

Before the
National Supreme Court of Justice
of Mexico

Action of Unconstitutionality 64/2019

Amicus curiae brief

Submitted by
Amnesty International

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I. Introduction

Amnesty International hereby addresses the Honourable National Supreme Court of Justice to submit this *amicus curiae* brief regarding Action of Unconstitutionality 64/2019.

The purpose of this brief is to present to the Court the different standards of international human rights law to which States are subject regulating, in law, the use of force and firearms by law enforcement officials.¹

The brief is being submitted regarding the Action of Unconstitutionality filed by the National Human Rights Commission in respect of the National Law on the Use of Force (hereinafter, “the Law”).² This Law was approved by the Congress of the Union as part of a package of laws arising from a constitutional amendment relating to security matters and the National Guard published in the *Official Gazette of the Federation* on 26 March 2019 (hereinafter, “constitutional amendment of March 2019”).³

This document consists of six substantive sections: the first deals with the principles of legality, absolute necessity, proportionality and accountability regarding the use of force; the second sets out the norms of international law on the permissibility of the use of lethal force; the third analyses the standards relating to lethal weapons and less lethal weapons; the fourth sets out the obligation to seek to avoid the use of force; the fifth addresses the obligation to protect third parties; and the sixth deals with the problematic regulation, in the law under analysis, of the use of force in the context of public assemblies. In the final section, the document concludes that the National Law on the Use of Force contains serious flaws in relation to Mexico's obligations under international human rights law.

II. The principles of legality, necessity, proportionality and accountability

States have an obligation to respect, protect and fulfil human rights that could be affected in the context of law enforcement operations. Among such rights are

¹ In this brief, the term “law enforcement official” includes any state official, including members of military forces, who carry out policing functions, in particular exercising the power of arrest and detention.

² Mexico, National Law on the Use of Force, published in the *Official Gazette of the Federation* on 27 May 2019.

³ By promulgating this law, the Congress of the Union was exercising its mandate – granted under Article 73, section XXIII of the Constitution of the United Mexican States, regulated by section III, of the transitory fourth article of the Decree by which various provisions of the Constitution of the United Mexican States are amended, added to and repealed – in relation to the National Guard, published in the *Official Gazette of the Federation* on 26 March 2019.

the rights to life, physical and mental integrity, freedom and privacy. From this obligation, stem the principles and rules necessary to control the use of force and firearms.⁴ Such regulations are detailed in the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (hereinafter, the Basic Principles) adopted by the United Nations in 1990.⁵

The United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions has stated that the Basic Principles are “widely accepted as authoritative statements of the law”.⁶ The Inter-American Commission on Human Rights has stated that they are “general principles of international law”.⁷ Similarly, the Inter-American Court of Human Rights has stated that they are a normative source “to give substance to the State's obligations regarding its use of force”.⁸

In Mexico, the National Supreme Court of Justice has relied on the Basic Principles, considering that they “establish standards on the use of public force that are reasonable and compatible with the constitutional system, guiding the functions of the police and the use of public force in order to ensure it is exercised in the best and most humane manner”.⁹

⁴ Human rights recognized both in international treaties to which Mexico is a State Party and in the Mexican Constitution itself. See Articles 6, 7, 9, and 17 of the International Covenant on Civil and Political Rights; Articles 4, 5, 7 and 11 of the American Convention on Human Rights; and Articles 1, 14 and 16 of the Mexican Constitution.

⁵ United Nations, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana, Cuba, from 27 August to 7 September 1990.

⁶ United Nations, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, 1 April 2014, A/HRC/26/36, para. 44.

⁷ Inter-American Commission on Human Rights, *Report No. 55/01, Case 11.286 Aluisio Cavalcante and other cases (Brazil)*, 16 April 2001, para. 138 (footnote 6).

⁸ “[D]otar de contenido a las obligaciones relativas al uso de la fuerza por parte del Estado”, Inter-American Court of Human Rights, *Case of Women Victims of Sexual Torture in Atenco Mexico*, (Preliminary Objection, Merits, Reparations, and Costs), Judgment of 28 November 2018, Series C No. 371, para. 160 (Spanish only). See also Inter-American Court of Human Rights, *Case of Montero-Aranguren et al (Detention Center of Catia) v. Venezuela*, (Preliminary Objection, Merits, Reparations, and Costs), Judgment of 5 July 2006, Series C No. 150, para. 66 et seq; and Inter-American Court of Human Rights, *Case of Nadege Dorzema et al. v. Dominican Republic* (Merits, Reparations and Costs), Judgment of 24 October 2012, Series C No. 251, para. 78.

⁹ “[E]stablecen estándares sobre el uso de la fuerza pública, razonables y compatibles con [el] régimen constitucional, que orientan en lo que atañe a las funciones de la policía y el uso de la fuerza pública para el mejor y más humano ejercicio de la misma”, Mexico, National Supreme Court of Justice Judgment delivered by the Plenary Court in its opinion assessing the constitutional inquiry carried out by the Commission designated in file 3/2006, 12 February 2009, published in the *Official Gazette of the Federation* on 21 September 2009 (Spanish only).

