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U.S. BORDER PATROL’S POLICY OF EXTRAJUDICIAL KILLING

Steve D. Shadowen*

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INTRODUCTION

From 2005 through March 2014, United States Border Patrol (Border Patrol) agents killed at least forty-four people along the nation’s southern border.¹ Many of the victims were undocumented Mexican nationals who were shot by agents for

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1. Rob O’Dell & Daniel González, *Border Patrol Agent Pleads Not Guilty in Mexican Teen’s 2012 Killing*, ARIZ. REPUBLIC (Oct. 10, 2015), <http://www.azcentral.com/story/news/local/arizona/breaking/2015/10/09/arizona-border-patrol-agent-mexican-teen-killing-court-plea/73552962/>.

allegedly throwing rocks at them.² These deaths resulted from a Border Patrol policy and practice—purportedly ended in March 2014—that allowed field agents to use lethal force against rock-throwers regardless of whether the agent was in imminent danger of death or serious injury.³ This article shows that the United States policy violated the international jus cogens norm against extrajudicial killing—a norm so fundamental to international order that every nation is bound by it regardless of the nation’s consent.

Police overreaction to rock-throwing is a long-standing problem. Consider one incident that occurred in an area where a tenth of the local merchants were smugglers and where the Governor had said in a moment of candor that these “lower sort of people” were “sinking into perfect barbarism.” On an otherwise typical evening, a teen and a guard exchanged curses, the officer drew his weapon, and several boys then began throwing debris—whatever was at hand—at him. More teens and young men gathered, more officers arrived as backup, and the crowd continued throwing rubble at the guards. Two officers, who later claimed they were in fear of their lives, fired their weapons. Among the victims were three seventeen-year-old boys—one killed and two permanently injured.

This particular incident could have happened just this year along the southern border at San Diego, Nogales, or El Paso. But it didn’t. It happened on March 5, 1770 in Boston. The guards were British soldiers, the victims were Boston colonists, and the incident is now known as the Boston Massacre.⁴

Samuel Adams, John Hancock, and other patriots condemned the use of lethal force against rock-throwers as a violation of “the highest law among men.”⁵ The guards acted with “barbarous caprice” and “polluted [our] streets with innocent blood.”⁶ The killings were “inhuman, unprovoked murders.”⁷ They were nothing less than a “bloody and horrid massacre.”⁸

America’s Founders were right. Responding to rock-throwing with lethal force is “barbarous” and “inhuman.” It is “murder.”⁹ The Founders considered it such a malevolent violation of the “the highest law among men” that it became a significant

2. Police Executive Research Forum, *U.S. Customs & Border Protection—Use of Force Review: Cases and Policies*, 8–9 (2013) [hereinafter, “PERF Report”].

3. See The Associated Press, *Border Patrol agents will continue to use deadly force against rock throwers*, DAILY NEWS (N.Y.) (Nov. 5, 2013), <http://www.nydailynews.com/news/national/u-s-border-agents-deadly-force-article-1.1507316>.

4. See generally ERIC HINDERAKER, *BOSTON’S MASSACRE* (Belknap Press 2017). The quotation—that the colonists were “sinking into barbarism”—is from Massachusetts Bay’s acting Governor, Thomas Hutchinson. *Id.* at 208 (quoting Hutchinson’s letter to former Governor Francis Bernard).

5. Benjamin Church, *Oration Delivered at Boston (Mar. 5, 1773)*, in *ORATIONS DELIVERED AT THE REQUEST OF THE INHABITANTS OF THE TOWN OF BOSTON, TO COMMEMORATE THE EVENING OF THE FIFTH OF MARCH, 1770; WHEN A NUMBER OF CITIZENS WERE KILLED BY A PARTY OF BRITISH TROOPS, QUARTERED AMONG THEM, IN A TIME OF PEACE.* (Boston: Peter Edes, 1785).

6. Dr. Joseph Warren, *1772 Boston Massacre Oration (Mar. 5, 1772)*, (transcript available at <http://www.drjosephwarren.com/2014/02/1772-boston-massacre-oration-full-text-2/>).

7. John Hancock, *Oration, Delivered at Boston (Mar. 5, 1774)*, in *ORATIONS DELIVERED AT THE REQUEST OF THE INHABITANTS OF THE TOWN OF BOSTON, TO COMMEMORATE THE EVENING OF THE FIFTH OF MARCH, 1770; WHEN A NUMBER OF CITIZENS WERE KILLED BY A PARTY OF BRITISH TROOPS, QUARTERED AMONG THEM, IN A TIME OF PEACE.* (Boston: Peter Edes, 1785).

8. HINDERAKER, *supra* note 4, at 249 (quoting Samuel Adams).

9. The colonists tried the British soldiers for murder, and even a jury packed with British loyalists convicted the two shooters of manslaughter. HINDERAKER, *supra* note 4, at 210. John Hancock later lamented, “Let this sad tale of death never be told without a tear: let every parent tell the shameful story to his listening children, till tears of pity glisten in their eyes, or boiling passion shakes their tender frames.” Hancock, *supra* note 7.

justification for overthrowing British sovereignty.¹⁰ And the United States later led the development of international law that prohibits the use of lethal force against rock-throwers unless the officer is in imminent peril of death or serious injury. The United States has consistently and adamantly invoked that principle to condemn other nations' use of lethal force against rock-throwers.

Yet the United States subsequently adopted a policy permitting its own Border Patrol agents to use lethal force against rock-throwers along the southern border regardless of whether the agent was in imminent peril. That policy was a betrayal of the nation's history and of the international law principles that the United States has long championed.

Lawsuits asserting *Bivens* claims against individual Border Patrol agents for unlawful use of lethal force are percolating up through the federal courts.¹¹ The U.S. Supreme Court has described these deaths as “disturbing,” “heartbreaking,” and “tragic,” but has left the appeals courts to grapple with the domestic law issues of extraterritoriality and qualified immunity, and to consider whether “special factors” preclude a *Bivens* remedy.¹² Only two decisions have addressed individual incidents under international law,¹³ and only one has addressed the use-of-force policy.¹⁴

This article fills that gap, analyzing whether the Border Patrol's policy allowing the use of lethal force against rock-throwers violated the international jus cogens norm against extrajudicial killing. The article proceeds in four parts.

First, using evidence unearthed in litigation, this article shows that from as early as the mid-2000s through at least March 2014, the Border Patrol had a policy and practice of treating the throwing of rocks at Border Patrol agents as per se deadly force. That is, the policy permitted agents to treat rock-throwing as deadly force regardless of the particular circumstances, such as the size of the rocks, the distance between the assailant and the agent, and the agent's ability to de-escalate the confrontation, take cover, or retreat. The policy thereby “justified” agents in responding to rock-throwing with lethal force of their own, regardless of whether a reasonable officer would have feared imminent death or serious injury to himself or another. The policy received the imprimatur of the highest executives within U.S. Customs and Border Protection (CBP).

Second, international law condemns police use of lethal force unless the

10. John Adams later concluded that on the night of the Boston Massacre “the Foundation of American Independence was laid.” HINDERAKER, *supra* note 4, at 273; *see also id.* (quoting Daniel Webster: “From that moment we may date the severance of the British Empire.”).

11. *See, e.g.*, *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017); *Rodriguez v. Swartz*, 111 F. Supp. 3d 1025 (D. Ariz. 2015), *appeal pending* No. 15-16410 (9th Cir.); *Perez v. United States*, 103 F. Supp.3d 1180 (S.D. Cal. 2015), *appeal pending* No. 17-56610 (9th Cir.).

