

EXPORTING VIOLATIONS OF INTERNATIONAL POLICING NORMS: THE US BORDER PATROL’S “BORTAC” SPECIAL OPERATIONS UNIT PROMOTES VIOLATIONS OF INTERNATIONAL NORMS AND REQUIRES SIGNIFICANT REFORM

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INTRODUCTION

US Customs and Border Protection (CBP)—more commonly known as “US Border Patrol”—idyllically links its history to customs and tariffs agencies established by the First Congress of the United States.¹ However, the reality of today’s US Border Patrol, mainly focused on the exclusion of foreign nationals from US territory via threat of violent force, no longer resembles in any meaningful way the humble US customs agencies to which CBP links its history.² This evolution,

¹ *CBP Through the Years*, U.S. CUSTOMS AND BORDER PROT. (May 5, 2021), <https://www.cbp.gov/about/history> [<https://perma.cc/JAS5-Z7HF>].

² *Compare 1789: First Congress Provides for Customs Administration*, U.S. CUSTOMS AND BORDER PROT. (Apr. 25, 2014), <https://www.cbp.gov/about/history/1789-first-congress-provides-customs-administration> [<https://perma.cc/G72K-EBE2>]; *with Programs and Special Operations What is the Missing Migrant Program?*, U.S. CUSTOMS AND BORDER PROT. (May 7, 2014), <https://www.cbp.gov/border-security/along-us-borders/operations/special-operations> [<https://perma.cc/U3C8-CRJE>].

from what was simply a customs collection agency to what today is a military-style law enforcement agency with components boasting Special Operations training,³ can be traced through the various acts of federal legislation that have housed and enabled the agency over time.

The US Border Patrol, as it exists today, was first authorized by congressional mandate in the 1924 Labor Appropriation Act, also known as the Immigration Act of 1924.⁴ Following the Mexican Revolution, border wars with Mexico, and the Great Depression,⁵ the act was largely a response to white lawmakers' fear of the increasing influence of Mexican culture on American society (an American society which had recently employed military force to expropriate regions historically controlled by Spain and Mexico).⁶ Some \$1–2 million, \$17–35 million after inflation,⁷ were appropriated for the “land-border patrol” to regulate border crossings between established checkpoints, with a focus on enforcing the racist Chinese exclusion laws of the era.⁸

Following the September 11, 2001, terrorist attacks, CBP was reorganized to become part of the Department of Homeland Security (DHS), and found a new “home” in the Homeland Security Act of 2002, which currently enables the agency.⁹ The primary purpose of the act is to prevent domestic terrorism.¹⁰ However, in recent years, some have questioned whether the actions and operations of CBP comport with the stated objective of the agency's enabling legislation.¹¹ One particular unit within CBP, the US Border Patrol Tactical Unit (BORTAC), has been

³ Ihor Bloshchynskyi, *Peculiarities of Professional Training of the US Border Patrol Special Operations Group's Agents*, 7 COMPAR. PRO. PEDAGOGY 42 (2017).

⁴ *Border Patrol History*, U.S. CUSTOMS AND BORDER PROT. (July 21, 2021), <https://www.cbp.gov/border-security/along-us-borders/history> [<https://perma.cc/32KM-5MXE>].

⁵ Karly Domb Sadof, *These Photos Show What the U.S.-Mexican Border Looked Like About 80 Years Ago*, WASH. POST (Feb. 6, 2017), <https://www.washingtonpost.com/news/in-sight/wp/2017/02/06/these-photos-show-what-the-u-s-mexican-border-looked-like-about-80-years-ago/> [<https://perma.cc/9S JL-LRF3>].

⁶ *Hearing before the Comm. on Immigr. and Naturalization*, 69th Cong. 324 (1926) (statement of John C. Box).

⁷ *Consumer Price Index Inflation Calculator*, U.S. BUREAU LAB. STAT., <https://data.bls.gov/cgi-bin/cpicalc.pl> [<https://perma.cc/5CXD-PQZB>].

⁸ Immigr. and Ethnic Hist. Soc'y, *Labor Appropriations Act of 1924*, UT AUSTIN DEP'T OF HIST. (2019), <https://immigrationhistory.org/item/labor-appropriations-act-of-1924/> [<https://perma.cc/4TJU-XVLC>].

⁹ 6 U.S.C. § 211.

¹⁰ *Id.*

¹¹ Stuart Anderson, *Why was the Homeland Security Department Created?*, FORBES (Apr. 12, 2019), <https://www.forbes.com/sites/stuartanderson/2019/04/12/why-was-the-homeland-security-department-created/?sh=5dfa8c90ad4b> [<https://perma.cc/9QJR-NUDQ>].

especially problematic when assessing whether CBP meets the stated goals of its enabling legislation.

This note seeks to address the question: do BORTAC's existence and activities comply with international norms, standards, and commitments related to policing and migration?

Part I summarizes BORTAC's rapid evolution and highlights a number of the unit's operations that have attracted international press coverage. Part II highlights widely accepted international norms and commitments related to policing and migration. Part III analyzes BORTAC's organizational structure and broad responsibilities and shows that the unit is predisposed to violate international norms and standards related to policing and migration. Finally, Part IV concludes by offering suggested reforms and discussing areas warranting further exploration.

I. EVOLUTION OF US BORDER PATROL TACTICAL UNIT (BORTAC)

A. INTRODUCTION TO BORTAC

The US Border Patrol's special operations tactical unit, BORTAC, was founded in 1984.¹² Today, the Government Accountability Office describes the special operations unit, comprised of 241 individuals,¹³ as a "highly trained tactical unit that provides DHS with an immediate-response capability to emergent and high-risk incidents" both nationally and internationally.¹⁴ Potential BORTAC officers undergo a three-week training to evaluate their skills.¹⁵ Those who pass the three-week evaluation go on to receive 250 hours of "advanced training" on skills like "patrolling, air operations, tactical combat casualty care . . . explosive breaching, precision marksmanship," and "helicopter rope suspension techniques."¹⁶

¹² U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-710, FEDERAL TACTICAL TEAMS: CHARACTERISTICS, TRAINING, DEPLOYMENTS, AND INVENTORY (2020).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

B. BORTAC WAS ORIGINALLY A RIOT RESPONSE UNIT.

BORTAC's humble origins as a reactionary riot response unit composed of volunteers stands in stark contrast to the unit's current large structure and broad set of responsibilities (both humanitarian and law enforcement, for example). In 1986, two years after BORTAC was founded, Alan C. Nelson, Commissioner of the Immigration and Naturalization Services (INS), explained the "function" of BORTAC during a congressional hearing before the Subcommittee on Immigration and Refugee Policy.¹⁷ Commissioner Nelson described the agency as consisting of "all volunteers" that would only act on a "reaction basis, to respond to riots [and] crowd control problems."¹⁸ At the time, BORTAC was only composed of forty-five trained agents, and Commissioner Nelson made clear that he only expected the agency to train up to one hundred agents at most.¹⁹ The commissioner went on to explain that in the four years of its existence, although BORTAC had rarely been deployed, it was on "standby" during the 1984 Los Angeles Olympics, and it would have been a potential asset in a response to the 1980 Cuban refugee "Mariel Boatlift" crisis, had the unit been in existence at the time.²⁰

BORTAC was also on standby in 1987—the unit was just an order away from storming a federal detention center in Oakdale, Louisiana,²¹ when prison guards were taken hostage by Cuban nationals detained there.²² The nine-day standoff began when detained Cubans learned of a renewed agreement between the United States and Cuba to forcibly repatriate roughly 2,500 migrants who risked their lives to seek protection in the United States during the 1980 Mariel Boatlift—many floating on makeshift rafts—back to Cuba where they would almost

¹⁷ *Fiscal Year 1986 Budget and Oversight of the Immigration and Naturalization Service: Hearing Before the Subcomm. on Immigr. and Refugee Pol'y*, 99th Cong. 28-29 (1985) (statement of Commissioner Nelson).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Mariel Cuban Detainees: Events Preceding and Following the November 1987 Riots: Hearing Before the Subcomm. on Cts. Civ. Liberties, and the Admin. of Just.*, 100th Cong. 56 (1989).

²² Jack Anderson & Joseph Spear, *Border 'Wide Open' During Cuban Riots*, WASH. POST (Feb. 25, 1988), <https://www.washingtonpost.com/archive/local/1988/02/25/border-wide-open-during-cuban-riots/561d12ea-3eeb-4ddc-ba32-d56ad5373eb2> [<https://perma.cc/7AW2-YGQK>].

certainly face governmental persecution.²³ The news provoked riots not only in Oakdale, but also in Atlanta detention centers.²⁴ Both conflicts ended peacefully, without the need for BORTAC intervention.²⁵

Nevertheless, BORTAC earned a reputation for its warrior culture and aggressive tactics early in its history. On multiple occasions, BORTAC agents forcibly quashed hunger strikes undertaken by foreign nationals detained in US custody who were protesting “mistreatment and . . . miserable conditions.”²⁶ In 1990, BORTAC quashed a hunger strike organized by Nicaraguan individuals, and again in 1991 when a Honduran woman organized a hunger strike to protest conditions that she claimed led her to having multiple miscarriages.²⁷

BORTAC’s reputation for brutality was reinforced during one of the first occasions where the executive branch tested an expansion of BORTAC’s domestic operations. In 2000, BORTAC carried out the forcible seizure of Elián González, who was a young Cuban boy living in Florida and the subject of an international custody dispute that gained national attention.²⁸ Elián had crossed the Straits of Florida in a makeshift boat with his mother and eleven others in order to escape Cuba.²⁹ His mother and ten other migrants died attempting the perilous crossing—Elián was one of the only survivors.³⁰

After an unsuccessful custody and asylum battle, Elián’s uncle, Lazaro González, was ordered to return Elián to his father, who remained in Cuba.³¹ When Elián’s extended family refused to surrender him to be returned to Cuba, BORTAC stormed their home in a military-style raid.³²

²³ Michael Rezendes, *Siege Ends at Prison in Louisiana*, WASH. POST (Nov. 30, 1987), <https://www.washingtonpost.com/archive/politics/1987/11/30/siege-ends-at-prison-in-louisiana/784be105-3f6d-4318-8507-51078bc89c9e/> [https://perma.cc/AT7Q-EW22].