The Basic Principles will be used throughout this document as an authoritative interpretation of States Parties' obligations under the International Covenant on Civil and Political Rights and the American Convention on Human Rights.¹⁰ However, for a comprehensive consideration of the scope of the Basic Principles, the organization would respectfully refer the Court to the document, *Use of force: Guidelines for the implementation of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*.¹¹

An essential component of international legal regulations on this issue are the principles of legality, necessity, proportionality and accountability, understood as set out below.¹²

The **principle of legality** indicates that the use of force by law enforcement agencies should be permitted only to achieve a legitimate objective and should be sufficiently based on national legislation. It is based on Principle 1 of the Basic Principles which states that: "Governments and law enforcement agencies shall adopt and implement rules and regulations on the use of force and firearms against persons by law enforcement officials."¹³

The **principle of necessity** requires the determination, in each specific case, of whether force should be used and, if so, what level of force should be used. There are three components to this principle: *qualitative*, which determines whether the use of force is unavoidable or whether the same objective could be achieved without resorting to force; *quantitative*, which indicates that the level of force used should be the minimum that can still be considered effective; and *temporary*, which indicates that the use of force must stop as soon as the legitimate objective has been achieved or is no longer achievable. Principle 4 of

¹⁰ As O'Donnell has pointed out, in the inter-American system, the expression "authoritative interpretation" is used to refer to the use of one instrument in the interpretation of another. This interpretative practice is also used in the universal system, although no specific term is used. Daniel O'Donnell, *Derecho Internacional de los derechos humanos: normativa, jurisprudencia y doctrina de los Sistemas Universal e Interamericano*, [International law and human rights: norms, jurisprudence and doctrine of the Universal and Inter-American Systems], IACHR, 2012, p. 58 (Spanish only).

¹¹ Amnesty International Netherlands, *Use of force: Guidelines for implementation of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, Amsterdam, 2015, available at: <https://www.amnesty.nl/actueel/use-of-force-guidelines-for-implementation-of-the-un-basic-principles-on-the-use-of-force-and-firearms-by-law-enforcement-officials>

¹² Id.

¹³ Similarly, the Inter-American Court of Human Rights has stated: "Domestic law must establish standards clear enough to regulate the use of lethal force and firearms by members of the State security forces", Inter-American Court of Human Rights, *Case of Zambrano Vélez et al. v. Ecuador*, (Merits, Reparations and Costs), Judgment of 4 July 2007, Series C No. 166, para. 86. See also, IACHR, Report No. 51/16, Gilberto Jiménez Hernández et al. (La Grandeza) Mexico, OEA/Ser.L/V/II.159, Doc. 60, 30 November 2016, para. 113.

the Basic Principles states: “Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.”

The **principle of proportionality** prohibits the use of force if it is determined that the benefits of using it are outweighed by the possible consequences and harm caused; that is, when the harm exceeds the benefits that the achievement of the legitimate purpose would bring.¹⁴ It is set out in Principle 5 of the Basic Principles which states: “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”.¹⁵

The **principle of accountability** establishes that law enforcement agencies are held accountable for the fulfilment of their duties and their compliance with the legal and operational framework; this applies not only to law enforcement officials acting in a specific situation, but also to those who bear responsibility in the chain of command.¹⁶

The Mexican State has recognized these principles as legally binding by incorporating them into its Constitution under the mandate given to the Congress of the Union to legislate on the use of force.¹⁷ Even prior to the constitutional amendment cited above, various state bodies accepted the binding nature of such principles.

The National Supreme Court of Justice has stated that these principles are contained in Article 19 of the Constitution.¹⁸ The National Human Rights

¹⁴ The Inter-American Court of Human Rights has indicated that while state agents may resort to the use of force, and in some circumstances may even need to use lethal force, the power of the State to achieve its ends is not without limits, regardless of the seriousness of certain actions and the guilt of their responsible, *Case of Cruz Sánchez et al. v. Peru*, (Preliminary Objections, Merits, Reparations and Costs), Judgment of 17 April 2015, Series C No. 292, para. 262 (Spanish only).

¹⁵ The original text of the Basic Principles is in English. Unfortunately, the official translation into Spanish of Principles 5 and 9 is flawed and changes the content of these norms. Therefore, Amnesty International uses these revised principles from the official English version.

¹⁶ For the normative basis of the principle, see the Basic Principles, Principles, 7, 22, 24 and 26.

¹⁷ Mexico, Constitution of the United Mexican States, constitutional amendment of March 2019, fourth transitory article, section III (3), (Spanish only).

¹⁸ Mexico, National Supreme Court of Justice, Revision of direct *amparo* 3153/2014, Constitutional precedent: Detention by public forces: Essential parameters that the authorities must observe to assess that these are in accordance with the constitutional system, *Gazette of the Judicial Weekly of the Federation*, tenth edition, book 23, October 2015, Volume II, p. 1653 (Spanish only).

Commission has used them as the legal basis of various recommendations addressed to federal authorities.¹⁹ Likewise, the federal Executive included them both in the Federal Police Protocol on the use of force and in the Manual on the use of force, applicable to the three services of the armed forces.²⁰

The National Law on the Use of Force contains these principles in its article 4, but their legal description is not consistent with international law.