12. *Hernandez*, 137 S. Ct. at 206–07 (remanding extraterritoriality and “special factors” issues to the court of appeals).

13. In a fractured decision, three judges of the U.S. Court of Appeals for the Fifth Circuit concluded there is “some force” to the argument that the United States has no sovereign immunity in its own courts to a jus cogens claim of an extrajudicial killing perpetrated by a U.S. Border Patrol agent in the course and scope of his employment, but that plaintiffs had not properly preserved the issue for appeal. *See Hernandez v. Mesa*, 785 F.3d 117, 142 (5th Cir. 2015) (en banc) (Haynes, J., concurring), *vacated on other grounds*, 137 S. Ct. 2003 (2017). A fourth judge agreed that the argument had force and that the Court should have decided the issue on the merits. *Id.* at 142–43 (Graves, J., concurring in part). Eleven judges concluded that the United States has sovereign immunity against such claims and/or that plaintiffs had waived the issue. *See id.* at 119 (per curiam); *id.* at 128–32 (Jones, J., concurring). In a case currently on appeal in the Ninth Circuit, a district court held that the United States is immune from such claims. *Perez v. United States*, 2014 WL 4385473 at *5–7 (S.D. Cal. Sept. 3, 2014), *appeal pending* No. 17-56610 (9th Cir.).

14. *See Perez*, 103 F. Supp.3d.

circumstances meet the imminent-peril standard. That standard provides that police may not use lethal force unless absolutely necessary to avoid the imminent death of or serious injury to the officer or another. The standard is reflected in innumerable international conventions, guidelines, and policing manuals.

Third, absent imminent peril, police use of lethal force against rock-throwers violates the jus cogens norm against extrajudicial killing—a norm so fundamental that all nations are bound by it regardless of their consent. The United States led the development of the international law principle that police use of lethal force absent imminent peril constitutes extrajudicial killing. Eight U.S. administrations have invoked that principle to condemn the use of lethal force against rock-throwers by police or security forces of some twenty nations, including Israel, India, Kenya, Chile, Nicaragua, Egypt, and Saudi Arabia. International tribunals routinely conclude that use of lethal force against rock-throwers, absent extraordinary circumstances, violates international law.

Fourth, the U.S. policy itself, not just individual instances of lethal force against rock-throwers, violated the jus cogens norm against extrajudicial killing. Top civilian officials are liable for failure to prevent the deluge of unjustified killings that occurred with their knowledge and acquiescence. And international law makes the United States itself, in addition to its top officials, responsible for the violations.

A subsequent article will unspool the consequences of the conclusion that U.S. policy violated the jus cogens norm against extrajudicial killing. Among those consequences are that the United States cannot claim immunity in U.S. courts from civil liability for its wrongs.

The conclusion that for at least a decade U.S. policy violated the jus cogens norm against extrajudicial killing should also spur other nations and international human rights organizations to continue to carefully monitor Border Patrol's conduct along the southern border. Under pressure from legislators, human rights organizations, the Government of Mexico, and private litigation, President Barack Obama's Secretary of Homeland Security directed the termination of the unlawful lethal-force policy in March 2014. The lawfulness of American use-of-force policy and practice along the southern border under the current Executive remains to be seen.

I. U.S. POLICY PERMITTED BORDER PATROL AGENTS TO TREAT THE THROWING OF ROCKS AT THEM AS PER SE DEADLY FORCE.

The United States justified killing dozens of people along the southern border on the ground that they had been throwing rocks at Border Patrol agents. It is exceedingly rare, however, for thrown rocks to place a law-enforcement officer in danger of imminent death or serious bodily injury. The National Law Enforcement Officers Memorial Fund has tracked all deaths of police officers in the line of duty since the killing of the first U.S. patrol officer in 1792. In those 200-plus years, only one police officer (in 1942) has been killed by a thrown rock.¹⁵ Most police departments teach their cadets that a rock is not deadly beyond fifty feet. Officers who encounter thrown rocks can simply retreat beyond that perimeter unless they are performing a particularly important mission, such as aiding a wounded colleague.

15. NAT'L L. ENF'T OFFICERS MEM'L FUND, <http://www.nleomf.com> (last visited Apr. 25, 2018).

The policy and practice within the Border Patrol was different. An Inspector General's report concluded, for example, that in 2011 there were 339 reported rock assaults on Border Patrol agents, who responded with lethal force in thirty-three instances, i.e., *ten percent of the time*.¹⁶ The same pattern occurred in 2012: Border Patrol agents used lethal force twenty-two times in response to 185 reported rock assaults, i.e., *twelve percent of the time*.¹⁷

What accounts for these astronomically high rates of use of deadly force against thrown rocks?

A. *The Unlawful Policy*

The high incidence of lethal force against alleged rock-throwers is the result of a policy and practice implemented and approved at the highest levels of CBP.¹⁸ In a lawsuit challenging the policy, the former Assistant Commissioner of CBP for Internal Affairs testified that from at least 2006 to 2014 the Border Patrol maintained a policy that allowed field agents to use lethal force against rock-throwers regardless of whether the agents were in imminent danger of death or serious injury.¹⁹

Regardless of circumstances—the size of the rock, the distance away from the agent, the ability to seek cover, etc.—the policy deemed rock-throwing to be a *per se* deadly assault. The policy thereby authorized agents to use lethal force to repel the rock assaults. The Internal Affairs chief testified: “there was a policy within CBP that in response to rocking or alleged rocking, agents need not backup, need not take cover, and could treat the throwing of rocks at them as *per se* lethal force to which they could respond with lethal force of their own.”²⁰

The highest CBP and Border Patrol officials routinely had “meetings, discussions, or other communications in which that policy . . . was discussed and affirmed.”²¹ When fatal shootings of alleged rock-throwers were addressed at the CBP Commissioner's daily meeting with his staff, the killings were invariably described as “a good shoot.”²²

CBP and Border Patrol management did not keep the policy secret, repeatedly telling the media in stark terms that shooting rock-throwers was justified by “the

16. U.S. DEP'T OF HOMELAND SEC., CBP USE OF FORCE TRAINING AND ACTIONS TO ADDRESS USE OF FORCE INCIDENTS 14 (Office of Inspector General 2013).

17. *Id.* at 14–15.

18. CBP is a component of the Department of Homeland Security (DHS). The Office of Border Patrol, which is headed by the Chief of the Border Patrol, is a component of CBP and employs approximately 21,000 Border Patrol agents.

Another component of DHS is the Office of Internal Affairs, which is headed by an Assistant Commissioner of CBP—a position coequal with that of Chief of the Border Patrol. Report of Thomas Frazier at ¶¶ 15–16, *Perez v. United States* (S.D. Cal. 2015) (No. 3:13-cv-01417-WQH-BGS) [hereinafter, “Frazier Report”].

19. Transcript of Deposition of James Tomsheck at 16, 300–01, *Perez v. United States* (S.D. Cal. 2015) (No. 3:13-cv-01417-WQH-BGS) [hereinafter, “Tomsheck Dep.”].

The former Chief of the Border Patrol has denied that the Border Patrol ever had “any written or unwritten policy that suggests that agents can use lethal force against a rock thrower, regardless of the level of threat posed.” Declaration of Michael J. Fisher at ¶ 5, *Perez v. United States* (S.D. Cal. 2015) (No. 3:13-cv-01417-WQH-BGS) [hereinafter, “Fisher Dec.”].

20. Tomsheck Dep., *supra* note 19, at 300–01.

21. *Id.* at 301; *see also id.* at 192 (“There were many meetings regarding use of force where it was emphatically stated . . . that lethal force was the appropriate response to rocks being thrown.”).