²⁴ Michael L. Graczyk, *Oakdale Hostages Freed Unharmd; Atlanta Siege Continues*, ASSOCIATED PRESS (Nov. 30, 1987), <https://apnews.com/article/4961d734216bb506c80bacd7feb8c73b> [https://perma.cc/X5Y9-YTRJ].

²⁵ *Id.*; Ronald Smothers, *Cubans End 11-Day Prison Siege In Atlanta, Freeing All Hostages*, N.Y. TIMES (Dec. 4, 1987), <https://www.nytimes.com/1987/12/04/us/cubans-end-11-day-prison-siege-in-atlanta-freeing-all-hostages.html> [https://perma.cc/7U68-XTMA].

²⁶ Robert E. Koulisch, *Systemic Deterrence against Prospective Asylum Seekers: A Study of the South Texas Immigration District*, 19 N.Y.U. REV. L. & SOC. CHANGE 529, 542 (1991).

²⁷ *Id.*

²⁸ Antonio Rafael de la Cova, *The Elian Gonzalez Case: The World’s Most Watched and Politically-Charged Custody Battle That Reached the U.S. Supreme Court and Determined a Presidential Election*, 18 HARV. LATINO L. REV. 151, 183 (2015).

²⁹ *Id.* at 152.

³⁰ *Id.*

³¹ *Id.* at 163, 180–82.

³² *Id.* at 181–82.

The special operations anti-terrorist unit gassed the family's home, causing children, attorneys, and other family members inside to ingest toxic fumes.³³ BORTAC agents also threatened to kill family members who were embracing Elián in an attempt to prevent his seizure.³⁴

During the violent, chaotic operation, one BORTAC agent struck an NBC sound operator in the back of their head with a weapon, causing the journalist to fall to the ground bleeding.³⁵ Another BORTAC agent then held the sound operator to the ground with his foot and threatened to shoot the journalist if he moved.³⁶ Alan Díaz, the Associated Press reporter who captured an iconic photo of the seizure would go on to win the Pulitzer Prize for breaking news photography for this photo the following year.³⁷



A BORTAC agent forcibly seizes Elián González (note the “BORDER PATROL” patch on the agent’s vest).
Credit: Alan Díaz/Associated Press

³³ *Id.*

³⁴ *Id.* at 183.

³⁵ *Id.*

³⁶ *Id.*

³⁷ Julienne Gage, *An Iconic Image Challenged the Politics of Cuban Americans*, THE WORLD (July 6, 2018), <https://www.pri.org/stories/2018-07-06/iconic-image-challenged-politics-cuban-americans> [<https://perma.cc/5NHS-NJV2>].

The heavy-handed response, authorized by President Clinton,³⁸ sparked protests in the local Cuban community and received near universal condemnation from political leaders regardless of party affiliation.³⁹ George W. Bush called Díaz's Pulitzer Prize winning photo "chilling," and "not an image a freedom loving nation wants to show the world."⁴⁰ Al Gore agreed with Bush that the matter should have been settled in family court.⁴¹ New York Mayor Rudolph Giuliani said the real winner of the fiasco was Castro.⁴² When the Federal Law Enforcement Officers Association asked Mayor Giuliani to apologize for characterizing the BORTAC unit as "stormtroopers," Giuliani refused, saying that "the Nazi imagery was 'obvious.'"⁴³

C. BORTAC'S "BOLD" EXPANSION IN THE WAKE OF SEPTEMBER 11, 2001.

Although BORTAC started as a small-sized volunteer force with limited responsibility, its responsibilities greatly expanded in response to the terrorist attacks of September 11, 2001. The Homeland Security Act of 2002 reorganized US Customs and Border Patrol, and by extension BORTAC, to form part of the newly-established Department of Homeland Security (DHS).⁴⁴ As part of this reorganization, BORTAC's responsibilities grew from purely domestic ones to increasingly encompass responsibilities abroad.⁴⁵ As part of the US government's post-9/11 era efforts to "improve the . . . readiness of Border Patrol teams to respond rapidly to a terrorist threat," BORTAC's responsibilities and capabilities were enhanced.⁴⁶

BORTAC's new home under DHS fostered its evolution from a reactionary prison riot response unit into a "paramilitary force" that

³⁸ de la Cova, *supra* note 28, at 182.

³⁹ *Id.* at 187.

⁴⁰ *Id.* at 186.

⁴¹ *Id.*

⁴² Elisabeth Bumiller, *Mayor Says 'Storm Trooper' Reflects Truth in Miami Case*, N.Y. TIMES (Apr. 26, 2000), <https://www.nytimes.com/2000/04/26/nyregion/mayor-says-storm-trooper-reflects-truth-in-miami-case.html> [<https://perma.cc/67PN-KVVF>].

⁴³ *Id.*

⁴⁴ Marissa Cohen & Jacqueline Stevens, *A Nation Joins in Tears: Implications of the Domestic Deployment of Federal Troops in Portland, Oregon*, 1 N.C. C.R. L. REV. 120, 131 (2021).

⁴⁵ See, e.g., Walter A. Ewing, *Beyond Border Enforcement: Enhancing National Security Through Immigration Reform*, 5 GEO. J.L. & PUB. POL'Y 427, 431 (2007).

⁴⁶ *Id.*

exists in a “hazy area between [a] police force and military.”⁴⁷ Although this transition was foreshadowed by events like the raid on Elián González’s home, the international “paramilitary” special operations unit has limited, if any, resemblance to the “reactionary” group of volunteers focused on crowd control that was described by Commissioner Nelson in 1986.⁴⁸ Today, BORTAC conducts both domestic police-style work (under the auspices of ICE and FBI Joint Anti-Terrorism Task Forces),⁴⁹ and also engages in military-style law enforcement operations abroad.⁵⁰

Examples of domestic work include stakeouts for drug smugglers on the US-Mexico border,⁵¹ and, more controversially, to suppress protests in Portland, Oregon, following the murder of George Floyd by law enforcement officials.⁵² BORTAC’s controversial response to the Portland protests was the subject of much criticism and spawned multiple lawsuits.⁵³ Federal law enforcement officials, including BORTAC agents, abducted protestors using unmarked vans while wearing uniforms that lacked any form of identifying insignia.⁵⁴ The mayors of several large US cities reacted by jointly condemning federal law enforcement’s response to the Portland protests.⁵⁵ Noting the anti-terror focus of BORTAC under DHS, some observers expressed that they were unsurprised by the heavy-handed response.⁵⁶

BORTAC’s operations abroad have also been the subject of scrutiny. Although official sources emphasize the unit’s role in

⁴⁷ Anthony Scott Good, *U.S. Border Patrol Oconus: Possible Contributions to the Whole of Government Approach to Stability Operations* (2010) (Master’s thesis, U.S. Army Command) (footnote omitted).

⁴⁸ *Fiscal Year 1986 Budget and Oversight of the Immigration and Naturalization Service: Hearing Before the Subcomm. on Immigr. & Refugee Pol’y*, 99th Cong. 28–29 (1985) (statement of Comm’r Nelson).

⁴⁹ *Department of Homeland Security Appropriations for 2021: Hearings Before the Comm. on Appropriations*, 116th Cong. 340 (2020).

⁵⁰ See, e.g., U.S. GOV’T ACCOUNTABILITY OFF., GAO-05-305, COMBATING ALIEN SMUGGLING: OPPORTUNITIES EXIST TO IMPROVE THE FEDERAL RESPONSE 66 (2005) (BORTAC assisted Honduras with their border patrol responsibilities).

⁵¹ *United States v. Soto-Barraza*, 799 F.3d 1111 (9th Cir. 2020).

⁵² Cohens & Stevens, *supra* note 44.

⁵³ Ted Wheeler (@tedwheeler), TWITTER (July 20, 2020, 6:27 PM) <https://twitter.com/tedwheeler/status/1285340673181233152> [<https://perma.cc/KB2Y-HY2Y>].

⁵⁴ Jonathan Levinson & Conrad Wilson, *Federal Law Enforcement Use Unmarked Vehicles to Grab Protesters off Portland Streets*, OR. PUB. BROAD. (July 16, 2020 4:45 PM), <https://www.opb.org/news/article/federal-law-enforcement-unmarked-vehicles-portland-protesters/> [<https://perma.cc/BBF3-5R53>].

⁵⁵ Wheeler, *supra* note 53.

⁵⁶ Cohen & Stevens, *supra* note 44.

combatting human and arms trafficking undertaken by criminal organizations and cartels, the reality is that the unit's operations cause it to interact with far less nefarious actors, and often with individuals in great need of humanitarian aid. For example, BORTAC agents engage in border patrol–style policing abroad with an intent to control international migration and regulate the flow of refugees in general.⁵⁷ The US Department of State notes that operations like those undertaken by BORTAC “rescued 81 unaccompanied children” and “identified 464 irregular migrants” in 2018 in Honduras alone.⁵⁸ Whether the children are truly being “rescued” and what exactly qualifies as “irregular migration” are important questions that will be addressed shortly.