In the Law, the **principle of legality** states only that “the actions of security institutions must be carried out in strict adherence with the Constitution, laws and international treaties”.²¹ However, such a broad legal framework does not help determine the limits of the use of force and, in particular, fails to establish the legitimate purposes for which it can be used. The Law should contain a clear minimum framework that regulates for what purposes and in what possible circumstances force may be used. The current very broad definition would make it difficult for law enforcement officials to determine in which scenarios they can use force and, therefore, carries an unacceptable risk to the enjoyment of human rights.

The **principle of [absolute] necessity** contained in the Law stipulates that: “the use of force shall be a last resort to protect human life and integrity or to prevent the violation of legally protected goods or in order to maintain order and public peace, other means to stop the aggressor's behaviour having been exhausted”.²² This wording is limited to the qualitative aspect of the principle: that is, whether it is possible to achieve the objective without resorting to force. However, the section of the Law quoted above does not contain provisions on the quantitative aspect of this principle, that is how much force is required in each specific case, nor the temporary aspect, which indicates that force should not be used if the objective has already been achieved or if it can no longer be achieved. In addition, there are concerns that the definition does not expressly indicate that in the case of the use of lethal force, including firearms, the principle of necessity is fulfilled only if the force is used for the sole purpose of preventing death or serious injury

¹⁹ Mexico, National Human Rights Commission, Recommendation No. 31/2018, of 28 September 2018 and Recommendation No. 4/2019 of 6 March 2019 (Spanish only).

²⁰ Mexico, Ministry of the Interior, Federal Police standard operating procedures on the use of force, published in the *Official Gazette of the Federation*, 18 October 2017, and Ministry of National Defence, Manual on the use of force, applicable to the three armed forces, published in the *Official Gazette of the Federation* on 30 May 2014 – in this document, the principle of necessity appears under the term “rationality”. (Spanish only)

²¹ Original Spanish: “*la acción de las instituciones de seguridad se realice con estricto apego a la Constitución, a las leyes y a los Tratados Internacionales*”.

²² Original Spanish: “*el uso de la fuerza sea la última alternativa para tutelar la vida e integridad de las personas o evitar que se vulneren bienes jurídicamente protegidos o con el fin de mantener el orden y la paz pública, al haberse agotado otros medios para el desistimiento de la conducta del agresor*”.

in the face of an imminent threat.²³ The objectives of protecting other legal assets, order or public peace are insufficient to justify the use of intentionally or potentially lethal force.²⁴

The Law's definition of the **principle of proportionality** states that: "the level of force used must be consistent with the level of resistance offered by the aggressor and the level of risk presented, so that officials apply means and methods in line with the criterion of differentiated and progressive use of force."²⁵ This definition contains elements that could correspond to other principles, for example, the principle of necessity, in analysing the level of force required. On the other hand, the wording includes reference to the "level of risk presented" which could be read as a mandate to assess the harm to be prevented. However, the phrase does not express the core aspect of the principle with sufficient clarity – namely, that law enforcement officials should not cause more harm than that which they are seeking to avoid – and, therefore, is not an adequate mechanism to ensure that the State fulfils its obligation to protect human rights and, in particular, its general obligation to prevent violations of these rights.

Therefore, Amnesty International believes that the description in the Law of the principles that govern the use of force does not satisfy the mandate conferred on Congress in the constitutional amendment of March 2019, nor does it comply with human rights standards which are binding on the Mexican State as a State Party to various international treaties or Article 1 of the Mexican Constitution itself.

III. Norms on the permissibility of the use of lethal force

During the course of carrying out their duties, law enforcement officials may need to use force in order to achieve a legitimate objective. At the same time, the State is obliged to protect the rights to life and personal integrity, set out in the International Covenant on Civil and Political Rights (Articles 6 and 7,

²³ Lethal force should be understood a type of force that involves either the high likelihood of causing death (potentially lethal force), or is used with the clear knowledge that it will lead to the loss of life (i.e. intentional lethal use of force). Amnesty International Netherlands, *Use of force: Guidelines for implementation of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, p. 55. See also, United Nations, Human Rights Committee, General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, CCPR/C/GC/36, para. 12 and United Nations, Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, A/HRC/31/66, para. 59.

²⁴ The same analysis applies to article 24 of the Law that provides for the use of force for the "maintenance of order and security", without indicating that lethal force can only be used to prevent death or serious injury.

²⁵ Original Spanish: "el nivel de fuerza utilizado sea acorde con el nivel de resistencia ofrecido por el agresor y el nivel de riesgo exhibido, de tal forma que los agentes apliquen medios y métodos bajo un criterio de uso diferenciado y progresivo de la fuerza".

respectively) and in the American Convention on Human Rights (Articles 4 and 5, respectively), among others.

Therefore, the use of force must be strictly regulated and should be limited to situations of absolute necessity. In particular, according to international standards on the use of force, the use of weapons that carry a high probability of causing death is only permissible when the objective is protection against the threat to another life or protection from serious injury in the face of an imminent threat.²⁶

In this regard, Principle 9 of the Basic Principles, which, as noted by the United Nations Special Rapporteur on extrajudicial executions is “binding international law”,²⁷ confirms the principle of protecting life by establishing that:

Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.