22. *Id.* at 150.

agency's long-standing position that rocks are lethal weapons."²³ After an agent killed a fifteen-year-old boy who was on the Mexican side of the border, the agents' union issued a press release asserting that "[r]ocks are weapons and constitute deadly force" and "[i]f an agent is confronted with deadly force they will respond in kind."²⁴ Border Patrol officials never disavowed the union's statement or many others like it. Both internally and externally, "the mantra from Border Patrol management was that [a rock assault] is lethal force."²⁵

This policy manifested itself in several ways. Rock-throwing is the most common type of assault encountered by agents,²⁶ yet Border Patrol executives did not issue any written guidelines to agents on how the imminent-peril standard applied or how they might avoid the necessity of using lethal force.²⁷ Nor did management provide any training to agents on how to counteract the assaults that they were most likely to encounter in the field.²⁸ Having refused to provide any specific written guidance or training, management rarely, if ever, disciplined an agent for using lethal force against alleged rock-throwers, regardless of the circumstances.²⁹

This policy was part of the militarization of the Border Patrol after September 11, 2001. The statutes governing CBP make clear that it is a domestic law-enforcement agency.³⁰ But CBP leadership viewed the agency as a paramilitary organization to which the legal constraints governing law-enforcement agencies did not apply. The Internal Affairs chief confirmed that the most senior executives purposefully "militarize[d] the Border Patrol—from the way Border Patrol agents are hired to the operational tactics Border Patrol agents were encouraged to take to the field."³¹

This militarization, and its role in permitting the use of lethal force against rock-throwers, is exemplified by an October 2012 meeting of senior CBP and Border Patrol brass in Harper's Ferry, Virginia.³² CBP's top official told the assembled group

23. The Associated Press, *supra* note 3. The former Chief of Border Patrol, to whom the Associated Press attributed this statement, has denied that he made it. Fisher Dec., *supra* note 19, at 143.

24. Frazier Report, *supra* note 18, at ¶ 73.

25. Declaration of James F. Tomsheck in Support of Plaintiff's Motion to Compel Documents in Fisher's Possession at ¶ 7, *Perez v. United States* (S.D. Cal. 2015) (No. 3:13-cv-01417-WQH-BGS) [hereinafter, "Tomsheck Dec."].

26. Frazier Report, *supra* note 18, at ¶ 40.

27. The written DHS policy simply restated the U.S. constitutional standard that "[l]aw enforcement officers and agents of [DHS] may use deadly force only when necessary, that is, when the officer has a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury to the officer or to another person," providing that each of its agencies "shall, to the extent necessary, supplement this policy with policy statements or guidance consistent with this policy." *Id.* In turn, the 2010 CBP use-of-force Handbook merely reiterates the broad constitutional standard "while enabling CBP operational component leadership to address use of force related issues unique to their respective workplace environments and adopt more detailed operational guidance." *Id.* at ¶¶ 20–25. The "component leadership"—the Border Patrol management—refused to issue any such guidance for responding to rock-throwing, until forced to do so in 2014.

28. *Id.* at ¶ 125.

29. *Id.* at ¶ 34. The stunning lack of disciplinary action, criminal prosecution, or successful civil actions is catalogued in Complaint, Family Members of Anastasio Hernandez-Rojas at 11–14.

30. 6 U.S.C. § 211(e)(3)(A) (2018) (Border Patrol shall "serve as the law enforcement office of U.S. Customs and Border Protection.").

31. Tomsheck Dec., *supra* note 25, at ¶ 12. On the militarization of the Border Patrol, see Brief of *Amici Curiae* Former Officials of U.S. Customs and Border Protection Agency in Support of Petitioners, Hernandez, 137 S. Ct. 2003 (2017) (No. 15-118).

32. The meeting was attended by the CBP Commissioner, the Chief of the Border Patrol, the Chiefs of each Sector of the Border Patrol, and other leadership within CBP. Tomsheck Dep., *supra* note 19, at 262.

that CBP was “now the premier paramilitary homeland security agency.”³³ While making a presentation on the string of fatal shootings and the constitutional restraints applicable to all law-enforcement officers, the Internal Affairs chief was interrupted and told that “we’re not cops and we don’t have to respond like they do.”³⁴

The result of this culture and policy was a staggering body count. The deaths of alleged rock-throwers included people shot in the back; shot by rifle from more than 50 yards away; shot while across the border in Mexico; shot seven times; and shot from patrol boats that could easily have maneuvered away.³⁵

B. *The End of the Policy?*

The Border Patrol’s policy of treating rock-throwing as per se deadly force, regardless of the circumstances, purportedly ended in March 2014. For many years the policy had received intense criticism from national and international human rights organizations,³⁶ and from the Mexican government.³⁷ The scrutiny intensified after the July 2010 killing of an unarmed Mexican teenager on the southern side of the border.³⁸ The U.S.’s refusal to extradite the shooter to Mexico to stand trial there, or to bring criminal charges of its own, drew the attention of the U.N. High Commissioner for Human Rights.³⁹

Responding to another killing in July 2012, the Inter-American Commission on Human Rights issued a statement declaring “that U.S. Border Patrol agents [have] used an excessive and disproportionate use of force on the Mexico-United States border.”⁴⁰ The Commission viewed the “deaths of immigrants . . . through the use of excessive and disproportionate force as extremely serious.”

Then, in October 2012 a Border Patrol agent shot another unarmed teenager in the back seven times. The U.N. High Commissioner announced that “the reports reaching me are that there has been excessive use of force by the U.S. border patrols while they are enforcing the immigration laws,” and that such force is “unacceptable under any circumstances.”

In February 2013, the Police Executive Research Forum issued a scathing report on the Border Patrol’s use of lethal force. Having reviewed the agency’s files on rock-throwing incidents, the report concluded that “[t]oo many cases do not appear to meet the test of objective reasonableness with regard to the use of deadly force.”⁴¹ In December 2013, Jeh Johnson became the new Secretary of Homeland Security, and

33. *Id.* at ¶ 14; *id.* at 287.

34. *Id.* at ¶ 14; *id.* at 305.

35. Frazier Report, *supra* note 18, at ¶¶ 48–86.

36. *See id.* at ¶ 57.

37. *Id.* at ¶ 72.

38. *Id.* at ¶¶ 70–76.

39. Highlights of Regular Briefing by the U.N. Information Service (May 29, 2012).

40. Press Release, The Inter-American Comm’n on Human Rights, *IACHR condemns the recent death of Mexican national by U.S. Border Patrol Agents* (July 24, 2012), http://www.oas.org/en/iachr/media_center/preleases/2012/093.asp.

41. PERF Report, *supra* note 2, at 7. CBP originally tried to keep the damning report hidden, even refusing a demand to give a copy to Congress. But, the report was leaked to the Los Angeles Times. The PERF Report had been preceded by a highly critical report by the DHS Inspector General and was succeeded by a similarly scathing report from the Homeland Security Advisory Council. *See* U.S. Dep’t. of Homeland Sec., Office of Inspector General, *CBP Use of Force Training and Actions To Address Use of Force Incidents* (Sept. 2013); Homeland Security Advisory Council, *Final Report of the CBP Integrity Advisory Panel* (Mar. 15, 2016).

he directed the Chief of the Border Patrol (Chief) to fix the problem of excessive force against rock-throwers.