However, BORTAC's most important and influential work—both domestically and abroad—is not the law enforcement it engages in directly. Rather, BORTAC's largest impact comes via its extensive cooperation with local police and military units throughout Central America. Working with local police and military units abroad has enabled BORTAC to effectively “[push] out the [US] border” over countries and populations that lack the ability to provide input into US border policy, raising democratic implications.⁵⁹

For example, BORTAC “helped” the government of “Honduras plan and put into operation an organization with border police–type responsibilities.”⁶⁰ Interviews with BORTAC agents suggest “help” might not have been an accurate description of the nature of BORTAC's assistance.⁶¹ Indeed, BORTAC built the Honduran “paramilitary force” responsible for that country's border patrol-style operations “from the ground up.”⁶² BORTAC agents trained the Honduran unit on US Border Patrol “techniques” like identifying forged documentation, conducting traffic checkpoints, emergency driving, and the use of force.⁶³ Notably,

⁵⁷ See Good, *supra* note 47.

⁵⁸ U.S. DEP'T OF STATE, *Bureau of International Narcotics and Law Enforcement Affairs: Honduras Summary* (2022) <https://www.state.gov/bureau-of-international-narcotics-and-law-enforcement-affairs-work-by-country/honduras-summary> [<https://perma.cc/L5V9-5GUZ>].

⁵⁹ See Cora Currier, *Pushing Out the Border: How the U.S. Is Waging a Global War on Migration*, THE INTERCEPT (Aug. 3, 2019), <https://theintercept.com/2019/08/03/migration-empire-borders-book/>.

⁶⁰ U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 50.

⁶¹ Good, *supra* note 47.

⁶² *Id.*

⁶³ *Id.* at 36.

BORTAC also trained the Honduran border force on “immigration and host nation laws.”⁶⁴

US Border Patrol tactical units have been training Honduran border security forces since at least 2012, when US border agents instructed at least five courses, each thirteen weeks long, to about one hundred Honduran border police officers.⁶⁵ Although the exact number of Border Patrol tactical unit trainees throughout Central America is unknown, the training described in Honduras was funded by a State Department program that spent more than \$642 million in Belize, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panama.⁶⁶

II. INTERNATIONAL NORMS AND AGREEMENTS

The International Committee of the Red Cross (ICRC) has published widely accepted norms of policing, and the US Department of Justice’s (DOJ) own guidelines mirror and embrace these norms.⁶⁷ Many Central Americans are legally entitled to enter other Central American nations with limited documentation, and the United States is party to international obligations relating to the rights of migrants and refugees.⁶⁸

A. INTERNATIONAL NORMS OF POLICING

Two sources are particularly helpful in outlining widely accepted international norms and standards for police. First, the International Committee of the Red Cross’s (ICRC) “International Rules and Standards of Policing” sets out a number of policing norms and cites

⁶⁴ *Id.*

⁶⁵ Cindy Carcamo, *Elite Honduran Unit Works to Stop Flow of Child Emigrants to U.S.*, L.A. TIMES (July 9, 2014 6:00AM), <https://www.latimes.com/world/mexico-americas/la-fg-ff-honduras-border-20140709-story.html> [<https://perma.cc/5ASG-RC8N>].

⁶⁶ *Id.*

⁶⁷ INT’L COMM. OF THE RED CROSS, INTERNATIONAL RULES AND STANDARDS OF POLICING (2015), <https://www.icrc.org/en/doc/assets/files/other/icrc-002-0809.pdf> [<https://perma.cc/MF8G-DVBT>]; DAVID H. BAYLEY, DEMOCRATIZING THE POLICE ABROAD: WHAT TO DO, AND HOW TO DO IT (2001), <https://www.ojp.gov/pdffiles1/nij/188742.pdf> [<https://perma.cc/NG8U-8834>].

⁶⁸ James C. Hathaway & Anne K. Cusick, *Refugee Rights Are Not Negotiable*, 14 GEO. IMMIGR. L. J. 481, 501 (2000) (noting the US’s intention to be bound by the UN Refugee Protocol); Acuerdo Regional de Procedimientos Migratorios CA 4 [Central America Regional Agreement on Immigration Procedures], June 30, 2005; U.N. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, art. 33.

various sources of international law for support.⁶⁹ Second, because BORTAC is a unit of the executive branch of the US government, the US executive branch's own understanding of international policing norms is also of useful consideration. The Department of Justice's (DOJ) 2001 publication, "Democratizing the Police Abroad: What to do And How to Do It" is helpful to this end.⁷⁰

B. ICRC INTERNATIONAL RULES AND STANDARDS FOR POLICING

The ICRC international norms of policing emphasize that states have an obligation to "protect" and "fulfil" human rights.⁷¹ All police action "should be based on . . . law" and "not affect or restrict human rights more than is necessary."⁷² Human rights should not be "affected in a way that is disproportionate to the aim."⁷³ Police officials should also be "accountable to . . . the public [and] the government."⁷⁴ The ICRC norms further observe that "[states] may not invoke [their] constitution or other national laws as reasons for not fulfilling [their] obligations under international law."⁷⁵

The ICRC's norms of policing are summarized in four "fundamental principles" which govern law enforcement activity.⁷⁶ First, the principle of "necessity" establishes that law enforcement activity must "not affect or restrict human rights more than is necessary."⁷⁷ Second, the principle of "proportionality" requires that law enforcement conduct not "affect human rights in a way that is disproportionate to the aim."⁷⁸ Third, the principle of "accountability" requires that law enforcement be accountable to "the judiciary, the public, the government, and the internal chain of command."⁷⁹ Finally, the principle of "legality" dictates that all law enforcement activity must be authorized by specific provisions of law.⁸⁰

⁶⁹ INT'L COMM. OF THE RED CROSS, *supra* note 67.

⁷⁰ BAYLEY, *supra* note 67.

⁷¹ INT'L COMM. OF THE RED CROSS, *supra* note 67, at 18.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 11.

⁷⁶ *Id.* at 18.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

While the four principles above state general obligations, the ICRC's standards for policing also emphasize specialized commitments for certain groups, such as children, women, and migrants.⁸¹ In all situations, "law enforcement officials are required to exercise particular care and sensitivity when dealing with children, thus preventing the law enforcement action from traumatizing them and causing long-lasting harm."⁸² Law enforcement should "take into account the specific needs and vulnerabilities of women," "prevent women from becoming victims of crime," and act "with appropriate empathy and sensitivity."⁸³ Women officers should conduct arrests and body searches of suspects who are women, and detained women should be supervised by women officers.⁸⁴ A sufficient number of women officers should exist on staff so that these requirements are fulfilled.⁸⁵

The ICRC observes that "[i]t is the duty of law enforcement officials to protect and assist people on the move and to deal with them in full respect of their rights and status."⁸⁶ The ICRC emphasizes the particular vulnerability of displaced people, and expresses that these individuals should enjoy equal rights and be free from discrimination.⁸⁷ Refugees, in particular, should "enjoy the same judicial guarantees as anyone else."⁸⁸ Other relevant principles include: (1) the need for law enforcement to protect displaced persons from human rights violations; (2) the prohibition of "arbitrary arrest and detention"; and (3) the principle of "non-refoulement," which prohibits states from returning displaced persons to countries of origin where they could face persecution or certain ill-treatment.⁸⁹ Police should also keep in mind migrants' limited legal knowledge and language skills, and should treat them as "victims and not criminals."⁹⁰ Finally, law enforcement should respect the legal rights of individuals in migration and ensure their access to due process of law.⁹¹

⁸¹ *Id.* at 27–30.

⁸² *Id.* at 28.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 29.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 30.

⁹⁰ *Id.* at 31.

⁹¹ *Id.*

C. US DEPARTMENT OF JUSTICE DEMOCRATIC POLICING NORMS

The US Department of Justice (DOJ) notes several “norms” of democratic policing that are demonstrative of what the US executive branch accepts as international norms of policing. Among them are (1) that police should give priority to servicing the needs of individuals, rather than the ends of government;⁹² (2) that police should be accountable to the law, rather than the government; (3) that police should protect human rights; and (4) that police should be transparent in their activities.⁹³

In the same publication, the DOJ also highlights several lessons learned from working with police abroad.⁹⁴ First, “[f]oreign assistance cannot produce democratic reform against the opposition of the host government.”⁹⁵ Additionally, “programs of police foreign assistance must be adapted to local conditions.”⁹⁶ The DOJ also observes that the military’s war-fighting objective is so “antithetical” to the police duty to serve the individual, that military and police missions “contaminate” each other when there is overlap.⁹⁷ This idea gives rise to the crucial principle of “separation of police from the military.”⁹⁸

D. INTERNATIONAL NORMS OF POLICING MIGRATION

According to the UN’s “Pocket Book on Human Rights for the Police,”⁹⁹ “[n]on-nationals have the same right to leave and to emigrate as nationals.”¹⁰⁰ “Collective or mass expulsions are prohibited.”¹⁰¹

⁹² BAYLEY, *supra* note 67, at 13.

⁹³ *Id.* at 14.

⁹⁴ *Id.* at 35.

⁹⁵ *Id.*

⁹⁶ *Id.* at 37.

⁹⁷ *Id.* at 38–39.

⁹⁸ *Id.*

⁹⁹ U.N. High Commissioner for Human Rights, *International Human Rights Standards for Law Enforcement*, <https://www.ohchr.org/sites/default/files/Documents/Publications/training5Add1en.pdf> [<https://perma.cc/25A6-8HDJ>].

¹⁰⁰ *Id.* at 15.

¹⁰¹ *Id.*; see also Office of the High Commissioner for Human Rights, *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, ¶ 11 (Apr. 11, 1986).