The United Nations Human Rights Committee has stated that the use of potentially lethal force for law enforcement purposes is an extreme measure that can only be used when strictly necessary to protect life or prevent serious injury. It has also determined that the use of *intentionally* lethal force is permissible only to protect life from an imminent threat.²⁸

Similarly, the Inter-American Court of Human Rights has reiterated the text of Principle 9 and determined that the use of lethal force and firearms must be generally forbidden and is therefore justified in only the most extraordinary cases, which must be restrictively construed, since “when excessive force is used, any deprivation of life is arbitrary.”²⁹

However, the Law does not clearly set out the principle of protecting life in

²⁶ The Basic Principles do not contain a definition of “serious injury”. However, in applying the principle of proportionality and the principle to protect life, the only way to understand the permissibility of the use of lethal force is that the risk of serious injury is “of a similarly serious nature” as the threat to life; that is to say that the level of severity of the injury must be very close to a threat to life. See United Nations, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, 1 April 2014, A/HRC/26/36, para. 70.

²⁷ United Nations, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, of 5 September 2006, A/61/311, para. 35.

²⁸ United Nations, Human Rights Committee, General Comment No. 36, article 6 of the International Covenant on Civil and Political Rights, the right to life, CCPR/C/GC/36, para. 12.

²⁹ Inter-American Court of Human Rights, *Case of Montero-Aranguren et al (Detention Center of Catia) v. Venezuela*, (Preliminary Objection, Merits, Reparations and Costs), Judgment of 5 July 2006, paras 68 and 69.

relation to the use of force and does not clarify under what circumstances the use of lethal force is permitted. In particular, it does not state that the use of lethal force is only permissible to avoid loss of life or serious injury in the face of an imminent threat.

Article 6, section VII, of the Law contains a provision that could be interpreted as limiting the use of *intentionally* lethal force to situations in which the aim is to protect life. However, the article does not extend that limitation to the use of potentially lethal force and, in particular, to all use of firearms.³⁰

Law enforcement officials may encounter many situations in carrying out their duties. Out of all those situations, article 7 of the Law selected six such situations— and establishes that in those circumstances there is a legal presumption of the existence of a threat to life that would permit the use of firearms. However, no selection criteria are set out either in the text or in the opinion issued by the Congressional Commission that analysed the amendment.

An assessment of whether there is a threat of loss of life or serious injury that would justify the use of lethal force can only be carried out on the ground and on a case-by-case basis, not generically in a law. This regulation is contrary to the principle of necessity because one can foresee cases that would reflect the scenarios described in article 7 of the Law but do not represent a threat that would justify, under international human rights law, the use of lethal force. In addition, in practice, scenarios included in this article of the Law can be presented in which, despite there being a serious threat to life, it is possible to respond effectively using other means and without resorting to lethal force.

Finally, with respect to this norm, law enforcement officials may face other possible situations that present a threat to life and have not been listed here. Therefore, a closed list such as the one included in article 7 could endanger the lives of officials if it is considered that only the situations listed can be legally considered an imminent lethal threat.

Therefore, the regulation of the use of lethal force in the Law does not comply with the standards established by international human rights law. In particular, it does not comply with the principle of protecting life and, therefore, jeopardizes the rights to life and personal integrity enshrined in human rights treaties to which Mexico is a State Party.

IV. Lethal and less lethal weapons

In accordance with the principles of necessity, proportionality and protecting life, law enforcement officials must have various devices and equipment that enable

³⁰ Relevant text of Article 6 indicates: “Death: using lethal force as an exceptional action, allowing the use of less lethal or firearms in order to repel and neutralize an aggression, having no other option to protect the lives of others or one's own, knowing that there is a high risk of causing the death of the aggressor.” Original Spanish “*Muerte: utilizar la fuerza letal como una acción excepcional, permitiendo el uso de armas menos letales o de fuego con la finalidad de repeler y neutralizar la agresión, no teniendo otra opción para proteger la vida de las personas ajenas o la propia, a sabiendas que existe un alto riesgo de causar la muerte del agresor*”.

them to carry out their duties, for example, they must have protective equipment, and they should not be provided exclusively with weapons as the only means of carrying out their duties. Thus, law enforcement officials must be provided with different types of equipment that allow them to choose the one that will cause the least harm in achieving the desired objective and ensure that they are not forced to resort to firearms in the first instance. Not all weapons at their disposal should be designed to achieve the same objectives.

For this purpose, it is usual to distinguish between lethal weapons, those weapons that are designed to kill, and less lethal weapons, weapons conceived for the use of force without causing death, although it must be recognized that that any weapon can potentially be lethal.³¹

Previously, in international human rights law, *less lethal weapons* were known as *non-lethal weapons*. This is how they are referred to in the Basic Principles and that is how they are denoted in the fourth transitory article of the constitutional amendment of March 2019. However, this classification is problematic since any weapon has the potential to take life, depending on the circumstances and the how it is used, for example, in cases of improper use.³² As the United Nations Special Rapporteur on extrajudicial executions has stated:

The problem is that in some cases “less-lethal weapons” are indeed lethal and can lead to serious injuries. The risks will be dependent on the type of weapon, the context of its use, and the vulnerabilities of the victim or victims. Innocent bystanders may also be affected where weapons cannot be directed at one individual.³³

Therefore, it is now considered more accurate to refer to *less lethal weapons* to designate any device that has not been specifically designed to kill.