In March 2014, the Chief responded by issuing a Directive to all agents that provided:

Agents should continue [sic], whenever possible, to avoid placing themselves in positions where they have no alternative to using deadly force. Agents shall not discharge firearms in response to thrown or hurled projectiles unless the agent has a reasonable belief, based on the totality of the circumstances, to include the size and nature of the projectiles, that the subject of such force poses an imminent danger of death or serious injury. Agents should obtain a tactical advantage in these situations, such as seeking cover or distancing themselves from the immediate area of danger.⁴²

The Directive was the first written guidance that CBP and Border Patrol executives had ever provided to agents on the most prevalent threat that they faced in the field.

II. INTERNATIONAL LAW APPLIES THE IMMINENT-PERIL STANDARD TO POLICE USE OF LETHAL FORCE.

Examining police use of lethal force under international law begins with the fundamental premise that human life is an ultimate good. Major human rights declarations and treaties—including those signed by the United States—establish every person’s right to life and require every nation to refrain from arbitrarily taking human life.⁴³ The International Covenant on Civil and Political Rights, for example, provides that “[e]very human being has the inherent right to life,” and that “[n]o one shall be arbitrarily deprived of his life.”⁴⁴ It requires the United States and other signatories to “respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party,” including persons who are

42. Memorandum from Michael J. Fisher, Chief, U.S. Border Patrol on Use of Safe Tactics and Techniques to U.S. Border Patrol Personnel (Mar. 7, 2014) (available at <https://www.cbp.gov/sites/default/files/documents/Use%20of%20Safe%20Tactics%20and%20Techniques.pdf>). The Directive also required that supervisors identify violence-prone areas; train agents in taking cover and knowing when to engage and disengage; plan for appropriate backup; use new technology and less-than-lethal force; and use the new guidelines in planning field operations.

43. *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71, art. 6 (1948); International Covenant on Civil and Political Rights, Dec. 19, 1966, U.S. Senate Treaty No. 95-20, 1966 U.S.T. LEXIS 521, 999 U.N.T.S. 171 (ratified by Mexico Mar. 23, 1981; ratified by U.S. June 8, 1992) [hereinafter, “ICCPR”]; International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, ratified by the U.S. Nov. 20, 1994, 660 U.N.T.S. 195; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, ratified by the U.S. Nov. 20, 1994, 1465 U.N.T.S. 85; American Convention of Human Rights, Art. 4, Nov. 22, 1969, OAS Treaty Series No. 36, 1144 U.N.T.S. 123, 9 ILM 99 [hereinafter, “ACHR”]; African Charter on Human and Peoples’ Rights art. 4, June 27, 1981, OAU Doc. CAB/LEG/67/3/rev.5, reprinted at (1982) 21 I.L.M. 58; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, 1950, 213 U.N.T.S. 222, 232 entered into force Sept. 8, 1953.

44. ICCPR, *supra* note 43, at art. 6(1).

“not situated within the territory of the State Party.”⁴⁵

The United States is also a member of the Organization of American States,⁴⁶ whose American Declaration on the Rights and Duties of Man provides that “[e]very human being has the right to life.”⁴⁷ The accompanying American Convention of Human Rights provides that “[e]very person has the right to have his life respected,” and that “[n]o one shall be arbitrarily deprived of his life.”⁴⁸

International law defines when it is “arbitrary,” and therefore unlawful, for police or state security forces to deprive a person of her life. Subject to elaborations and refinements not applicable here, the core principle is the imminent-peril standard. That standard provides that a law-enforcement officer may not use deadly force against a person except to protect himself or another from imminent danger of death or serious bodily injury at the hands of the person against whom the force is used.⁴⁹ For example, the U.N.’s Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provides that police may use lethal force only in “self-defense or defense of others against the imminent threat of death or serious injury,” and “when strictly unavoidable in order to protect life.”⁵⁰ Likewise, the U.N.’s Code of Conduct for Law Enforcement Officials mandates that “[i]n general, firearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the

45. U.N. H.R. Comm., General Comment No. 31, *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004). The U.N. Human Rights Committee is responsible for interpreting the ICCPR.

46. Organization of American States (OAS), Charter of the Organization of American States, Apr. 30, 1948, ratified by the United States, Dec. 13, 1951, T.I.A.S. No. 2361, 119 U.N. T.S. 3.

47. American Declaration on the Rights and Duties of Man, Res. XXX, Final Act of the Ninth Int’l Conf. of Am. States (Pan American Union), Bogota, Colombia, Mar. 30–May 2, 1948, at Art. I.

48. ACHR, *supra* note 43, at art. 4. The Commission that enforces the American Declaration and the American Convention asserts that the United States is bound by the Declaration by virtue of its membership in the OAS. *See, e.g.*, *Gonzales v. the United States*, Case 12.626, Inter-Am. Comm’n H.R., Report No. No. 80/11, ¶ 115 (2011).

49. *See, e.g.*, Basic Principles on the Use of Force and Firearms by Law-Enforcement Officials, Eighth United Nations Cong. on the Prevention of Crime and the Treatment of Offenders, Havana, Aug. 27–Sept. 7 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 112 (1990) [hereinafter, “Basic Principles on Use of Force”]; Code of Conduct for Law-Enforcement Officials, G.A. Res. 34/169, U.N. Doc. A/RES/34/169, Annex I, art. 3 (Dec. 17, 1979) [hereinafter, “Code of Conduct for Law-Enforcement Officials”]; U.N. Human Rights Comm., General Comment No. 6, ¶ 3, U.N. Doc. HRI/Gen/1 (1982); Principles on the Prevention of Human Rights Violations Committed with Small Arms, Sub-Com. Res. 2006/22, Annex, U.N. Doc. A/HRC/Sub.1/58/L.11/Add.1 at ¶ 8 (Aug. 24, 2006); U.N. Special Rapporteur on Extrajudicial and Summary Executions Interim report on the worldwide situation in regard to extrajudicial, summary or arbitrary executions, U.N. Doc. A/61/311 ¶ 35 (2006) (by Philip Alston); Inter-American Comm’n on Human Rights, *Report on Terrorism and Human Rights* ¶ 87, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, <http://hrlibrary.umn.edu/iachr/terrorism-index.html>; Report (Part One) of The Public Comm’ to Examine the Maritime Incident of 31 May 2010, January 2011, <http://www.turkel-committee.gov.il/les/worddocs/8707200211english.pdf>, at ¶ 226; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 comment f (AM. LAW INST. 1987); *McCann and Others v. The United Kingdom*, Eur. Ct. H.R. (ser. A) No. 324 (1995); *Suárez de Guerrero v. Colombia*, U.N. Human Rights Comm., R.11/45 (1982), ¶ 13.2; Amnesty International, *Basic Human Rights Standards for Law Enforcement Officials*, Dec. 1998; Amnesty International, *Use of Force: Guidelines for the Implementation of the U.N. Basic Principles on the Use of Force of Force and Firearms by Law Enforcement Officials*, Amnesty International Dutch Section: Amsterdam (2015), at 23; Cees de Rover & Anja Bienert, *To Serve and to Protect: Human Rights and Humanitarian Law for Police and Security Forces*, ICRC: Geneva (2d ed. 2014), at 247; ICRC, *International Rules And Standards For Policing*, 10 Mar. 2014, 18; ICRC Advisory Service On International Humanitarian Law, *The use of force in law enforcement operations*.