“Everyone has the right to seek, and to enjoy, in another country, asylum from persecution.”¹⁰²

The 1967 UN Protocol Relating to the Status of Refugees “recognizes the right of persons to seek asylum from persecution in other countries.”¹⁰³ Several rights owed to refugees are also enumerated. Article 24, for example, details the right to work.¹⁰⁴ Article 16 states that refugees “shall have free access to the courts of law [in] all Contracting States.”¹⁰⁵ “Refugees shall be granted treatment which is at least as favorable as that granted to nationals in the exercise of basic rights, such as free association; religion; elementary education; public relief; access to courts; property; and housing.”¹⁰⁶ Refugees coming directly from a country of persecution shall not be refused at least temporary entry.¹⁰⁷ The United States, Mexico, Honduras, El Salvador, Guatemala, Nicaragua, and nearly every other nation in the world are signatories to this agreement.¹⁰⁸

E. THE CENTRAL AMERICAN FREE MOBILITY AGREEMENT (CONVENIO CENTROAMERICANO DE LIBRE MOVILIDAD)

The Central American Free Mobility Agreement (also known as the Central America-4 Border Control Agreement (“CA-4”)) serves as the legal basis for the right of citizens of El Salvador, Guatemala, Honduras, and Nicaragua to unrestricted movement between these four states.¹⁰⁹ The agreement removes any passport or visa requirement when traveling between the signatory countries.¹¹⁰ Some eighty-two thousand

¹⁰² U.N. High Commissioner for Human Rights, *supra* note 99, at 15; *see also*, G.A. Res. 2198 (XXI), Convention Relating to the Status of Refugees (1951 Convention), art. 32.

¹⁰³ G.A. Res. 2198, *supra* note 102, at 2.

¹⁰⁴ *Id.* at 25.

¹⁰⁵ *Id.* at 21.

¹⁰⁶ *Id.* at 17, 24.

¹⁰⁷ UNCHR, *supra* note 99, at 14.

¹⁰⁸ Protocol Relating to the Status of Refugees, Oct. 4, 1967, 606 U.N.T.S. 267.

¹⁰⁹ Laurent Faret, María Eugenia Anguiano Téllez, & Luz Helena Rodríguez-Tapia, *Migration Management and Changes in Mobility Patterns in the North and Central American Region*, 9 J. on Migration and Hum. Sec. 63, 67 (2021).

¹¹⁰ *La excusa perfecta: Autoridades de Mesoamérica aprovechan el COVID-19 para frenar la migración*, Amnesty Int’l (May 23, 2021, 12:25 PM), <https://www.amnesty.org/es/latest/news/2021/05/autoridades-mesoamerica-aprovechan-covid19-para-frenar-migracion> [https://perma.cc/9R3B-V334].

Hondurans traveled through Guatemala, El Salvador, and Nicaragua under the treaty during the first few months of 2021 alone.¹¹¹

One notable aspect of CA-4 is that it grants freedom of movement *between* signatory countries, but not *beyond* them.¹¹² The freedom of movement granted by the agreement does not apply to migrants who seek to travel beyond the borders of signatory nations.¹¹³ Despite this exception, the United States has pressured Central American governments to revise the agreement with the goal of preventing the formation of so-called “migrant caravans.”¹¹⁴

III. BORTAC’S LAW ENFORCEMENT OPERATIONS FAIL TO COMPLY WITH INTERNATIONAL NORMS OF POLICING.

A. ANALYTICAL FRAMEWORK

BORTAC’s wide-ranging and often militaristic responsibilities make the unit ill-suited for the humanitarian role it is often called to fulfill. The special operation unit’s structure predisposes it to conduct law enforcement operations in a manner that violates well-established international norms of policing and migration. In order to relieve the United States of liability for violations of international obligations, BORTAC is in crucial need of reform. Prioritizing reforms that bring the unit into closer compliance with norms related to accountability and transparency will better enable BORTAC to act in harmony with other important international norms of policing.

BORTAC has shown chronic non-compliance with several international norms related to policing. First, the unit is persistently non-compliant with international norms related to the protection and fulfilment of human rights—international norms which have been articulated by both the ICRC and the US DOJ.¹¹⁵ Below is a review of BORTAC’s general human rights abuses is below, followed by a more detailed analysis of international norms articulated by the ICRC, (e.g.,

¹¹¹ *Más de 82,000 hondureños han transitado por Guatemala, El salvador y Nicaragua este 2021*, La Prensa (May 22, 2021, 10:05 AM), <https://www.laprensa.hn/honduras/miles-hondurenos-transitado-guatemala-salvador-nicaragua-instituto-nacional-migracion-IYLP1465195> [<https://perma.cc/X74G-BVH2>].

¹¹² Faret, Anguiano Téllez, & Rodríguez-Tapia, *supra* note 109, at 67.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ See INT’L COMM. OF THE RED CROSS, *supra* note 67; See also BAYLEY, *supra* note 67.

policing operations must not affect human rights in an unnecessary or disproportionate way).¹¹⁶ This analysis of BORTAC's human rights record considers international norms that require police activity to give special consideration to the needs of women, children, and migrants.¹¹⁷

A review of BORTAC's compliance with international policing norms related to accountability follows the analysis of BORTAC's human rights record. Both the ICRC and US DOJ affirm accountability as an international norm of policing.¹¹⁸ Two additional norms of policing contribute to law enforcement organizations' fulfillment of international policing norms related to accountability. Although the DOJ articulated these as independent norms required for democratic policing, they can also be viewed as essential pillars of the more generalized policing norm of accountability. These are: (1) that policing is carried out in a transparent manner; and (2) that law enforcement operations enforce the law, not the whims of particular members of government.¹¹⁹

After reviewing the international norms of policing noted above, this note then compares these norms with BORTAC's conduct. A review of the unit's activity shows that BORTAC's law enforcement operations often violate international norms that its host government, the United States, has explicitly recognized.¹²⁰ Among these international norms are the US Department of Justice's (DOJ) "democratic policing" norms related to: (1) human rights obligations; (2) distinction of police and military duties; and (3) foreign law enforcement aid.¹²¹ BORTAC's lackluster compliance with the DOJ's "democratic policing" norms related to law enforcement (4) accountability and (5) transparency predispose the unit to non-compliance with other international norms of policing.¹²² Furthermore, the self-described "special operation" unit's history, culture, and organizational structure all pose serious barriers to compliance with these international norms.

This analysis concludes by outlining the urgent reforms needed in order to bring BORTAC into compliance with international norms of policing. It is important to note that US immigration policy could still be effectively enforced if BORTAC were disbanded entirely. Indeed, given

¹¹⁶ See INT'L COMM. OF THE RED CROSS, *supra* note 67.

¹¹⁷ *Id.* at 28.

¹¹⁸ *Id.* at 18; See BAYLEY, *supra* note 67, at 14, 76.

¹¹⁹ BAYLEY, *supra* note 67, at 1314.

¹²⁰ *Id.*

¹²¹ *Id.* at 14, 19, & 35–38.

¹²² See *id.*

the serious and chronic nature of the unit's problematic conduct, this may be the best option. After all, agents monitoring ports of entry likely do not need training for rappelling from helicopters. When necessary, law enforcement operations combatting highly dangerous, organized criminal actors might instead leverage local SWAT or military resources.

However, a special operations Border Patrol unit has the potential to be more helpful than harmful, but only if the unit is accountable and can meaningfully fulfill human rights obligations. As such, this article concludes by discussing reforms that could bring BORTAC into closer alignment with international norms of policing and migration. In so doing, BORTAC could be transformed from a law enforcement unit that generally operates in tension with human rights, to one that generally supports them. These reforms are particularly urgent as BORTAC plays a key role in the externalization of the US border.

First, BORTAC should immediately cease all support—including advising, financial support, and training—for national security forces with records of committing human rights abuses. Second, BORTAC, and the US Border Patrol as a whole, must improve accountability within their own ranks before they can claim to be accountable to the public and law. Third, major organizational reforms are needed. Among these are the need for a distinction between BORTAC units focused on violent crime (e.g., arms and drug trafficking) and units focused on regulating migration. Additional reforms, like prioritizing the recruitment of women agents and agents with family connections to the regions in which the unit operates, are important initial steps required to address BORTAC's chronic noncompliance with international norms related to policing.

B. BORTAC'S ACTIVITIES DO NOT PROTECT AND FULFILL HUMAN RIGHTS, AS INTERNATIONAL NORMS OF POLICING REQUIRE.

BORTAC's activities do not comply with international norms of policing that require the protection and fulfillment of human rights.¹²³ Both the ICRC and the DOJ emphasize that policing efforts should protect and fulfill human rights.¹²⁴ BORTAC's training of national

¹²³ *See Id.*

¹²⁴ *Id.*; INT'L COMM. OF THE RED CROSS, *supra* note 67, at 14.

security forces with histories of human rights abuses,¹²⁵ as well as BORTAC's own operations,¹²⁶ demonstrate the unit's noncompliance with this international norm on policing. Further highlighting the unit's lack of commitment to upholding human rights, BORTAC operatives have trained national security forces with histories of human rights abuses.¹²⁷ For example, the unit is responsible for training security forces in Honduras and Guatemala.¹²⁸

In Honduras, security forces targeted Bartolo Fuentes, a migrants' rights activist, in retribution for his efforts assisting a migrant group in 2018.¹²⁹ The Honduran security force's persecution of Mr. Fuentes was so severe that Mr. Fuentes was eventually forced to flee Honduras.¹³⁰ Mr. Fuentes's story is unfortunately not unique. Human Rights Watch has observed that Honduran public-security forces are "[m]arred by corruption," including with criminal organizations, to the point that "corruption is the norm."¹³¹ The same report also shared that "the [Honduran] government has set up roadblocks, deployed security forces, and used violence to prevent people from leaving the country."¹³²

In 2021, Guatemalan border security forces beat back a group of migrants with batons.¹³³ One migrant recounted the abuse to reporters:

¹²⁵ Good, *supra* note 47, at 36, 55 (discussing BORTAC's training of Honduran and Guatemalan forces); *Honduras: Events of 2020*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2021/country-chapters/honduras> (noting police corruption and police and military abuse including excessive force) [<https://perma.cc/3D6Q-4YMQ>].