Although the Law returns to this terminology in article 3, it does so with imprecise definitions that are difficult to apply. The first problem is that the Law defines firearms as those “authorized for the use of members of security institutions, in accordance with the Federal Firearms and Explosives Law and its Regulations”.³⁴ Although legislators can refer the definition to a specialized regulatory body, it should be recognized in the Law that firearms are always lethal weapons. Amnesty International has stated that firearms be understood to be weapons that by nature

³¹ Amnesty International Netherlands, *Use of force: Guidelines for implementation of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*,

³² Article four, section III, no. 6, provides that the National Law contains “a distinction and regulation of non-lethal and lethal incapacitating weapons and devices” [*una distinción y regulación de las armas e instrumentos incapacitantes, no letales y letales*].

³³ United Nations, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, 1 April 2014, A/HRC/26/36, para. 104.

³⁴ Original Spanish: “*autorizadas para el uso de los miembros de las instituciones de seguridad, de conformidad con la Ley Federal de Armas de Fuego y Explosivos y su Reglamento*”.

of their ammunition are designed to take life.³⁵

The same article of the Law contains definitions that are based on selecting some possible outcomes of the use of weapons rather than the function for which they were designed, which is what should govern decisions on their deployment and use in law enforcement operations. Thus, the article includes the following definitions:

Lethal weapons: those whose design and mechanism cause or can cause serious injuries and death

Less lethal weapons: those that disrupt the bodily functions of an individual while reducing to a minimum the risk of causing them life-threatening injuries³⁶

These definitions would suggest that there are ways to use firearms that are not potentially lethal, this is a factual error does not meet international human rights standards. As the United Nations Special Rapporteur on extrajudicial executions has indicated, when Basic Principle 9 refers to firearms, it should be construed to encompass “all weapons that are designed and are likely to be lethal”.³⁷

At the same time, the definition of less lethal weapons is inaccurate in that it states that they reduce “to a minimum” the risk of causing life-threatening injuries when the effects of less lethal weapons depend on how they are used and that in some circumstances they can cause death. The confusion introduced by these definitions in the Law is exacerbated by a definition of serious injury (in the same article 3) that equates the possible results of using firearms with those of using less lethal weapons.

Article 15 of the Law contains a list of permissible weapons for law enforcement officials. Apparently, this list comes from the mandate given to Congress to include “the distinction and regulation of weapons” when legislating on the use of force.³⁸

While states have some discretion in the setting of legal standards to determine the weapons they will provide to their law enforcement officials, all weapons must be consistent with the standards of international human rights law as regards their features and risks.

³⁵ Amnesty International Netherlands, *Use of force: Guidelines for implementation of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*.

³⁶ Original Spanish: “*Armas letales: las que por su diseño y mecanismo ocasionan o pueden ocasionar lesiones graves y la muerte / Armas menos letales: aquellas a través de las cuales se disminuyen las funciones corporales de un individuo, reduciendo al mínimo el riesgo de causarle lesiones que pongan en peligro su vida*”.

³⁷ United Nations, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, 1 April 2014, A/HRC/26/36, para. 71.

³⁸ “[L]a distinción y regulación de las armas”, see the fourth transitory article, third section (6) of the constitutional amendment of March 2019.

In this sense, it is grossly insufficient to give a list of weapons without specifying, for each of them, both the criteria for their use and the very special and limited circumstances in which such use would be permissible.

For example, article 15 refers to “devices that discharge electric shocks”.³⁹ Some of these types of weapons, especially projectile electric shock weapons, have the potential to cause serious injury and even death. Therefore, they should only be used on the basis of a clearly defined operational need and in situations that would otherwise require the use of lethal force. These devices should not be provided for ordinary security duties.⁴⁰ In addition, “devices that discharge electric shocks” is a description that can include batons and paralyzing belts that work using electric shocks. These weapons cause intense suffering, which can sometimes amount to torture or other ill-treatment, and their use does not serve to achieve a legitimate objective aimed at enforcing the law that cannot be achieved effectively by other, safer means, and consequently they should be prohibited in order to comply with international human rights principles.⁴¹

Article 15 also mentions PR-24 sticks, batons, or equivalent devices, and aerosols of irritant substances. In this regard, the Law should clarify that these are weapons that law enforcement officials can use in defence against a violent attack and that they should not be used simply to enforce an order.

Article 15 permits the use of pressurized water hoses. However, these are among the devices with indiscriminate effects that have great potential to cause harm and so should be used with care and only in situations of widespread violence in order to disperse a crowd.⁴² Their use must be restricted to circumstances in

³⁹ Original Spanish: “*dispositivos que generan descargas eléctricas*”.

