but rather for his safety and for the safety of the public. The DOJ found this near impossible to refute, and this is the more difficult of the two theories to prove because it seems to contain an element of mens rea. However, whether it is as difficult to prove as the DOJ suggested may not necessarily be true, especially as, at the international level, there is no need to prove it beyond a reasonable doubt. Therefore, the U.S. could still be held accountable for the death of Michael Brown, despite the U.S.'s inability to punish the actual perpetrator at home.

The death of Michael Brown was a tragedy. But consider the following: without the killing of Michael Brown, the DOJ may never have felt compelled by public outrage to investigate FPD, allowing the racial discrimination to continue indefinitely. This does raise the question of whether the DOJ—or another independent, (international) investigative body—should be conducting systematic reviews of other police departments and their policies, not just those to which officer-involved shootings draw attention.

VI. A TWO-PART SOLUTION

A. *Determining Whether the U.S. is in Violation of International Law*

This Section will examine the ways in which the U.S. is currently non-compliant with the ICCPR, CERD, and CAT.

1. The U.S. is in violation of the ICCPR.

The U.S. has failed to uphold the right to life, thereby violating the ICCPR, Article 6. First, the U.S.'s laws are not being adequately enforced in practice. The policies governing law enforcement's use of force are primarily determined at the state level and there is little federal review of department policies unless there is a complaint lodged.¹⁶⁷ Additionally, while there is at least one federal statute on which victims can rely to bring

¹⁶⁶ *Id.*

¹⁶⁷ Simone Weichselbaum, *The Problems with Policing the Police*, Time, available at <http://time.com/police-shootings-justice-department-civil-rights-investigations/> (last visited Jan. 15, 2017).

claims for illegal, state-sanctioned use of force, the elements are difficult to prove (giving incredible deference to the state actor). Moreover, prosecutors do not bring charges under this statute very often.¹⁶⁸ And cases like Michael Brown further highlight that the U.S.’s threshold for necessity and proportionality in the use of deadly force is incongruent with the ones set out in international law.

Second, the duty to investigate is not sufficiently upheld in the U.S. because investigations lack impartiality and transparency.¹⁶⁹ Prosecutors cannot effectively prosecute law enforcement officers for illegal use of lethal force without first conducting an investigation. However, this investigation is typically done by the police department implicated in the case.¹⁷⁰ If no investigation is conducted—or if a biased investigation is conducted—this is a violation of the victim’s right to life, even if the use of force was originally warranted.¹⁷¹

Third, there is a rampant culture of police impunity in the U.S., in part because of a lack of sufficient laws under which to prosecute the officers involved.¹⁷² The fact that the states do not have laws that mirror § 242 is a potential violation of the U.S.’s international obligations.¹⁷³ As previously explained, the decentralization of government does not absolve the U.S. of its legal responsibilities; rather, it requires that both the states and the federal governments be in compliance with international law or the U.S. can be held responsible internationally. Because of this failure at the state level, victims like Alton Sterling, killed only a week before Philando Castile, and families of the deceased may never see the perpetrators scrutinized under the lens of

¹⁶⁸ See Section IV(B), *supra*.

¹⁶⁹ For example, the video of the Laquan McDonald shooting was released over a year after his fatal shooting. It was only released after a lawsuit was filed against the Chicago Police Department for repeatedly denying requests for the video, rightfully producible under the Freedom of Information Act (FOIA). See Nausheen Husein, *Laquan McDonald timeline: The shooting, the video, and the fallout*, CHICAGO TRIBUNE (Sept. 12, 2016), <http://www.chicagotribune.com/news/laquanmcdonald/ct-graphics-laquan-mcdonald-officers-fired-timeline-htmlstory.html>.

¹⁷⁰ Ryan J. Reilly, *Here’s What Happens When You Complain to Cops About Cops*, THE HUFFINGTON POST (Oct. 13, 2015), http://www.huffingtonpost.com/entry/internal-affairs-police-misconduct_us_5613ea2fe4b022a4ce5f87ce.

¹⁷¹ See Section VI(B)(2), *infra*.

¹⁷² The culture of impunity discussed in this Comment is limited to criminal prosecutions only. Though helpful, civil suits result only in financial remuneration, which is not equivalent to the impact of a criminal conviction: stigmatization, the long-lasting impact of a criminal conviction, and the possibility of incarceration. Additionally, in order to even reach a police officer in a civil suit, the plaintiff must first demonstrate that qualified immunity does not insulate the officer from liability.