¹²⁶ Ed Pilkington, 'These Are His People': Inside the Elite Border Patrol Unit Trump Sent to Portland, THE GUARDIAN (July 27, 2020), <https://www.theguardian.com/us-news/2020/jul/27/trump-border-patrol-troops-portland-bortac> [<https://perma.cc/V2LW-B82Z>].

¹²⁷ Good, *supra* note 47, at 36, 55 (discussing BORTAC training of Honduran and Guatemalan forces); Geneva Sands, *US Border Patrol Agents Will Deploy to Guatemala to Train 'Side-by-Side'*, CNN (May 31, 2019), <https://www.cnn.com/2019/05/31/politics/us-border-patrol-agents-will-train-guatemala/index.html> [<https://perma.cc/8DVU-EYVZ>]; *Genocide Trial Against High-Level Military Officials to Begin in Guatemala*, WOLA (Jan. 6, 2023), <https://www.wola.org/2023/01/genocide-trial-against-high-level-military-officials-to-begin-in-guatemala/> (Noting high-level Guatemalan military members' complicity with genocide) [<https://perma.cc/R5D5-UDH8>]; HUM. RTS. WATCH, *supra* note 125.

¹²⁸ Good, *supra* note 47 at 36, 55 (discussing BORTAC training of Honduran, Guatemalan forces); Sands, *supra* note 127.

¹²⁹ Jared Olson, *In Honduras, Efforts to Deter Migrants Add Danger, Costs*, THE NATION (Jun. 8, 2021), <https://www.thenation.com/article/world/honduras-border-migration-militarization/> [<https://perma.cc/C6DB-HUSA>].

¹³⁰ *Id.*

¹³¹ HUM. RTS. WATCH, *supra* note 125.

¹³² *Id.*

¹³³ Valerie Dekimpe, *Guatemalan Security Forces Beat Back Caravan of Honduran Migrants*, FRANCE 24 (Jan. 18, 2021), <https://www.france24.com/en/americas/20210118-guatemalan-security-forces-beat-back-caravan-of-honduran-migrants> [<https://perma.cc/JK3R-C44T>].

“They hit me in the head . . . I didn’t come with the intention of looking for problems with anybody. We’re brothers, Central Americans. We’re not looking for trouble. We just want to pass.”¹³⁴ The US State Department also called attention to the fact that Guatemalan governmental agents have carried out arbitrary and unlawful killings,¹³⁵ and they have also highlighted widespread governmental corruption and lack of transparency.¹³⁶ In 2017, Guatemalan police locked fifty-six girls in a space that could only hold eleven to punish the girls for protesting conditions in a government-run shelter.¹³⁷ After six hours without access to water or restroom facilities, one of the girls lit a mattress on fire so that the police officers would let them out.¹³⁸ Instead, the officers waited nine minutes before opening the door, killing forty-one of the fifty-six girls in their custody.¹³⁹

BORTAC’s training, and therefore support, of national security forces with such abysmal human rights records cannot be said to fulfil the international policing norm of protecting and fulfilling human rights. To the contrary, BORTAC has enabled forces accused of extrajudicial killings.¹⁴⁰ This training has also facilitated the flagrant violation of other human rights, like the right to emigrate or seek asylum from persecution.¹⁴¹ This training implicates at least some responsibility onto BORTAC. This is especially true considering BORTAC has claimed it trained these units on both international law and host nation laws.¹⁴² BORTAC’s training of national security forces abroad should result in a net *reduction* of the number of human rights violations by foreign law enforcement units. Instead, the reality has been the opposite.

¹³⁴ *Id.*

¹³⁵ U.S. Dep’t of State, 2020 Country Reports on Human Rights Practices: Guatemala (Mar. 30, 2021), <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/guatemala> [https://perma.cc/9QUQ-VC62].

¹³⁶ *Id.*, sec. 4.

¹³⁷ *Guatemala: Events of 2019*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2020/country-chapters/guatemala> [https://perma.cc/C8TZ-3RT6].

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ U.S. Dep’t of State, Honduras 2021 Hum. Rts. Report, https://www.state.gov/wp-content/uploads/2022/02/313615_HONDURAS-2021-HUMAN-RIGHTS-REPORT.pdf [https://perma.cc/MM7C-6ZD6].

¹⁴¹ *Guatemala: Events of 2022*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2023/country-chapters/guatemala> (showing Guatemalan border forces restricting the right to emigrate/seek asylum) [https://perma.cc/M7YF-9EYZ].

¹⁴² Good, *supra* note 47, at 36.

BORTAC's training of national security forces that violate human rights works against the international policing norm of protecting and fulfilling human rights. Additionally, BORTAC's own activities, like the funding and operation of checkpoint operations in Guatemala, violate human rights obligations.¹⁴³ Ana Maria Ramos and her two-year-old son were pulled from a bus in Guatemala as part of a BORTAC operation.¹⁴⁴ The two were fleeing violence in Honduras when Ms. Ramos told one reporter who was observing BORTAC's operation, "I don't want my boy to grow up in such a violent environment. I don't want him to see the violence and learn it. I don't want this for my son."¹⁴⁵ Ms. Ramos and her son (who both had a right to be in Guatemala without documentation as part of the CA-4 agreement) were forced to return to Honduras.¹⁴⁶ In just this one example where there happened to be a reporter, BORTAC violated two important human rights: Ms. Ramos's right to seek asylum from persecution, as well as her right to emigrate. This example also illustrates in real terms, with real consequences, BORTAC's failure to meet the heightened responsibilities owed to women, children, and migrants, under international norms of policing.¹⁴⁷

1. BORTAC's Activities Do Not Comply with the Principle of Necessity.

The "fundamental principle" of necessity is an international norm on policing which requires that law enforcement operations "not affect or restrict human rights more than is necessary."¹⁴⁸ International standards and norms require law enforcement to provide special consideration for the human rights to those with "special status,"¹⁴⁹ notably, women, children, and migrants.¹⁵⁰ Considering BORTAC's law enforcement objectives, its operations unnecessarily restrict human

¹⁴³ See Carcamo, *supra* note 65.

¹⁴⁴ *Id.*; *U.S. Tries to Slow Migrant Flow From Honduras*, NAT'L PUB. RADIO (July 13, 2014), <https://www.npr.org/2014/07/13/331133750/u-s-tries-to-slow-migrant-flow-from-honduras> [<https://perma.cc/ZJZ4-VWAP>].

¹⁴⁵ Carcamo, *supra* note 65.

¹⁴⁶ *Id.*

¹⁴⁷ INT'L COMM. OF THE RED CROSS, *supra* note 67, at 27–28.

¹⁴⁸ *Id.* at 18.

¹⁴⁹ UNCHR, *supra* note 99, at 4.

¹⁵⁰ INT'L COMM. OF THE RED CROSS, *supra* note 67, at 25–31.

rights, especially those special protected classes who should be afforded additional consideration.

a. Women

The ICRC emphasizes that women are not inherently vulnerable, but that law enforcement should “take into account the specific needs and vulnerabilities of women,” and highlights the “particular relevance . . . of violence against women.”¹⁵¹ Law enforcement agencies should maintain a sufficient number of women officers such that arrests, detentions, interrogations, and body searches of women can be carried out by women officers.¹⁵² Finally, recruitment procedures should be tailored to facilitate admission of as many female officers as required to meet these ends.¹⁵³

BORTAC’s legally baseless migration deterrence operations are carried out in a manner that lacks special consideration for the specific needs and vulnerabilities of women. For example, BORTAC trainees often prevent the migration of women traveling alone with their children.¹⁵⁴ BORTAC agents have also failed to properly consider the special status of these women in failing to determine if they are fleeing domestic violence.¹⁵⁵

Additionally, the unit almost certainly does not maintain enough women officers such that arrests, detentions, interrogations, and body searches of women can be carried out by women officers. Although recruitment statistics for BORTAC are difficult to determine given the secrecy that surrounds the unit, women make up just 5 percent of the US Border Patrol as a whole—10 percent lower than the average for other federal law enforcement agencies.¹⁵⁶ Of helpful comparison is BORTAC’s less-militaristic sibling unit—that exists under the same Special Operations Group (SOG)—BORSTAR (Border Patrol Search

¹⁵¹ *Id.* at 28.

¹⁵² UNCHR, *supra* note 99, at 13.

¹⁵³ INT’L COMM. OF THE RED CROSS, *supra* note 67, at 29.

¹⁵⁴ Olson, *supra* note 129; Carcamo, *supra* note 65.

¹⁵⁵ See Olson, *supra* note 129; Carcamo, *supra* note 65.

¹⁵⁶ Alan Neuhauser, *Border Patrol as a Problem with Women*, U.S. NEWS & WORLD REPORT (Aug. 3, 2018 6:00AM), <https://www.usnews.com/news/the-report/articles/2018-08-03/for-women-border-patrol-is-a-hostile-place-to-work> [<https://perma.cc/T6TF-A6AA>].