50. Basic Principles on Use of Force, *supra* note 49, at ¶ 9.

suspected offender.”⁵¹ In short, police and security forces may use lethal force only “when an individual poses an imminent threat to the life of another, and where the use of lethal force is strictly unavoidable to protect life.”⁵²

The binding imminent-peril standard is incorporated into policing standards and training manuals around the world.⁵³ Even in exceedingly difficult hot spots, such as the Occupied Territories, security forces “shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury.”⁵⁴

The imminent-peril standard is quite familiar to U.S. law-enforcement agencies. The jury instructions in the criminal trial of the soldiers in the Boston Massacre in 1770 were succinct: “if a man who is assaulted retreats to where he can retreat no farther, he may to save his life kill his assailant.”⁵⁵ This remains the standard that applies to U.S. law-enforcement officers today. The Supreme Court has held that deadly force is permissible only when “the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.”⁵⁶ Accordingly, “[a] police officer may not seize an unarmed, non-dangerous suspect by shooting him dead.”⁵⁷

III. ABSENT IMMINENT PERIL, POLICE USE OF LETHAL FORCE VIOLATES THE JUS COGENS NORM AGAINST EXTRAJUDICIAL KILLING.

A. *The Prohibition Against Extrajudicial Killing Is a Jus Cogens Norm.*

Jus cogens norms are at the apex of international law. They are universal and obligatory, binding all nations regardless of their consent. Jus cogens norms are “derived from values taken to be fundamental by the international community, rather

51. Code of Conduct for Law-Enforcement Officials, *supra* note 49, at art. 3(c).

52. Flavia Pansieri, U.N. Deputy High Comm’r for Human Rights, Opening Statement at the Human Rights Council’s Interactive Panel Discussion on the Use of Remotely Piloted Aircraft or Armed Drones in Compliance With International Law, (Sept. 2, 2014) (transcript available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15113&LangID=E>).

53. *See, e.g.*, COMMONWEALTH SECRETARIAT, COMMONWEALTH MANUAL ON HUMAN RIGHTS TRAINING FOR POLICE 65 (2006) (“Unnecessary and unlawful use of deadly force by a police officer would therefore constitute a violation of the right to life”); SENIOR POLICE ADVISOR TO THE OSCE SECRETARY GENERAL, GUIDEBOOK ON DEMOCRATIC POLICING 23 (2d ed. 2008) (“Intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.”); ICRC, *Human Rights and Humanitarian Law in Professional Policing Concepts* 22 (2002) (“The intentional lethal use of firearms is allowed only when strictly unavoidable to protect life.”).

54. LAW—The Palestinian Society for the Protection of Human Rights and the Environment, *Violating the Right to Life and Security of Person* (Feb. 19, 2001), http://www.pac-usa.org/law_violating.htm (quoting the guidelines issued to Israeli troops for opening fire in the Occupied Territories). Every British soldier in Iraq was issued a card summarizing the rules of engagement, which provided that “[y]ou may only open fire against a person if he/she is committing or about to commit an act likely to endanger life and there is no other way to prevent the danger.” *Al-Saadoon et al. v. Secretary of State for Defence*, (2016) EWHC (Admin) [773], [89] (Eng.); *see generally* McCann, 21 Eur. Ct. H.R. at 212–13 (State’s failure to appropriately plan operation led to “the killing of the three terrorists [and] constituted the use of force which was . . . more than absolutely necessary in defence [sic] of persons from unlawful violence.”).

55. Hiller B. Zobel, *The Boston Massacre* 260 (W.W. Norton & Co. 1996) (defense counsel John Adams’ closing argument).

56. *Tennessee v. Garner*, 471 U.S. 1, 3 (1985).

57. *Id.* at 11.

than from the fortuitous or self-interested choices of nations.”⁵⁸ These “fundamental and universal norms constituting jus cogens transcend [nations’] consent, as exemplified by the theories underlying the judgments of the Nuremberg tribunals following World War II.”⁵⁹

The prohibition against extrajudicial killing is a peremptory jus cogens norm.⁶⁰ The laws of all civilized societies prohibit extrajudicial killing, generally defined as any “deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court.”⁶¹ Like courts throughout the developed world, U.S. courts consistently recognize that extrajudicial killing violates a jus cogens norm.⁶² It is “a norm of international law so fundamental that it is binding on all members of the world community.”⁶³

B. Police Use of Lethal Force, Absent Imminent Peril, Constitutes Extrajudicial Killing.

The peremptory norm against extrajudicial killing includes a prohibition on police use of excessive, lethal force. Such use of force is one of the core forms of “extrajudicial killing” defined by international law. For example, the U.N. Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions has concluded that the imminent-peril standard, as embodied in the Code of Conduct and the Basic Principles, “reflects binding international law.”⁶⁴ Consequently, “[f]or [deliberate] lethal force to be considered to be lawful it must be used in a situation in which it is necessary for self-defense or the defense of another’s life.”⁶⁵

58. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 715 (9th Cir. 1992); *see also id.* at 715 (“Whereas customary international law derives solely from the consent of states, the fundamental and universal norms constituting jus cogens transcend such consent.”).

59. *Id.*; *see* Mary Ellen O’Connell, *Jus Cogens: International Law’s Higher Ethical Norms*, in THE ROLE OF ETHICS IN INTERNATIONAL LAW, 78, 83 (Donald Earl Childress III ed., 2012) (Jus cogens norms are “not derived from the three primary sources of international law . . . [they] are understood as superior to the rule derived from the primary sources because [they] can void positive law rules, but positive law rules cannot void or modify jus cogens.”).

60. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (AM. LAW INST. 1987); *Gonzalez v. Mexico*, Cases 12.496-12.498, Inter-Am. Comm’n H.R., Report No. 28/07, ¶¶ 251–52 (Mar. 9, 2007); Jürgen Bröhmer, STATE IMMUNITY AND THE VIOLATION OF HUMAN RIGHTS 214 (1997); Gerald L. Neuman, *Understanding Global Due Process*, 23 GEO. IMMIGR. L.J. 365, 395–96 (2009).

61. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (1994)); *see also* Rome Statute, War Crimes, at art. 8, https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

62. *See, e.g.*, *Yousuf v. Samantar*, 699 F.3d 763, 778 (4th Cir. 2012); *Chavez v. Carranza*, 559 F.3d 486, 491 (6th Cir. 2009); *Sarei v. Rio Tinto, PLC*, 456 F.3d 1069, 1091 (9th Cir. 2006) (en banc); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157–58 (11th Cir. 2005); *Kadic v. Karadzic*, 70 F.3d 232, 243–44 (2d Cir. 1995); *Hilao v. Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791 n. 20 (D.C. Cir. 1984) (Edwards, J., concurring); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1179 (C.D. Cal. 2005); *Abiola v. Abubakar*, No. 02-C-6093, 2005 WL 3050607, at *2–3 (N.D. Ill. Nov. 8, 2005); *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1153–54 (E.D. Cal. 2004); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 305–06 (S.D.N.Y. 2003); *Est. of Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250, 1262 (N.D. Ala. 2003); *Xuncax v. Gramajo*, 886 F. Supp. 162, 172 (D. Mass. 1995); *Denegri v. Chile*, No. 86-3085, 1992 WL 91914, at *4 (D.D.C. Apr. 6, 1992); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1542 (N.D. Cal. 1987), *amended*, 694 F. Supp. 707, 710–11 (N.D. Cal. 1989).

63. *Alejandro v. Republic of Cuba*, 996 F. Supp. 1239, 1239 (S.D. Fla. 1997).

64. G.A. Res. A/61/311, ¶ 35 Extrajudicial, Summary or Arbitrary Executions (Sept. 5, 2005).

65. Phillip Alston (Special Rapporteur on extrajudicial, summary or arbitrary executions), *Civil and Political Rights, Including the Questions of Disappearances and Summary Executions*, ¶ 48, U.N. Doc. E/CN.4/2006/53 (Mar. 8, 2006).