¹⁷³ See Section IV(B), *supra*.

the criminal justice system, let alone convicted.¹⁷⁴

2. The U.S. is in violation of CERD.

In the U.S., there is evidence that police officers make decisions to use lethal force along “racially discriminatory lines.” This raises a claim against the U.S. under CERD.¹⁷⁵ Disparate treatment of Black Americans by law enforcement, though perhaps unintentional, has the effect of nullifying the equal enjoyment of their most basic human rights, namely the right to life.¹⁷⁶

The Fourteenth Amendment is seen as the U.S.’s safeguard against racial discrimination.¹⁷⁷ However, by requiring that proof of discrimination under facially neutral laws can only be demonstrated by both discriminatory effect and intent, the U.S. has imposed a higher burden than is required under international law.¹⁷⁸ This alone should be enough to put the U.S. in violation of CERD Article 1. However, the U.S. is also in violation of CERD Articles 2(1) and 5.

Article 2(1)(a) would likely require the U.S. to retrain officers to

¹⁷⁴ Alton Sterling was fatally shot by police on July 5, 2016, in Baton Rouge, Louisiana. His death prompted the DOJ to initiate a civil rights investigation. However, no report has been released, whether it will continue under President Trump’s administration is unknown, and no charges have been filed at the local level, at least as of January 21, 2017. *See* Richard Fausset, et al, *Alton Sterling Shooting in Baton Rouge Prompts Justice Dept. Investigation*, *The New York Times* (Jul. 6, 2016), <https://www.nytimes.com/2016/07/06/us/alton-sterling-baton-rouge-shooting.html>.

¹⁷⁵ This is not only reflected in the races of the deceased, but in the amount of de-escalation techniques employed prior to using lethal force. For example, an armed white suspect may be given greater opportunity to surrender his firearm before officers use lethal force, contrasted to a black suspect who is fatally shot immediately upon officers arriving on the scene. Compare *Dash-Cam Video Released Showing Laquan McDonald’s Fatal Shooting*, NBC Chicago (Nov. 24, 2015) (“Alvarez said Van Dyke was at the scene for less than 30 seconds before he started shooting, and opened fire six seconds after he got out of his car.”), available at <http://www.nbcchicago.com/news/local/Police-Release-Disturbing-Video-of-Officer-Fatally-Shooting-Chicago-Teen-352231921.html>, with Eric Lach, *Video Captures MI Police Struggling to Respect Gun-Toting Ranter’s Open Carry Rights*, Talking Points Memo (Jun. 16, 2014) (covering a case in which an armed white man open carrying an assault rifle engaged with police in a forty-five minute standoff, and at one point even pointed the rifle at police, but was successfully apprehended without any shots fired and was returned his rifle within 48 hours of release from custody), available at <http://talkingpointsmemo.com/livewire/joseph-houseman-police-standoff>.

¹⁷⁶ Despite finding no racial difference in police use of lethal force, Professor Fryer’s study has already affirmatively answered the question of whether Americans receive different treatment by law enforcement on the basis of race. *See* Section II *supra*.

¹⁷⁷ U.S. Const. amend. XIV, *supra* note 107.

¹⁷⁸ Compare CERD, *supra* note 10, art. 1, ¶ 1, with *Washington v. Davis*, 426 U.S. at 239 (holding that, in order to prove a violation of the Equal Protection Clause under the Fourteenth Amendment, a facially neutral law requires a showing of intentional discrimination, not just discriminatory impact).

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employ de-escalation techniques equally across racial lines and to identify potential implicit biases of officers. The U.S. would also have to impartially investigate and prosecute the officers involved in suspect fatal shootings of minorities. Thus far, it has failed in these regards. Article 2(1)(b) condemns explicit support of racially discriminatory law enforcement tactics. Yet, the culture of impunity and biased investigations gives the perception that the U.S. protects its law enforcement officials more rigorously than it protects other Americans.¹⁷⁹ Article 2(1)(c) would further require an extensive review of police department policies allowing for use of force and how those policies are actually put into practice. Policies that are not intentionally discriminatory still place the U.S. in violation of CERD if they result in a disparate effect along racial or other discriminatory lines.