Trauma and Rescue), which is ninety-nine percent male.¹⁵⁷ The lack of participation by women in US Border Patrol, as well as BORTAC's SOG-companion BORSTAR, strongly suggest that the unit cannot fulfill its international norms of policing related to interacting with women.

b. Children

Law enforcement officials have “specific obligations” to “protect” and “provide assistance for” children.¹⁵⁸ Police should “pay utmost attention to their specific needs and rights and to [children’s] specific vulnerability . . . [exercising] particular care and sensitivity . . . thus preventing the law enforcement action from traumatizing them and causing them long-lasting harm.”¹⁵⁹

BORTAC’s law enforcement operations also show unnecessary restriction on the human rights of children, who are owed a duty of special consideration.¹⁶⁰ As a special operations unit, BORTAC conducts its operations while wearing military-style clothing and using intimidating weapons of war like automatic rifles. These officers, who are trained to shoot from helicopters,¹⁶¹ risk traumatizing, or retraumatizing, the children with whom they interact, this is especially true given the context of corrupt policing and gang violence that exists in many of the countries where BORTAC operates.¹⁶² BORTAC (and their host nation trainee) operations forcibly return individuals to places of origin where they may face violence.¹⁶³ This violates the principle of non-refoulment and fails to adequately protect, provide assistance for, and prevent long-lasting harm to children, as required by international norms and standards.

¹⁵⁷ Jodi Butts, *Breaching the Gender Wall at the Border Patrol*, POLICE1 BY LEXIPOL (Aug. 15, 2013), <https://www.police1.com/border-patrol/articles/breaching-the-gender-wall-at-the-border-patrol-K6qBWL15Z40LHnSN/> [<https://perma.cc/L23S-B3S8>].

¹⁵⁸ *Id.* at 27.

¹⁵⁹ *Id.* at 27–28.

¹⁶⁰ INT’L COMM. OF THE RED CROSS, *supra* note 67, at 28.

¹⁶¹ U.S. GOV’T ACCOUNTABILITY OFF., GAO-20-710 1 (2020-09-10) FEDERAL TACTICAL TEAMS: CHARACTERISTICS, TRAINING, DEPLOYMENTS, AND INVENTORY (2020).

¹⁶² See CONG. RSCH. SERV., HONDURAS: BACKGROUND AND U.S. RELATIONS, RL34027, (2020) (detailing existence of generalized violence in Honduras).

¹⁶³ NAT’L PUB. RADIO, *supra* note 144; see also Carcamo, *supra* note 65.

c. Migrants

Specific obligations also apply to “people on the move” including migrants, displaced peoples, and refugees. International norms require law enforcement officials “protect and assist people on the move” giving “full respect [to] their rights and status.”¹⁶⁴ Officials must note the “particular vulnerability” of migrants and treat them as victims and not criminals.¹⁶⁵ Migrants should be protected from arbitrary arrest or detention.¹⁶⁶ When arrested or detained, migrants’ legal rights must be protected, and due process ensured.¹⁶⁷ Refugees should be given the same judicial guarantees as anyone else.¹⁶⁸ Additionally, the principle of non-refoulement prohibits law enforcement from sending individuals to a country where their fundamental rights might be violated.¹⁶⁹

BORTAC’s operations that prevent migrants from exercising their full rights as displaced persons is an additional intrusion on human rights that disregards the “fundamental principle” of necessity. The arbitrary detention of entire buses at checkpoints, along with the forcible return of migrants to areas from which they have been displaced, violates the special obligations owed to “people on the move.” Alternative, less restrictive means of enforcing migration policy exist, and this is especially true considering the rights of displaced persons to emigrate, seek asylum, and be free from arbitrary arrest and detention. Further, the forcible detention of individuals in migration deprives these individuals of their rights without due process of law. BORTAC’s failure to give special considerations to women, children, and migrants means its activities do not comply with the principle of necessity.

2. *BORTAC’s Negative Impact on Human Rights is Not Proportional to its Law Enforcement Objectives.*

BORTAC’s operations act in tension with the international norm that policing operations should not affect human rights “in a way that is

¹⁶⁴ CONG. RSCH. SERV., HONDURAS: BACKGROUND AND U.S. RELATIONS, RL34027, 29 (2020).

¹⁶⁵ *Id.* at 31.

¹⁶⁶ *Id.* at 30.

¹⁶⁷ *Id.* at 31.

¹⁶⁸ *See id.*

¹⁶⁹ *Id.* at 30.

disproportionate to the aim.”¹⁷⁰ BORTAC’s military-style operations are not in proportion to the unit’s goals of regulating migration and preventing trafficking of illicit goods. The unit’s military-style training means it is ill-suited to meet the humanitarian needs of individuals fleeing violence. The result is often traumatizing to individuals who interact with the military-style unit, and this is not proportional with the unit’s purported law enforcement objectives.

BORTAC’s operations have direct and indirect impacts on human rights that are not proportional with the unit’s law enforcement objectives. One example of BORTAC’s direct impact on human rights was the unit’s military-style raid and gassing of young Elián Gonzales’s home.¹⁷¹ The unit’s violation of human rights—in just this one instance—included (1) deploying flash grenades and tear gas in a home where a child was known to be present, (2) pointing assault weapons at unarmed family members and threatening them with death, and (3) assaulting and threatening a member of the press with death.¹⁷² The law enforcement objective of enforcing US family law related to child custody was not proportional to the military-style raid that resulted in the assault and traumatization of children and members of the press.

Exactly how BORTAC’s Elián Gonzales operation violated international norms of policing is discussed below. However, it is worth noting that this operation also violated several, more general human rights, as well. BORTAC’s military-style raid violated Elián’s, his family’s, his lawyer’s, and members of the media’s fundamental right to life, liberty, and security of person.¹⁷³ The raid also violated the family’s right to not be subjected to arbitrary interference with privacy, family, and home.¹⁷⁴ That Elián’s right not to be subjected to cruel, degrading treatment was violated is clearly evident in Mr. Diaz’s Pulitzer Prize-winning photo.¹⁷⁵ The same is true regarding BORTAC’s treatment of the NBC journalist, considering a BORTAC agent used his foot to hold the journalist to the ground and threatened the journalist with death.¹⁷⁶ This latter detail is especially problematic considering that the freedom and

¹⁷⁰ See *id.* at 18 (explaining that policing operations must conform with the principle of proportionality).

¹⁷¹ See de la Cova, *supra* note 28, at 182–83.

¹⁷² *Id.* at 183.

¹⁷³ See G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 3 (Dec. 10, 1948).

¹⁷⁴ See *id.* art. 12.

¹⁷⁵ See *id.* art. 5.

¹⁷⁶ de la Cova, *supra* note 28, at 183.

safety of the media is “essential for the protection of other human rights.”¹⁷⁷

In addition to the numerous instances of excessive use of force, the unit’s activity also indirectly undermines human right obligations in that they force migrants to take more dangerous, perilous migration routes.¹⁷⁸ As more popular routes become increasingly policed, migrants take more dangerous ones, hoping they will be less likely to encounter law enforcement.¹⁷⁹

Just one example of this dangerous journey is a system of trains running through Mexico called La Bestia, or “the Beast.”¹⁸⁰ There are no passenger cars—migrants, including children, ride on the top of box cars and shipping containers.¹⁸¹ As more traditional migratory routes have become more heavily policed, aid organizations have noted an increase in mutilations resulting from individuals falling from the trains.¹⁸² This is further evidence of individuals being forced to undertake more perilous journeys as less dangerous migratory routes are increasingly policed.¹⁸³ Additionally, increased policing of migratory routes does nothing to alleviate the underlying conditions that generate migratory pressure, and bolsters the coffers of organized criminal organizations who charge higher rates as migratory routes are increasingly policed.¹⁸⁴ BORTAC’s law enforcement operations result in unnecessary risk to human life and make human trafficking more lucrative for organized criminals.¹⁸⁵ The unit’s actions burden human rights in a way that is not proportional with its law enforcement objectives. Specifically, the BORTAC’s military-

¹⁷⁷ *Freedom of Expression, Media Freedom and Safety of Journalists*, COUNCIL OF EUR., <https://www.coe.int/en/web/commissioner/thematic-work/media-freedom> [https://perma.cc/U53W-LCHK].

¹⁷⁸ Olson, *supra* note 129.

¹⁷⁹ TODD MILLER, *STORMING THE WALL: CLIMATE CHANGE, MIGRATION, AND HOMELAND SECURITY* 41 (2017).

¹⁸⁰ Valeria Luiselli, *Riding ‘The Beast’: Child Migrants Reveal Full Horror of their Journeys to America*, *THE GUARDIAN* (Oct. 5, 2017, 6:00 AM), <https://www.theguardian.com/inequality/2017/oct/05/riding-the-beast-child-migrants-reveal-full-horror-of-their-journeys-to-us> [https://perma.cc/9ZVQ-ZAQT].

¹⁸¹ *Id.*

¹⁸² Delphine Schrank, *REFILE-Victims of ‘La Bestia,’ Mexico’s Notorious Migrant Train, Learn to Walk Again*, *REUTERS* (Aug. 22, 2019), <https://www.reuters.com/article/usa-immigration-mexico-idINL4N25G3H1> [https://perma.cc/55NL-LA55].

¹⁸³ David Agren, *Migrants brave the ‘Beast’ as Mexico cracks down under US pressure*, *THE GUARDIAN* (Jun. 5, 2019), <https://www.theguardian.com/world/2019/jun/05/migrants-brave-the-beast-as-mexico-cracks-down-under-us-pressure> [https://perma.cc/Q8BW-BZ5B].

¹⁸⁴ Olson, *supra* note 129.

¹⁸⁵ *Id.*; See generally Luiselli, *supra* note 180.

style training, mindset, and ethos are incompatible with the special obligations owed to women, children, and migrants under international law. The law enforcement objective of regulating migration or preventing trafficking of contraband is not proportional to the negative impact BORTAC's operations have on human rights. Therefore, the unit is in violation of the ICRC principle of proportionality.