⁴⁰ Amnesty International Netherlands, *Projectile Electric-Shock Weapons*, Amsterdam, February 2019, p. 14, available at: <https://policehumanrightsresources.org/position-paper-projectile-electric-shock-weapons-long-and-short-version>

⁴¹ See: Amnesty International, ‘5 tools of of torture which need to be banned’, (News, 16 June 2019), available at: <https://www.amnesty.org/en/latest/news/2019/06/5-tools-of-torture-which-need-to-be-banned/>

Combatting torture and other ill-treatment: A manual for action (POL 30/4036/2016), pp. 188 et seq., available at: <https://www.amnesty.org/en/documents/pol30/4036/2016/en/> and Amnesty International and Omega Research Foundation, *The human rights impact of less lethal weapons and other law enforcement equipment* (Index: ACT 30/1305/2015) pp. 20 and 22, available at <https://www.amnesty.org/download/Documents/ACT3013052015ENGLISH.PDF>

⁴² The organization notes that the National Law does not allow the use of tear gas, which would in any case be subject to the same restrictions as water cannon.

which all other legitimate means available cannot contain the violence and must be preceded by clear warnings.⁴³

In addition, Amnesty International is concerned that the Law provides for the use of explosives without introducing a clear rule that restricts this to the most extreme circumstances when there is positively no other option and where it is possible to ensure with certainty that no one will be harmed except the person presenting the serious threat.

Consequently, the regulation of weapons in the Law is flawed and does not adequately reflect international human rights standards.

V. Obligation to avoid the use of force

It is a generally accepted rule of international law that “[l]aw enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duties”.⁴⁴ This formulation of the principle of necessity implies not only that force should be used as a last resort, but, read in conjunction with the principle of the protection of life and the general duty to prevent human rights violations, also stipulates that the State has an obligation to actively seek alternatives in order to avoid the use force.⁴⁵ The use of force should always be considered an unwanted result and not a normal part of the discharging of police duties. Basic Principle 4 states:

Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.

⁴³ Amnesty International Netherlands, *Use of force: Guidelines for implementation of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, Guideline No. 7 and section 7.4.2 c).

⁴⁴ United Nations, Code of Conduct for Law Enforcement Officials, adopted by General Assembly resolution 34/169 of 17 December 1979.

⁴⁵ Regarding the general duty to prevent human rights violations, the Inter-American Court of Human Rights has stated that the rights recognized in the American Convention not only entail obligations of a negative nature, such as that state agents must refrain from violating rights, but also require State to take all appropriate measures to guarantee rights (a positive obligation). This obligation includes adopting all legal, political, administrative and cultural means to promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to provide comprehensive reparations for the harm caused to the victims. See Inter-American Court of Human Rights, *Case of López Soto et al. Venezuela*, (Merits, Reparations and Costs), Judgment of 26 September 2018, Series C No. 362. para. 129 (Spanish only).

The Inter-American Court of Human Rights has stated that “force or coercive means can only be used once all other methods of control have been exhausted and failed”.⁴⁶

To respect these standards, a law on the use of force must clearly establish a rule of law that states that any use of force by its agents, and not just use of lethal force, must be a last resort. Likewise, it must oblige law enforcement officials to take the necessary measures to defuse or reduce tension or conflict in order to avoid the use of force. Finally, the law must establish an appropriate planning process for police operations.

Operational planning is essential to avoid causing harm to people, including death or serious injury. Poor planning of operations may incur the international responsibility of the State if it has an impact on human rights.⁴⁷ In this regard, the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has stated that:

Even if the use of force is necessary and proportionate in the immediate circumstances of a case, it may nonetheless be unlawful if it results from a failure to plan, organize and control operations so as to minimize harm, respect and preserve human life and avoid any excessive use of force.⁴⁸

The Law lacks clear provisions that comply with these international human rights standards. It is worrying that the Law does not have an express provision on the obligation of law enforcement officials to avoid the use of force. Although articles 3 and 13 establish that the use of force (and lethal force, respectively) should only be used as a last resort, the Law does not include the obligation to try to mitigate the situation to avoid the use of force. The closest it comes to this is the provision in article 4, section III, which requires that the use of force be minimized, but not avoided.

Article 11 of the Law refers to “verbal persuasion or deterrence”⁴⁹ using orders. However, this provision is not sufficient to fulfil the State's obligation to avoid

⁴⁶ Inter-American Court of Human Rights, *Case of Montero-Aranguren et al (Detention Center of Catia) v. Venezuela*, (Preliminary Objection, Merits, Reparations and Costs), Judgment of 5 July 2006, para. 67.

⁴⁷ The Inter-American Court of Human Rights has state that: “States have an obligation to plan the actions taken by their agents adequately in order to minimize the use of force and the fatalities that may result from it”, Inter-American Court of Human Rights, *Case of Nadege Dorzema et al. v. Dominican Republic*, para. 88.

⁴⁸ United Nations, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer, *Extra-custodial use of force and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment*, 20 July 2017, A/72/178, para. 12. Similarly, the European Court of Human Rights, *McCann and others v. United Kingdom (Application no. 18984/91)*, Court (Grand Chamber), Judgment of 27 September 1995, para. 211 and 212.