Under Article 5, the U.S. is in violation of CERD because of the DOJ’s findings of discriminatory practices in local law enforcement agencies coupled with the failure to adequately remedy such policies.¹⁸⁰ This will be especially true if the new DOJ administration should suspend the Civil Rights Division’s investigations of suspicious instances of police use of deadly force and the local law enforcement agencies.

3. The U.S. is in violation of CAT.

A victim of illegal police use of force (or their representative in cases of deadly force) has two colorable theories under which to argue that the U.S. is in violation of CAT: 1) infliction of severe pain where the victim is suspected of committing some crime, or 2) infliction of severe pain by a public official on the basis of racial discrimination.¹⁸¹ Either of these theories, especially when coupled with allegations of violations under the ICCPR and CERD, demonstrates that the U.S. is not in compliance with its CAT obligations.

On its own, finding a violation of CAT is less likely because of its “lawful sanctions” exception and because the U.S. understood Article 1 to mean that noncompliance is not sufficient to find a violation of the treaty.¹⁸² Therefore, the argument that the U.S. is in violation of CAT is significantly strengthened when coupled with another violation in order to demonstrate more than just “noncompliance.”

¹⁷⁹ Kimberly Kindy, *Ferguson decision reflects juries’ tendency to give police benefit of doubt, experts say*, The Washington Post (Nov. 24, 2014), https://www.washingtonpost.com/politics/ferguson-decision-reflects-juries-tendency-to-give-police-benefit-of-doubt-experts-say/2014/11/24/268c7b62-7311-11e4-a589-1b102c2f81d0_story.html?utm_term=.d18ad720410b.

¹⁸⁰ See Section V(A)(2), *supra*.

¹⁸¹ See Section III(D), *supra*.

¹⁸² *Id.*

B. Immediate Adoption by the U.S. of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and Minnesota Protocol II

The solutions proposed in the following Sections have taken on greater importance since the results of the U.S.'s most recent presidential election. The DOJ Civil Rights Division has no longer be investigating instances of police use of lethal force against minorities, reinforcing the idea that this issue must now be analyzed on an international rather than domestic level.

The Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions should conduct a nationwide review of law enforcement policies governing use of deadly force in the U.S. This analysis should begin with major U.S. cities, in particular those with the highest crime rates, such as Chicago, largely because many studies have found higher rates of killings by police in places with high rates of violent crime.¹⁸³ This Comment proposes that the international documents which should be used as comparison standards against local law enforcement policies are the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and Minnesota Protocol II.

1. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials

The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials calls for “[l]aw enforcement officials . . . [to], as far as possible, apply non-violent means before resorting to the use of force and firearms.”¹⁸⁴ Governments must ensure that arbitrary or abusive use of force and firearms by law enforcement officials is punished as a criminal offense under the laws of their nation.¹⁸⁵ Theoretically, the U.S. has satisfied this requirement if the federal government and each of the fifty states have at least one law (such as homicide or assault laws) under which they may prosecute officers who operate outside of the bounds of the use of force laws of their jurisdiction.

The Basic Principles dictate that, whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall:

(a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved;¹⁸⁶

(b) Minimize damage and injury, and respect and preserve human

¹⁸³ Klinger, *supra* note 16.

¹⁸⁴ Basic Principles on the Use of Force and Firearms, *supra* note 84, at 2, ¶ 4.

¹⁸⁵ *Id.* at 2, ¶ 7.

¹⁸⁶ *Id.* at 2, ¶ 5(a).

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life;¹⁸⁷ [and]

(c) Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment.¹⁸⁸

This mandate is consistent with the proportionality requirement and parallels the international standard discussed in relation to Article 6 of the ICCPR.¹⁸⁹ The U.S. must demonstrate that each of their laws governing use of force by police reflect this proportionality standard, both on paper and in practice.

Law enforcement officials should not use firearms against any person except in the following situations: 1) in self-defense or defense of others against imminent threat of death or serious injury; 2) to prevent the perpetration of a particularly serious crime involving grave threat to life; 3) to arrest a person presenting such a danger and resisting authority; or 4) to prevent escape, and only when less extreme means are insufficient to achieve these objectives.¹⁹⁰

It is important to note that, if the U.S. followed situation four, it would be in violation of *Tennessee v. Garner*,¹⁹¹ where the U.S. Supreme Court held that police are not justified in killing a suspected fleeing felon, even when less extreme means are insufficient to prevent his escape.¹⁹² It is an example of when a U.S. standard is more stringent than its international counterpart.