C. BORTAC IS NONCOMPLIANT WITH THE INTERNATIONAL NORM OF POLICE ACCOUNTABILITY.

One of the most well-accepted international norms related to policing is that of accountability.¹⁸⁶ The ICRC notes that law enforcement agencies should be accountable to both the public and the government.¹⁸⁷ As the US Department of Justice observes, police should be accountable to the law, rather than to the whims of a particular governmental group or regime.¹⁸⁸

1. BORTAC's Operations Lack Transparency.

According to the DOJ, accountability also means transparency.¹⁸⁹ The DOJ notes that policing "activity must be open to observation and regularly reported to outsiders."¹⁹⁰ This observation and reporting requirement "applies to information about the behavior of individual officers as well as to the operations of the institution as a whole."¹⁹¹ Because "the military's mission is so different from that of the police that each contaminates the other," accountability is negatively impacted where there is no separation of police and military duties.¹⁹²

BORTAC is not accountable to the public because its activities are not transparent, and because the US Border Patrol, as a whole, lacks oversight. The DOJ's observed norm of transparency applies to both the

¹⁸⁶ See generally U.N. OFF. ON DRUGS & CRIME, HANDBOOK ON POLICE ACCOUNTABILITY, OVERSIGHT, AND INTEGRITY 1 (2011), https://www.unodc.org/pdf/criminal_justice/Handbook_on_police_Accountability_Oversight_and_Integrity.pdf [https://perma.cc/XJA6-SEH3].

¹⁸⁷ INT'L COMM. OF THE RED CROSS, *supra* note 67.

¹⁸⁸ BAYLEY, *supra* note 67, at 14.

¹⁸⁹ See *id.* at 14–15.

¹⁹⁰ *Id.* at 14.

¹⁹¹ *Id.* at 14–15.

¹⁹² *Id.* at 38.

activities of individuals and police units as a collective.¹⁹³ BORTAC was diverted to Portland, Oregon, “where agents used unmarked vehicles to follow and arrest protesters” following the murder of George Floyd by law enforcement in the summer of 2020.¹⁹⁴ “[U]nidentified masked agents in camouflage strong-arm[ed] civilians into unmarked vans,” and acted as a “national militarized force operating outside constitutional constraints.”¹⁹⁵ This aggressive behavior garnered attention from international media.¹⁹⁶ Human rights organizations also condemned these actions.¹⁹⁷ Unidentified BORTAC agents used unmarked vehicles and uniforms without identifying insignia in order to abduct protestors in the wake of George Floyd’s murder.¹⁹⁸ This demonstrates a lack of transparency and contributes to the unit’s overall lack of compliance with international policing norms related to accountability.

The New York Times explicitly stated that the Border Patrol’s “lack of transparency” made completing one study related to the organization’s accountability a “difficult task.”¹⁹⁹ The study highlighted a total lack of accountability within the organization, noting that the complaint system is “ornamental” and “carries no real weight in how the agency functions.”²⁰⁰ US Border Patrol agents, which include BORTAC operatives, act with “impunity,”²⁰¹ because the organization “lacks many basic safeguards against abuse that would be demanded of any metropolitan police department.”²⁰² BORTAC’s non-compliance with international norms relating to law enforcement accountability is best

¹⁹³ *Id.* at 14–15.

¹⁹⁴ MIZUE AIZEKI, GEOFFREY BOYCE, TODD MILLER, JOSEPH NEVINS, & MIRIAM TICKTIN, SMART BORDERS OR A HUMANE WORLD? 31 (2021), https://www.immigrantdefenseproject.org/wp-content/uploads/smart_borders_humane_world_2021.pdf [<https://perma.cc/X4VC-4QBF>].

¹⁹⁵ Pilkington, *supra* note 126.

¹⁹⁶ *Id.*

¹⁹⁷ See Belkis Wille & Ida Sawyer, *The US Commits the Same Abuses it Condemns Abroad*, HUM. RTS. WATCH (Jun. 29, 2020, 7:00 AM), <https://www.hrw.org/news/2020/06/29/us-commits-same-abuses-it-condemns-abroad> [<https://perma.cc/Q2KB-VJZB>]; Press release, ACLU, Documents Obtained by ACLU Reveal Border Patrol Agents Were Authorized to Use Deadly Force at George Floyd’s Burial (Oct. 1, 2020), <https://www.aclu.org/press-releases/documents-obtained-aclu-reveal-border-patrol-agents-were-authorized-use-deadly-force> [<https://perma.cc/5HSY-D5LK>].

¹⁹⁸ AIZEKI BOYCE, MILLER, NEVINS & TICKTIN, *supra* note 194, at 31.

¹⁹⁹ The Editorial Board, Editorial, *Impunity and the Border Patrol*, N.Y. TIMES (May 11, 2014), <https://www.nytimes.com/2014/05/12/opinion/impunity-and-the-border-patrol.html> [<https://perma.cc/62XS-ZZCW>].

²⁰⁰ *Id.*

²⁰¹ Pilkington, *supra* note 126.

²⁰² The Editorial Board, *supra* note 199.

summarized by The New York Times Editorial Board's words, "If a Border Patrol agent beats, kicks, threatens or otherwise abuses you, you can file a complaint. What you can't count on, evidently, is anything being done about it."²⁰³

2. BORTAC's Operations Lack Basis in Law.

The international norm that policing activity should have a legal basis and enforce the law, rather than the will of particular members of government, is widely accepted.²⁰⁴ Freedom of movement and freedom from arbitrary arrest are fundamental international norms; arbitrary arrest and detention are explicitly prohibited.²⁰⁵ BORTAC operates without basing its activity on established law. BORTAC's use of arbitrary searches and seizures as a means of deterring and migration, as well as its violations of international conventions regarding free movement, suggest the unit prioritizes the enforcement of policy governmental actors policy preferences, rather than enforcement of established law.²⁰⁶ BORTAC's strategy of deterring migrants before they reach the US-Mexico border violates (1) international norms related to migration and human rights,²⁰⁷ (2) international conventions on free movement,²⁰⁸ (3) international prohibitions on arbitrary detentions,²⁰⁹ and (4) local law related to arbitrary detentions.²¹⁰

BORTAC's law enforcement activity violates at least three well-established international norms of policing. First, that "[n]on-nationals have the same right to leave and to emigrate as nationals."²¹¹ Second, that "[e]veryone has the right to seek, and to enjoy, in another country, asylum from persecution."²¹² Finally, that "[r]efugees coming directly

²⁰³ *Id.*

²⁰⁴ INT'L COMM. OF THE RED CROSS, *supra* note 67, at 18; BAYLEY, *supra* note 67, at 14.

²⁰⁵ See G.A. Res. 217 (III), *supra* note 173; INT'L COMM. OF THE RED CROSS, *supra* note 67, at 30.

²⁰⁶ See, e.g., NAT'L PUB. RADIO, *supra* note 144.

²⁰⁷ See INT'L COMM. OF THE RED CROSS, *supra* note 67, at 38; BAYLEY, *supra* note 67, at 14.

²⁰⁸ See Acuerdo Regional de Procedimientos Migratorios CA 4, *supra* note 68 (establishing regulations for implementing the single Central American Visa).

²⁰⁹ See INT'L COMM. OF THE RED CROSS, *supra* note 67, at 39–40; BAYLEY, *supra* note 67, at 14.

²¹⁰ See U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUM. RTS., AND LAB., HONDURAS 2018 HUMAN RIGHTS 6 (2018), <https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/honduras/> [<https://perma.cc/F8GS-VHX3>].

²¹¹ U.N. High Commissioner for Human Rights, *supra* note 99.

²¹² G.A. Res. 217 (III) A, *supra* note 173, art. 14.

from a country of persecution shall not be refused at least temporary entry.”²¹³

BORTAC’s activity in Honduras serves as an example of how the unit violates international norms. In Honduras, where arbitrary arrest and detention are prohibited both by local law and international norms,²¹⁴ BORTAC-trained agents conducted arbitrary detentions of entire buses in order to achieve the law enforcement objective of deterring migration to the United States.²¹⁵ In violation of the right to emigrate, BORTAC-trained agents (wearing BORTAC badges) interrupted the emigration of families who were fleeing migratory “triggers” like gang violence, even though some of these families had proper documentation.²¹⁶ This action was carried out in order to “stop the flow” of individuals migrating North-ward towards the United States.²¹⁷

Both the *ends* of these operations (to inhibit North-ward migration), as well as the *means* (documentation checkpoints) lack basis in law. Regarding the ends, northern migration in and of itself is not a violation of any codified law, so policies designed to “stop the flow” of such migration necessarily lack basis in law. Furthermore, both Honduras and the United States are signatories to the Universal Declaration of Human Rights (“UDHR”), which grants “[e]veryone . . . the right to seek . . . asylum from persecution.”²¹⁸ Other international agreements also affirm the human right to seek asylum from persecution.²¹⁹ Accordingly, BORTAC-affiliated operations, designed to “stop the flow” of North-ward migration in general,²²⁰ are in tension with international law because they inhibit individuals’ efforts to seek asylum, which is a human right. Secondly, the means employed to reduce North-ward migration—documentation checkpoints—often lack legal basis. For example, these operations single out “mothers . . . traveling alone with children” to check for “written authorization from the father,”²²¹ even

²¹³ U.N. High Commissioner for Human Rights, *supra* note 99, at 14.

²¹⁴ U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUM. RTS., AND LAB., *supra* note 210, at 6.

²¹⁵ Carcamo, *supra* note 65; *see also* NAT’L PUB. RADIO, *supra* note 144.