That conclusion is echoed by the U.N. Special Rapporteur on the Use of Small Arms, who determined that police and security forces may use lethal force “defensively only in the most extreme circumstances, expressly, where the right to life is already threatened or unjustifiably impinged” due to “the jus cogens human rights obligations imposed upon all states and individuals to respect the right to life.”⁶⁶ International tribunals have similarly concluded that police killing not justified by Imminent Peril “would amount to an extrajudicial execution.”⁶⁷

For decades, the U.S. Department of State has agreed—insisted—that the jus cogens norm against extrajudicial killing includes “excessive use of lethal force by the police, security forces, or other agents of the State whether against criminal suspects, detainees, prisoners, or others.”⁶⁸ The State Department prepares annual Human Rights Reports for Congress regarding the human rights record of more than 200 nations. In those Reports “lethal use of excessive force by security forces [is] defined as a form of extrajudicial killing.”⁶⁹

C. Police Use of Lethal Force Against Rock-Throwers, Absent Imminent Peril, Constitutes Extrajudicial Killing.

The State Department has also consistently concluded that, in all but the most unusual circumstances, responding to rock-throwing with lethal force is excessive and therefore a violation of the jus cogens norm against extrajudicial killing. The issue often arises when police or security forces use live ammunition against rock-throwing protesters. For example, the 2010 Human Rights Report for India concluded that “protesters threw stones and rocks at security forces, and security forces retaliated with excessive or deadly force.”⁷⁰ In 2011, Secretary of State Hillary Clinton condemned

66. Barbara Frey (Special Rapporteur in accordance with Sub-Commission resolution 2002/25), *Prevention of Human Rights Violations Committed with Small Arms and Light Weapons*, ¶ 27, U.N. Doc. A/HRC/Sub.1/58/27 (Aug. 8, 2006); see also Christof Heyns (U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions), ¶¶ 60–61, U.N. Doc. A/HRC/17/28 (May 23, 2011); ICRC, *Human Rights and Humanitarian Law for Police and Security Forces*, 263 (Mar. 31, 2017); *Comment by the Spokesperson for the U.N. High Commissioner for Human Rights, Rupert Colville, on the killing of a Palestinian man in Hebron*, ohchr.org (Mar. 30, 2016), [http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=18540&LangID=; U.N.](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=18540&LangID=; U.N.;); Sarah Joseph, *Denouement of the Deaths on the Rock: The Right to Life of Terrorists*, 14 NETH. Q. OF HUM. RTS. 5, 20 (1996).

67. *Zambrano Velez et al. v. Ecuador, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 166, ¶ 108 (July 4, 2007)*; see also *Dorzema v. Dominican Republic, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 251, at ¶¶ 85(i), 100 (Oct. 24, 2012)*.

68. U.S. DEP’T OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES 1995, app. A: Notes on the Preparation of the Reports (Mar. 1996), http://dosfan.lib.uic.edu/ERC/democracy/1995_hrp_report/95hrp_report_appenda.html; see also U.S. DEP’T OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES 1997—PAPUA NEW GUINEA (Jan. 30, 1997) <http://www.refworld.org/docid/3ae6aa278.html> (police’s unreasonable killing of innocent bystander is extrajudicial killing); U.S. DEP’T OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES 2000, app. A: Notes on the Preparation of the Reports (Feb. 23, 2001), <https://www.state.gov/j/drl/rls/hrrpt/2000/app/650.htm> (excessive use of lethal force by state agents is extrajudicial killing).

69. COUNTRY REPORT ON HUMAN RIGHTS PRACTICES 1995, *supra* note 68.

70. U.S. DEP’T OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES—INDIA, (Apr. 8, 2011), <https://www.state.gov/j/drl/rls/hrrpt/2010/sca/154480.htm>. See also U.S. DEP’T OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES—BURUNDI (Feb. 23, 2001), <https://www.state.gov/j/drl/rls/hrrpt/2000/af/703.htm>.

Country Reports on Human Rights Practices for the following years and countries: 1986 Israel; 1988 Israel; 1989 Yugoslavia/Serbia; 1990 Madagascar; 1991 Tunisia; 1991 Madagascar; 1992 Cameroon; 1992 Kenya; 1992 New Guinea; 1993 Chile; 1995 Nicaragua; U.S. DEP’T OF STATE, COUNTRY REPORT ON HUMAN

Egyptian soldiers' "excessive" use of lethal force against stone-throwing protesters in Tahrir Square. She implored then-President Mubarak's forces "to respect and protect the universal rights of all Egyptians."⁷¹

The United States condemnations are not limited to the use of lethal force against rock-throwers in large demonstrations or protests. For example, in the 2002 Human Rights Report for Israel and the Occupied Territories, the State Department condemned the human rights violation when "[Israel Defense Forces] soldiers shot and killed a ten-year old Palestinian boy in the Balata Refugee Camp in Nablus. The boy was among a group of youths who were throwing rocks at Israeli soldiers. The use of lethal force against a rock-thrower, in this instance and in many others like it, was excessive."⁷² The State Department pointedly noted that "IDF statistics state that no

RIGHTS PRACTICES—ETHIOPIA (Mar. 31, 2003), <https://www.state.gov/j/drl/rls/hrrpt/2002/18203.htm>; U.S. DEP'T OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES 2002—TANZANIA (Mar. 31, 2003), <https://www.state.gov/j/drl/rls/hrrpt/2002/18230.htm>; U.S. DEP'T OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES—ETHIOPIA (Mar. 8, 2006), <https://www.state.gov/j/drl/rls/hrrpt/2005/61569.htm>; U.S. DEP'T OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES 2011—EGYPT <https://www.state.gov/j/drl/rls/hrrpt/2011/humanrightsreport/index.htm?dclid=186423#wrapper>; U.S. DEP'T OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES 2011—DJIBOUTI <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dclid=186190>; U.S. DEP'T OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES 2011—MADAGASCAR (May 24, 2012) <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dclid=186213>; U.S. DEP'T OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES 2012—SAUDI ARABIA (April 19, 2013) <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dclid=204381>; U.S. DEP'T OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES 2016—NEPAL (Mar. 3 2017) <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dclid=265544>; U.S. DEP'T OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES 2011—ISRAEL AND THE OCCUPIED TERRITORIES (May 24, 2012) <https://www.state.gov/j/drl/rls/hrrpt/2011/nea/186429.htm>; U.S. DEP'T OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES 2012—ISRAEL AND THE OCCUPIED TERRITORIES (April 19, 2013) <https://www.state.gov/j/drl/rls/hrrpt/2012/nea/204363.htm>; U.S. DEP'T OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES 2013—ISRAEL AND THE OCCUPIED TERRITORIES (Feb. 27, 2014) <https://www.state.gov/j/drl/rls/hrrpt/2013/nea/220356.htm>; U.S. DEP'T OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES 2014—ISRAEL AND THE OCCUPIED TERRITORIES (June 25, 2015) <https://www.state.gov/j/drl/rls/hrrpt/2014/nea/236602.htm>; U.S. DEP'T OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES 2015—ISRAEL AND THE OCCUPIED TERRITORIES (Apr. 13, 2016) <https://www.state.gov/j/drl/rls/hrrpt/2015/nea/252927.htm>; U.S. DEP'T OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES 2016—ISRAEL AND THE OCCUPIED TERRITORIES (Mar. 3 2017) <https://www.state.gov/j/drl/rls/hrrpt/2016/nea/265500.htm>.