2. Minnesota Protocol II

As the aim of Minnesota Protocol II is “to protect the right to life and advance justice, accountability, and the right to a remedy, by promoting the effective investigation of potentially unlawful deaths,”¹⁹³ the principles included therein should be the minimum guarantee reflected in all law enforcement policies in the U.S. In the suggested review of law enforcement policies, the Special Rapporteur should see whether the policies mirror the definitions and standards set out in Minnesota Protocol II. First, “potentially unlawful deaths,” those requiring investigation, include: “death caused by acts or omissions of the State, its organs or agents, or otherwise attributable to the State, in violation of its duty to respect the right to life”¹⁹⁴ and “death which occurred where the State may have failed to meet its obligations to

¹⁸⁷ *Id.* at 2, ¶ 5(b).

¹⁸⁸ *Id.* at 2, ¶ 5(c).

¹⁸⁹ ICCPR, *supra* note 9, art. 6, ¶ 1.

¹⁹⁰ *Id.* at 2, ¶ 9.

¹⁹¹ 105 S.Ct. 1694, 1697 (1985), *supra* note 127.

¹⁹² *See supra* Section IV(C).

¹⁹³ Minnesota Protocol II, *supra* note 81, at I(A), ¶ 1.

¹⁹⁴ *Id.* at I(A), ¶ 2(a).

protect life.”¹⁹⁵

Second, investigations should be: (i) prompt, (ii) effective and thorough, (iii) independent and impartial, and (iv) transparent.¹⁹⁶ The investigation must determine “whether there was a breach of the right to life—which includes, for example, officials in the chain of command who were complicit in the death, any failures to take reasonably available measures which could have had a real prospect of preventing the death, and identification of policies and systemic failures that may have contributed to the death.”¹⁹⁷

Minnesota Protocol II requires that investigators and investigative mechanisms be, and be seen to be, “independent of undue influence.”¹⁹⁸ That is, they must be independent institutionally and formally, in both practice and perception, and at all stages of the investigation.¹⁹⁹ Here, in most cases, the U.S. has failed. When the police department tasked with investigating the officer-involved shooting is the police department that employs the officer in question, there is little likelihood that the investigation is impartial, and no chance that it will be perceived to be impartial or independent from undue influence. The legitimacy of the investigation is improved when it is the DOJ that is conducting the investigation, as they seemingly have no obvious biases regarding the matter. As they will likely be focusing their attentions elsewhere, there is a need for a new impartial investigative body to fill their void. Thus, the first step in implementing Minnesota Protocol II is for the SR to conduct the review of law enforcement use of deadly force policies. The second would be to make recommendations as to the establishment of independent investigative bodies in order to comply with the standard and perception of impartiality.

Finally, the investigation, its processes and outcomes, must be transparent in order to promote the rule of law, public accountability, and enable external monitoring of its efficacy. Along with transparency, the more independent and impartial the investigative body, the greater likelihood of transparency and public confidence in both the processes and outcomes. For this reason, this Comment suggests that an international investigative body be created for this purpose and that this body is specifically assigned to the U.S. until the U.S. is complying with its international obligations under the ICCPR, CERD, and CAT.

¹⁹⁵ *Id.* at I(A), ¶ 2(c).

¹⁹⁶ *Id.* at II(D)(1), ¶ 26.

¹⁹⁷ *Id.* at II(D)(1)(ii), ¶ 30.

¹⁹⁸ *Id.* at II(D)(1)(iii), ¶ 33.

¹⁹⁹ *Id.* at II(D)(1)(iii), ¶ 33.

C. *Creation of an Independent Investigative Body Under the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions*

Given the inability to rely on the DOJ Civil Rights Division for at least the next four years due to the priorities of the Trump Administration, this Comment proposes the appointment of a new, international, independent investigative body. This team would utilize Minnesota Protocol II when investigating an officer-involved shooting resulting in a suspicious death of a racial minority in the U.S. and would exist under the supervision of the SR on Extrajudicial, Summary and Arbitrary Executions. Its purpose would be the following: to bring the United States back into compliance with its international obligations under the ICCPR, ICERD, and CAT; ultimately, the goal would be to implement the updated United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions into the practices of local law enforcement agencies in order for the U.S. to have intra-nation mechanisms to “police the police.” If DOJ Civil Rights remains operational, the investigative body should be invited in by DOJ. The DOJ should aid the investigation by providing resources and cultivating a positive relationship with local law enforcement to allow the investigative team to perform its charge.