⁴⁹ Original Spanish: “*persuasión o disuasión verbal*”.

the use of force. A system for reducing tension, more than orders, must be provided for. For example, this should include negotiation and mediation, as indicated in Basic Principle 20.⁵⁰

One way to avoid resorting to force is to issue a warning about its use. In this sense, the requirement to give a warning is another expression of the principle of necessity, since if the person representing the risk ceases their activity in response to the warning, the use of force will no longer be necessary. International human rights law provides that: “In order to avoid confusion and uncertainty, it is essential that law enforcement officials identify themselves as such and give a clear warning of their intention to use their weapons at all times.” In this regard, Basic Principle 10 states:⁵¹

In the circumstances provided for under principle 9, law enforcement officials shall identify themselves as such and give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident.

In addition, Amnesty International considers that warnings should be given before resorting to any form of use of force, not only firearms. In this way, law enforcement officials can ensure that they respect the principle of necessity and that they are acting in a way that could avoid the use of force. Therefore, a warning must be considered one of the non-violent means to which recourse must be made before using force.

Regrettably, the Law does not contain any rules on the obligation to issue a warning about the intention to use force, even in those circumstances in which the intention is to use firearms.

Amnesty International notes with concern that not only does the Law not contain provisions on the need to avoid the use of force, but in article 36 it sets out a worrying provision that allows the use of lethal force to be authorized at the planning stage of an operation. This rule is clearly contrary to international human rights standards and contravenes the principle of protecting life that should guide all law enforcement operations. Operations should be designed with the aim of avoiding the use of lethal force, whose use should be decided only after an analysis of each case, in response to the circumstances on the ground and only

⁵⁰ See, IACHR, Report No, 51/16 Gilberto Jiménez Hernández et al. (La Grandeza) Mexico, OEA/Ser.L/V/II.159, Doc. 60, 30 November 2016, para. 131.

⁵¹ Inter-American Court of Human Rights, *Case of Landaeta Mejías Brothers et al. V. Venezuela*, (Preliminary Objections, Merits, Reparations and Costs), Judgment of 27 August 2014, Series C No. 281, para. 135.

if there is no other possible means (including withdrawal) of avoiding death or serious injury.⁵²

Therefore, the provisions of the Law do not fulfil the obligation of the Mexican State to avoid the use of force. Therefore, the Law constitutes a violation of the principles of necessity and the protection of life and of the duty to adopt domestic measures that protect human rights, contained in Article 2 of the American Convention on Human Rights, among other instruments.

VI. Obligation to protect third parties

Taking into account the principles of proportionality and protecting life, the potentially lethal or intentionally lethal use of firearms is acceptable only in relation to the person presenting the imminent threat. Therefore, the protection of third parties must have the highest priority in law enforcement operations.

This means that no operation can be planned or carried out in such a way that carries a high risk for third parties, much less in a way that results in certain death. In this regard, see the criticism of article 36 of the Law in the preceding section. It is important to note that the concept of an acceptable level of incidental harm to others (often called “collateral damage” in international humanitarian law) is only applicable to the conduct of hostilities in situations of armed conflict; it is not applicable in the context of police law enforcement operations.⁵³

The Law makes no mention of the obligation of law enforcement officials to protect third parties. This obligation should appear, at least, in the principles established in article 4, in the rules on the use of firearms and explosives (article 13), in the rules on the policing of demonstrations (article 28) and in the planning of operations (article 30).

Article 23 of the Law states: “During an arrest, the safety of persons not involved, of the agents and of the subject of the detention must be guaranteed **in that**

⁵² Article 36, states that: “In those operations in which the use of lethal force is required and authorized at the planning stage, technological devices may be used in order to provide an audiovisual recording of the progress of the operation for verification purposes.” [*“En aquellos operativos en los que se requiera y autorice desde la planeación el uso de la fuerza letal, se podrán utilizar dispositivos tecnológicos con el fin de registrar audiovisualmente el desarrollo del operativo con fines de verificación”*].

⁵³ By its very purpose, international humanitarian law is only applicable to armed conflicts, including non-international armed conflicts. Even in the conduct of hostilities, States must continue to respect human rights and, in particular, protect life. The Inter-American Court of Human Rights has concluded that international humanitarian law does not displace the applicability of Article 4 of the American Convention on Human Rights, but rather fosters an interpretation of the of the clause of the Convention that prohibits the arbitrary deprivation of life because the events occurred within the framework of and as part of an armed conflict. See Inter-American Court of Human Rights, *Case of Cruz Sánchez et al. v. Peru*, para. 272 (Spanish only).

order.⁵⁴ This article creates a priority and hierarchy of the rights of different people by setting out a special duty to protect third parties. However, the article, read in conjunction with other relevant provisions of the Law, does not indicate that force will be used against the detained person only if there is an imminent threat of serious injury or death at that time; it does not even indicate that the detained person must be presenting some level of resistance.⁵⁵ Moreover, this type of classification, which seems to give a lower value to the life and physical integrity of the detainee, considers *a priori* that the detainee will have a violent attitude or pose a security risk. This is not permissible under international human rights law, which guarantees the right to equality before the law.

The Inter-American Court of Human Rights has confirmed that the principle of equality and non-discrimination is a norm of *jus cogens*.⁵⁶ It is also guaranteed by treaties (Article 26 of the International Covenant on Civil and Political Rights and Article 24 of the American Convention on Human Rights). The Mexican Constitution itself contains a robust clause on equality and non-discrimination in its first article.