71. Marwa Awad & Edmund Blair, *Egypt clashes move into 4th day, US worried*, REUTERS (Dec. 18, 2011), <https://www.reuters.com/article/us-egypt/egypt-clashes-move-into-4th-day-u-s-worried-idUSL6E7NH03C20111219>.

72. U.S. DEP'T OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES 2002—ISRAEL AND THE OCCUPIED TERRITORIES (Mar. 31, 2003), <https://www.state.gov/j/drl/rls/hrrpt/2002/18278.htm>; *see also* U.S. DEP'T OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES 2015—TURKEY (Apr. 13, 2016) <https://www.state.gov/documents/organization/253121.pdf> (12-year-old boy was killed when "a military officer opened fire when a group of boys began to throw stones."); *United States v. Acosta Sierra*, 690 F.3d 1111, 1122 (9th Cir. 2012) (imminent-peril standard not met because the officer's "general feeling of fear or unease is not the same as apprehension of an imminent battery due to Acosta Sierra's throwing of the rock" and the assailant had no "apparent present ability to immediately cause harm to Officer Lopez."); *Mann v. Wash. Metro. Area Transit Auth.*, 168 F. Supp. 3d 71, 82 (D.D.C. 2016), *aff'd*, 16-7031, 2017 WL 2859562 (D.C. Cir. 2017) ("[n]o reasonable jury could conclude that Defendant did not honestly believe that Plaintiff's use of force was excessive" where plaintiff beat and pepper-sprayed assailant who had been throwing rocks at subway ticket booth); *White v. Cty. of San Diego*, 13-cv-1166, 2014 WL 9859196, at 5-6 (S.D. Cal. 2014) (denying summary judgment on qualified immunity where officer shot suspect who had thrown cinderblock and rocks and was wielding stick); *United States v. Behenna*, 71 M.J. 228 (2011) (lethal force was excessive when used against a detainee who threw concrete at soldier and lunged for his gun); *In re S. Afr. Apartheid Litig.*, 617 Supp. 2d 228, 243 (S.D.N.Y. 2009) (security forces guilty of extrajudicial killing when they opened fire on group of rock-throwing demonstrators); *Otioti v. Arizona*, 07-cv-443, 2008 WL 7069009, at 2-5 (D. Ariz. 2008) (denying summary judgment on qualified immunity where officer shot suspect who had thrown rocks).

Israeli soldier has ever been killed by rock-throwing.”⁷³

The United Nations concurs that lethal force against rock-throwers is excessive and therefore a jus cogens violation. The U.N.’s training manual for its own peacekeeping forces describes a scenario in which rock-throwers assaulted peacekeepers. The manual concludes that lethal force “could have only been justified in response to a serious threat to the life of a person. The scenario does not give any indication that this was the case. Therefore the use of firearms was not justified.”⁷⁴ The Israeli-Palestinian conflict generates many similar conclusions by human rights organizations in the context of rock-throwing protesters.⁷⁵

Courts throughout the developed world have reached the same conclusion. For example, in *Aydan v. Turkey*,⁷⁶ the European Court of Human Rights concluded that Turkey violated its obligation to safeguard human rights when its criminal courts failed to convict a security officer who used lethal force against a rock-thrower. The officer fired a burst from an automatic weapon into a group of protesters who had thrown rocks at the jeep in which he was riding, killing one of the protesters. The court concluded that the use of lethal force against rock-throwers was patently excessive. Turkey could not excuse the officer’s conduct on the ground that he operated in an area of high tensions and frequent violence. Turkey was obligated to ensure that its “law-enforcement officials . . . possess the appropriate moral, physical and psychological qualities for the effective exercise of their functions.”⁷⁷ Failure to discipline the officer would “give carte blanche to the members of the security forces operating in that region, who had a duty to ensure that such weapons were used only in the appropriate circumstances and in a manner likely to decrease the risk of unnecessary harm.”⁷⁸

73. U.S. DEP’T OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES 2002—I ISRAEL AND THE OCCUPIED TERRITORIES (Mar. 31, 2003) <https://www.state.gov/j/drl/rls/hrrpt/2002/18278.htm>.

74. Human Rights Standards in the Use of Force, *U.N. Peacekeeping PDT Standards, Specialized Training Material for Police* 23 (1st ed. 2009), <http://repository.un.org/bitstream/handle/11176/387368/STM%20Human%20Rights%20Standards%20in%20the%20Use%20of%20Force%20and%20Firearms.pdf?sequence=7&isAllowed=y>; see also UN, Office of the High Commissioner for Human Rights in Nepal, *The April Protests—Democratic Rights and the Excessive Use of Force 16–17* (Sept. 2006); University of Cambridge Centre of Governance & Human Rights, *Unlawful Killings in Africa: a study prepared for the U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions* (June 2014).

75. See, e.g., Amnesty Int’l, *Lethal Force and Accountability for Unlawful Killings By Israeli Forces in Israel and the Occupied Palestinian Territories* (Sept. 28, 2016); Amnesty USA, *Trigger-Happy: Israel’s Use of Excessive Force in the West Bank* (Feb. 2014); Al-Haq, *Unlawful killing of Palestinians by Israeli Occupying forces* (Oct. 31 2015); Emily Schaeffer Omer-Man, *Extrajudicial Killing With Near Impunity: Excessive force by Israeli Law Enforcement Against Palestinians*, 35 *BOSTON U. INT’L L. J.* 115 (2017). Human rights organizations condemn other nations for the same type of conduct. See, e.g., Human Rights Watch, *World Report 2012: Yemen*; Human Rights Watch, <https://www.hrw.org/news/2017/03/09/nepal-use-proportionate-force-while-policing-protests>; Human Rights Watch, <https://www.hrw.org/report/2013/08/01/blood-streets/use-excessive-force-during-bangladesh-protests>.

76. *Affaire Aydan c. Turquie*, ECtHR Appl. No. 16281/10, Judgment of 12 Mar. 2013. The quotations in the text are Jako Garos’ translation of the French-language decision. See also *Aydan v. Turkey*, ECtHR Appl. No. 16281/10, Judgment of 12 Mar. 2013, Information Note on the Court’s case-law No. 161.

77. *Id.* at ¶ 47 (quoting Basic Principles on Use of Force, *supra* note 49, at ¶ 18).

78. *Id.* at ¶ 100; see also *Abdullah Yasa et al. v. Turkey*, ECtHR, Appl. No. 44827/08, Judgment of 16 July 2013, ¶ 50 (police firing of tear-gas canister at rock-throwing demonstrator was excessive); *Solomou et al. v. Turkey*, ECtHR, Appl. No. 36832/97, Judgment of 24 June 2008, ¶¶ 78–79 (security forces’ use of lethal force against man who was not among stone-throwing protesters, but who crossed into U.N. buffer zone, was excessive); *Ciorcan et al. v. Romania*, ECtHR, Appl. Nos. 29414/09 and 44841/09, Judgment of 27 January 2015, ¶¶ 116–117 (police used excessive force in firing live rounds into crowd of

IV. THE U.S. POLICY PERMITTING USE OF LETHAL FORCE AGAINST ROCK-THROWERS VIOLATED JUS COGENS.

Before March 2014, U.S. policy permitted Border Patrol agents to use lethal force against rock-throwers regardless of the imminent-peril standard. Top CBP and Border Patrol officials knew of and acquiesced in repeated and notorious use of lethal force when the imminent-peril standard was not met. They communicated to Sector Chiefs and line officers that rock-throwing was per se deadly force that could be met with lethal force regardless of the circumstances. They justified the policy on the ground that “we’re not cops and we don’t have to respond like they do.”⁷⁹

CBP and Border Patrol failed to issue written guidelines on how to respond to rock-throwing, even though it was the most common threat that agents faced in the field. Management compounded that failure by refusing to train agents on appropriate responses, provide them with proper equipment, or discipline them for using excessive, lethal force.