There is a question of who should serve on the investigative body. There should be members with law enforcement training;²⁰⁰ the central members probably should not be from the U.S. in order to maintain an air of impartiality.²⁰¹ It would be helpful for these individuals to have a familiarity with English in order to decrease the need for an interpreter and limiting the number of individuals involved in the process.²⁰² These individuals with law enforcement training will need to be able to conduct witness interviews and take statements from law enforcement personnel involved in the incident.²⁰³ They should be qualified to analyze findings and offer them openly in a court of law.²⁰⁴ There should be at least one medical professional on the team who is qualified to conduct physical examinations of a body—including external and internal exams.²⁰⁵ There must be field forensic experts and additional support staff to help in the testing of forensic evidence.²⁰⁶ The experts should be qualified to analyze ballistic evidence, given the prevalence in the use of firearms in the U.S., especially in the high

²⁰⁰ Minnesota Protocol II, *supra* note 81, at V(B)(6).

²⁰¹ *Id.*, at II(D)(1), ¶ 26.

²⁰² *Id.*, at V(B)(7).

²⁰³ *Id.*, at V(B)(5).

²⁰⁴ *Id.*, at V(B)(2), ¶ 70.

²⁰⁵ *Id.*, at V(D) & (E).

²⁰⁶ *Id.*, at V(B), ¶ 57.

profile cases of police use of lethal force against minorities.²⁰⁷ The lab team members should be given access to a full lab with ample resources, even if that means moving evidence from the initial scene to a better-equipped facility.

In their investigations, the investigative group should embody the principles of Minnesota Protocol II—ensuring promptness, efficacy and thoroughness, independence and impartiality, and transparency. They would have a reporting requirement to the Special Rapporteur for each investigation conducted, offering findings, conclusions and recommendations in the form of a compiled report. The Special Rapporteur should incorporate the results in the report he or she must produce for the Human Rights Council (HRC). Copies of the team's report should also be provided to the local law enforcement agency and to DOJ, if they are involved.

An additional consideration the body should take note of while conducting the investigations is the feasibility of establishing an independent investigative mechanism within the U.S., the purpose of which would be to eventually take over the international investigative body's charge. This probably would have been the DOJ Civil Rights Division, but due to the politics and expected priorities of the incoming administration, this goal may be put on hold for at least four years.

VII. CONCLUSION

This Comment analyzed some of the international law concerning the illegal use of deadly force by police against racial minorities in the U.S. It used the international legal framework as a backdrop against which to compare the U.S.'s domestic law governing use of force by law enforcement. As a concrete example, the Comment delved into the case of Michael Brown. The Comment concluded that the U.S. is in violation of its international obligations under the ICCPR, CERD, and CAT.

When police use deadly force without employing the international standards of necessity and proportionality, the right to life is eroded. When the resulting death is not considered suspect or when it is not investigated by an impartial body, the right to life is further diminished. And when the criminal justice system fails to hold the officers accountable, the right to life is rendered completely meaningless. The U.S. has failed to preserve the right to be free from racial discrimination and the right to be free from torture when the value of a Black life is less than that of another race—either when more Black Americans are dying at the hands of police or the police fires more bullets into one body over another because of the color of his skin.

²⁰⁷ *Id.*, at IV(F)(3)(ii), ¶ 145.

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Justice Sonia Sotomayor said it most eloquently in her dissent in *Utah v. Strieff*.²⁰⁸

We must not pretend that the countless people who are targeted by police are ‘isolated.’ They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere. . . . Until their voices matter too, our justice system will continue to be anything but.²⁰⁹

The U.S. *can* be brought back into compliance with international human rights law, though. The U.S. must incorporate the Basic Principles on the Use of Force and Firearms by Law Enforcement and the Minnesota Protocol II into law enforcement policies and practices across the U.S. The international community must assign to the U.S. a new, international investigative body to apply the techniques described in Minnesota Protocol II in cases of suspicious deaths at the hands of police. Finally, this Comment is written in honor of the canaries in the coal mine, past, present, and future; may their voices matter too.

²⁰⁸ 136 S.Ct. 2056, 2064-72 (2016) (Sotomayor, J. dissenting).

²⁰⁹ *Id.* at 2071-72.