Therefore, the relevant provisions of the Law do not fulfil the obligation of the Mexican State to protect third parties. In this regard, the Law constitutes a violation of the principles of necessity, prevention and the protection of life.

VII. Use of force in public assemblies

The right to freedom of peaceful assembly is set forth in Article 21 of the International Covenant on Civil and Political Rights and Article 15 of the American Convention on Human Rights. The Mexican Constitution also recognizes it in its ninth article. The exercise of this right is clearly linked to freedom of expression (Articles 19 of the International Covenant and 13 of the American Convention, respectively) and freedom of association (Articles 21 of the International Covenant and 15 of the American Convention, respectively).

States must exercise the greatest caution when regulating public assemblies, because everyone has the right to participate in them and the function of the State is to facilitate the enjoyment of this right, not to hinder it. As the Inter-American Commission on Human Rights has indicated, there is a “pressing need

⁵⁴ Original Spanish: “*Durante una detención, se debe garantizar la seguridad de las personas no involucradas, la de los agentes y la del sujeto de la detención, en ese orden*”.

⁵⁵ As has been argued in this document, the provisions of the National Law do not adequately regulate the principles of necessity and proportionality, which should also govern the actions of law enforcement officials when deployed in the context of a public assembly.

⁵⁶ Inter-American Court of Human Rights, Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03 of 17 September 2003, Series A, No. 18, para. 101.

that States, when imposing restrictions on this form of expression, conduct a rigorous analysis of the interests it intends to protect by way of the restriction”.⁵⁷

To achieve this, the State cannot use law enforcement operations alone. Therefore, police work in this regard should only be part of a comprehensive strategy aimed at allowing the peaceful exercise of the right of assembly. In cases where the State believes that it must deploy security forces in the context of assemblies and protests, it must give special consideration to the appropriate and detailed planning of operations.

The decision to resort to the use of force in the context of protests must respect the principles of necessity and proportionality. In those cases where force has to be used, it can only be directed at people who are involved in acts of violence or who represent a threat, and not against other people who are participating peacefully in the assembly or demonstration or who are simply passers-by. In these cases, the authorities must take the necessary measures to identify the specific people who have committed acts of violence and continue to facilitate the right to peaceful assembly of those who wish to exercise that right. Only in cases where violence has become widespread may law enforcement officials use force indiscriminately to disperse a gathering. In this regard, the Inter-American Commission has indicated that “the actions of the security forces should protect, rather than discourage, the right to assembly and therefore, the rationale for dispersing the demonstration must be the duty to protect people”.⁵⁸

Article 27 of the Law states that: “Under no circumstances may weapons be used against people who participate in demonstrations or peaceful public assemblies with a lawful purpose”.⁵⁹ This implies, in clear contradiction to international human rights standards, that the prohibition of the use of weapons protects only those who participate in gatherings that law enforcement officials consider to have a lawful purpose. The police should not have the power to decide whether the purpose of an assembly is lawful and, therefore, to decide whether or not to use force. In any case, the unlawfulness of an assembly would not be sufficient to authorize the use of force except for reasons of sufficient gravity, such as protecting human life or integrity, since even if a person carries out acts of violence during a demonstration, this should not give rise to human rights violations.

Article 28 states: “When demonstrations or public assemblies become violent, the police must act in accordance with the different levels of force set out in this

⁵⁷ Inter-American Commission on Human Rights, Report on the Situation of Human Rights Defenders in the Americas, OEA/Ser.L/V/II.124, 7 March 7 2006 para. 62.

⁵⁸ Id. para. 63.

⁵⁹ Original Spanish: “*Por ningún motivo se podrá hacer uso de armas contra quienes participen en manifestaciones o reuniones públicas pacíficas con objeto lícito*”.

Law”.⁶⁰ This rule is not clear enough, read with the rest of the law, to serve as an indication that the purpose of the use of force in assemblies may only be to contain violent individuals or to disperse the participants if violence is widespread. These restrictions on the actions of law enforcement officials should be clearly established in law.

Finally, article 31 stipulates that in order to police demonstrations that have become violent, “the presence of officials trained to carry out negotiations and procedures for deterrence and persuasion”⁶¹ must be considered. This creates an optional power and not an obligation to try to reduce tensions and to seek alternatives that avoid the use of force.

Therefore, the Law is insufficient to fully and adequately cover the obligations of the Mexican State in this area.

VIII. Conclusions

Based on the above, Amnesty International considers that the National Law on the Use of Force contravenes the obligations of the Mexican State regarding, among other things, the principles of legality, necessity, proportionality, prevention and the protection of life, and the rights to life, physical and mental integrity, equality and non-discrimination, and to freedom of assembly, association and expression, all of which are guaranteed in the Mexican Constitution and in international human rights treaties to which Mexico is a party.

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⁶⁰ Original Spanish: “*Cuando las manifestaciones o reuniones públicas se tornen violentas, las policías deberán actuar de acuerdo a los distintos niveles de fuerza establecidos en esta Ley*”.

⁶¹ Original Spanish: “*se deberá considerar la presencia de agentes capacitados para llevar a cabo negociaciones y procedimientos de disuasión y persuasión [...]*”.