The policy was a flagrant violation of the jus cogens norm against extrajudicial killing. The prohibition against extrajudicial killing applies to policies as well as individual instances of excessive force. “A state violates international law if, as a matter of state policy, it practices, encourages, or condones” conduct that violates jus cogens.⁸⁰ That conclusion applies whether the policy is viewed as the U.S.’s affirmative conduct or wrongful omission.⁸¹

The U.S. Congress has made clear that State executives “need not have personally performed or ordered the abuses in order to be held liable. Under international law, responsibility for [jus cogens violations] extends beyond the person

Roma who allegedly were throwing rocks and other items); *Ataykaya v. Turkey*, ECtHR, Appl. No. 50275/08, Judgment of 22 July 2014, ¶ 58 (State violated right to life by failing to adequately investigate and prosecute security forces who used lethal force against rock-throwers and “the Government have not shown satisfactorily that the use of lethal force against the applicant’s son was absolutely necessary and proportionate”); *Andreou v. Turkey*, ECtHR, Appl. No. 45653/99, Judgment of 27 October 2009, ¶ 54 (use of lethal force against stone-throwing crowd was “totally unwarranted”); *Nagmetov v. Russia*, ECtHR, Appl. No. 35589/08, Judgment of 30 Mar. 2017, ¶¶ 46–47 (State violated right to life by failing to adequately investigate and prosecute security forces who used lethal force against rock-throwers); *Forrester v. Leckey*, [2005] NICA 26, No. NICC5282, ¶ 20 (requiring criminal retrial to determine whether police officer who drove vehicle toward rock-throwing crowd had “good cause to fear that death or serious physical injury would result if he did not take the action that he did”); *Güler and Öngel v. Turkey*, ECtHR Appl. No. 29612/05 30668/05, Judgment of 4 October 2011, ¶ 29 (police were not justified in using any force against demonstrators who were not themselves throwing rocks); *X v. Belgium*, ECommHR, Appl. No. 2758/66, Decision of 21 May 1969 (officer used excessive force in shooting a demonstrator who was beating him with a stick).

On rare occasions courts have accepted use of lethal force in particular circumstances. *See, e.g.*, *Giuliani and Gaggio v. Italy*, ECtHR Appl. No. 23458/02, Judgment of 25 August 2009, ¶¶ 220, 225 (lethal force not excessive where demonstrators had surrounded police officers in their car, smashed the windows, beat them with stones, and were preparing to smash them with a fire extinguisher); *Garcia v. United States*, 826 F.2d 806, 812 (9th Cir. 1987) (lethal force not excessive when assailant with stick and rock was five feet away from Border Patrol agent.).

79. Tomsheck Dec., *supra* note 25, ¶ 14.

80. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (AM. LAW INST. 1987); *see also Sarei v. Rio Tinto, PLC*, 456 F.3d 1069, 1209–10 (9th Cir. 2006); *Kadic v. Karadzic*, 70 F.3d 232, 240 n.3 (2d Cir. 1995); M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 L. & CONTEMP. PROBS. 63, 69 (1996).

81. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 711(a) (AM. LAW INST. 1987); Bassiouni, *supra* note 91, at 69.

or persons who actually committed those acts—*anyone with higher authority who authorized, tolerated or knowingly ignored those acts is liable for them.*⁸² Top CBP and Border Patrol executives had the authority and responsibility to “assess the need for any changes in policies, tactics, training, equipment as it related to use of force,”⁸³ and “to clarify CBP use of force policy to tailor it to the rocking incidents that were a daily occurrence for agents under [their] authority.”⁸⁴ That responsibility and authority is exemplified by the March 2014 Directive that gave the long-needed guidance and instituted changes in planning, training, and use of less-than-lethal weaponry.

International law has moved beyond the “authorized, tolerated or knowingly ignored” standard referred to by Congress. Today international law imposes liability on top officials for all jus cogens violations that occur under their command and of which they had knowledge. The law now imposes liability on civil officials based on the same “command responsibility” concept applicable to military commanders.⁸⁵ The principle reinforces the conclusion that top officials were responsible for preventing the widespread failure of Border Patrol agents to refrain from using lethal force absent imminent peril. The officials failed to provide the guidance, training, weaponry, and planning necessary to prevent those ubiquitous abuses.

Finally, the United States itself is also responsible for these jus cogens violations. U.S. courts readily conclude that “States practicing, encouraging, or condoning . . . extrajudicial killings . . . violate international law.”⁸⁶ International tribunals reach the same conclusion.⁸⁷ Having violated a jus cogens norm, the United States is internationally responsible for these violations.⁸⁸

82. Legislative History of the Torture Victims Protection Act, S. Rep. No. 102-249, 9 (1991) (emphasis in original).

83. Fisher Dec., *supra* note 19, at 15; *see also id.* at 22, 76.

84. *Id.* at 21.

85. *See, e.g.*, Hilao v. Estate of Marcos, 103 F.3d 767, 777 (9th Cir. 1996); Xuncax v. Gramajo, 886 F. Supp. 162, 172 (D. Mass. 1995); Patrick Walsh & Joshua F. Berry, *Expanding Command Responsibility Beyond War: The Application of the Doctrine of Command Responsibility to Human Rights Law*, 11 LIBERTY U.L. REV. 423, 424–25 (2016); Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93 AM. J. INT’L L. 573, 575 (1999).

For the principle of command responsibility in the military context, see Rome Statute of the International Criminal Court, art. 28(a) (July 17, 1998) (military commander is criminally responsible for crimes committed by forces under his control if he failed to take all necessary measures to prevent crimes that he knew or should have known they were committing).

86. Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 305 (S.D.N.Y. 2003); *see also* Kadic, 70 F.3d at 240 n.3. *See generally* Thomas Weatherall, *Jus Cogens: International Law and Social Contract* 384 (Cambridge Univ. Press 2015) (“The state is internationally responsible for a breach of obligations *erga omnes* arising from peremptory norms. This aspect of responsibility arises where the apparatus of the state has failed, through will or negligence, to prevent the violation of a peremptory norm, through preemption or suppression, or to punish such a violation, through extradition or prosecution.”); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.) (Feb. 26, 2007), ¶¶ 469, 471 (States are liable for failing to prevent or punish violation of jus cogens norms.).

87. *See, e.g.*, A v. United Kingdom 1988, ECtHR, No.25599/94 (1998), ¶¶ 22–24; Velasquez Rodriguez Case, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (ser. C) No. 4 (1988), ¶¶ 166, 174.

88. *See, e.g.*, ILC, Responsibility of States for Internationally Wrongful Acts, art. 4 (“[t]he conduct of any State organ shall be considered an act of that State under international law”); *id.* at art. 7 (State is responsible even if its agency “exceeds its authority or contravenes instructions”); *id.* at art. 8 (State is responsible if the agency “is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”).

CONCLUSION

The Border Patrol's policy of using lethal force against alleged rock-throwers was a betrayal of the United States' history and its leadership in developing international law to prevent fundamental human rights abuses. Under pressure from the United Nations, the Inter-American Commission on Human Rights, human rights organizations, and human rights litigation, the Obama Administration ultimately ended the policy and began to bring Border Patrol practice into compliance with the nation's human rights obligations. International law, which the United States played a vital role in developing, is available to remedy the past violations and to intercede, if necessary, to prevent any backtracking under the new administration.