²¹⁶ *A U.S.-Funded Special Operations Unit is Trying to Stop Kids from Crossing its Border*, THE WORLD, <https://admin.theworld.org/node/67243/popout> [<https://perma.cc/45M7-FQXC>].

²¹⁷ NAT’L PUB. RADIO, *supra* note 144; *see also* Carcamo, *supra* note 65.

²¹⁸ G.A. Res. 217 (III) A, *supra* note 173.

²¹⁹ Convention Relating to the Status of Refugees, *supra* note 28; Protocol Relating to the Status of Refugees, *supra* note 108; Inter-American Convention on Diplomatic Asylum, Dec. 20, 1969, 23 U.S.T. 357, 490 U.N.T.S. 255.

²²⁰ NAT’L PUB. RADIO, *supra* note 144.

²²¹ *Id.*

though some may be fleeing situations in which authorization from the father may be unfeasible, even dangerous. Furthermore, refoulment of individuals who are traveling without passports under the CA-4 agreement also lacks basis under international law.²²²

Additionally, the practice of establishing roadblocks for the arbitrary detention of migrants and restriction of movement is in violation of international norms related to the freedom of movement.²²³ This practice is an openly shared aspect of BORTAC training curriculum.²²⁴ Because BORTAC has trained in some 30 countries,²²⁵ the practice of foreign state agents using checkpoints to arbitrarily detain and repatriate individuals—despite international agreements permitting free travel—is now a common practice throughout Central America.²²⁶

The result is that BORTAC agents often prevent the free movement of individuals who are entitled under international obligations to flee violence and seek refuge.²²⁷ At the very least, these individuals are entitled to unrestricted, passport-free travel between certain Central American countries.²²⁸ As a result, BORTAC's aforementioned arrests, detentions, and repatriations are arbitrary and lack basis in law. Viewed more critically, BORTAC's actions flagrantly and intentionally violate both local and international law.²²⁹ In context of the lack of legal basis for these activities, in carrying out these operations, BORTAC was enforcing the objectives of particular members of government rather than enforcing the law itself.

²²² Acuerdo Regional de Procedimientos Migratorios CA 4, *supra* note 68 (establishing regulations for implementing the single Central American Visa).

²²³ G.A. Res. 217A, *supra* note 173 art. 14.

²²⁴ Good *supra* note 47.

²²⁵ *Id.* at 1.

²²⁶ Miller, *supra* note 179, Olson, *supra* note 129, Carcamo, *supra* note 65.

²²⁷ See INT'L COMM. OF THE RED CROSS, *supra* note at 67, at 29–31 (explaining that police may not send people fleeing violence back to their country of origin or any other country where there is a risk of violence).

²²⁸ Acuerdo Regional de Procedimientos Migratorios CA 4, *supra* note 68 § 5, ¶¶ 5–7.

²²⁹ See U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUM. RTS., AND LAB., *supra* note 210, at 7–8 (explaining that as of October 2018 the Honduran public ministry report 49 cases of illegal detention or arbitrary arrest); INT'L COMM. OF THE RED CROSS, *supra* note 67, at 30–31; BAYLEY, *supra* note 67, at 56; Faret, Téllez, & Rodríguez-Tapia, *supra* note 109, at 67 (explaining that the Central America Border Control Agreement endows citizens with the right to free movement between Honduras Guatemala, El-Salvador and Nicaragua).

**IV. URGENT REFORMS ARE NECESSARY TO BRING BORTAC
IN COMPLIANCE WITH INTERNATIONAL NORMS OF
POLICING.**

BORTAC's law enforcement activities play a key role in externalizing the US border. This fact generates a compelling urgency to undertake needed reforms in order to bring BORTAC in compliance with international norms of policing. Both self-interested considerations, as well as humanitarian ones, create this urgency. First, externalizing the US border with BORTAC operations results in unacceptable liability for the United States (because BORTAC-trained and funded national security forces violate international law and norms). Second, BORTAC's activities negatively contribute to ongoing human rights crises and retraumatize individuals who are fleeing violence.

**A. BORTAC'S EXTERNALIZATION OF THE US BORDER GENERATES
URGENCY FOR REFORM.**

In establishing and training Central American border patrol units, BORTAC is both normalizing US foreign policy related to migration and enforcing its policy outside of its borders. The result is the "externalization" of the US border into Central American countries like Guatemala, Honduras, and El Salvador.²³⁰ This is especially problematic considering US migration policies that run counter to international norms and conventions on policing and migration. It is also problematic because the individuals most affected by the externalized US border have no democratic input into the contours of these policies.

This "externalization" of the US border (and US migration policy) was observed by an LA Times reporter who visited Honduras and witnessed a local elite border patrol unit maintaining a checkpoint while wearing bullet proof vests with large "BORTAC" and "POLICE" patches.²³¹ The heavily-armed unit detained an entire bus of migrants bound for Guatemala.²³² BORTAC made the men stand with their hands against the bus, as if it were a wall, as the women and children looked on.²³³ The BORTAC agents informed the LA Times reporters that they

²³⁰ Olson, *supra* note 129.

²³¹ Carcamo, *supra* note 65.

²³² *Id.*

²³³ *Id.*

were “saving the lives of . . . children” by preventing unaccompanied minors from continuing the journey to Guatemala, and by preventing the migration of children traveling with only one parent.²³⁴

Among the detained individuals were a mother and her two-year-old son.²³⁵ The mother shared that she was headed to Los Angeles “to flee gang violence” because she didn’t “want [her] boy to grow up in such a violent environment” in Honduras.²³⁶ Because the mother did not have physical evidence of the father’s consent for them to flee, the border agent removed them from the bus and did not let them continue their journey.²³⁷

The visibility of BORTAC’s support for Central American border forces is especially problematic when the tactics used by local forces conflict with international norms of policing and migration. For example, the Interamerican Commission on Human Rights condemned the excessive use of force against migrants and refugees by Guatemalan forces during a border operation in 2021.²³⁸ Honduras has an elite police unit known for extrajudicial killings (Public Order Military Police or “PMOP”),²³⁹ and US prosecutors have accused the former president of Honduras, Juan Orlando Hernández, of offering to protect cocaine labs with police units.²⁴⁰ Even though BORTAC did not directly carry out these atrocities, the United States bears at least some responsibility considering BORTAC’s history of training paramilitary forces with alarming human rights records on both local and international laws.

Because national security forces trained and funded by BORTAC are violating international law, the United States may be deemed liable for these actions. BORTAC’s heavy-handed involvement in these activities (training, financing, supervision), may generate legal liability under international law.²⁴¹ A state is responsible for an internationally wrongful act when the conduct is (1) attributable to the state and (2) constitutes a breach of an international obligation of the

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ AMNESTY INT’L, *supra* note 110.

²³⁹ *See* HUM. RTS. WATCH, *supra* note 125.

²⁴⁰ Olson, *supra*, note 129.

²⁴¹ *See* Sompong Sucharitkul, *State Responsibility and International Liability under International Law*, 18 LOY. L.A. INT’L & COMP. L. J. 821, 835 (1996) (stating that states are liable under international law for harmful effects of activities occurring within their jurisdiction).

state.²⁴² Here, BORTAC's operations are attributable to the United States, as BORTAC is an "organ" of the US government.²⁴³ A state is still responsible for violative conduct if foreign agents carry out the conduct under its instructions.²⁴⁴ International obligations can originate from customary international law, not just treaty law, so violations of human rights or international policing norms may be sufficient to generate state responsibility where those norms are so relied upon that they form part of customary international law.²⁴⁵ In summary, since the Central American border security agents violate human rights following BORTAC's training and instruction, the United States could be deemed legally liable under international law for these human rights violations.

B. BORTAC MUST CEASE TRAINING OF NATIONAL SECURITY FORCES THAT FAIL TO RESPECT HUMAN RIGHTS OBLIGATIONS.

As previously noted, BORTAC is well-documented as having trained national security forces in countries where those resources historically have been, and continue to be, used to violate human rights.²⁴⁶ This not only might generate legal liability for the United States under international law, but it also generates moral responsibility and a humanitarian imperative. Additionally, given the US Border Patrol's lack of accountability,²⁴⁷ it seems wise to abstain from sending BORTAC to serve as a representative of the United States abroad in order to interact with foreign law enforcement agencies until the unit can hold its own members accountable for their actions.

Ending BORTAC's support—including financial, advising, and training support—of security forces with poor human rights records is an important first step towards bringing the unit into compliance with international norms of policing relating to the protection and fulfillment of human rights. It would also bring the unit into compliance with the US Department of Justice's own stated views on norms of policing.

The DOJ has noted that foreign assistance to local police forces will not induce reform where there is opposition from the host

²⁴² Int'l L. Comm'n, Rep. on the Work of Its Fifty-Third Session, ¶ 76, art. 2, U.N. Doc. A/56/10 (2001).

²⁴³ See *id.* art. 4.

²⁴⁴ *Id.* art. 8.

²⁴⁵ *Id.* art. 12.

²⁴⁶ See *supra* Part I.C.

²⁴⁷ The Editorial Board, *supra* note 199.

government, or where the local police force is not seriously committed to reform.²⁴⁸ Despite this, BORTAC gives substantial support to security forces which are notoriously corrupt and well-documented human rights abusers.²⁴⁹ For example, former Honduran President Juan Orlando Hernández was arrested for extradition to the United States due to a connection with a “violent drug-trafficking conspiracy.”²⁵⁰ Thus, the government of the United States had reason to believe lending assistance to foreign police forces will not generate reform where there is no local support for it but still knowingly gave BORTAC’s assistance to corrupt national security forces that violate human rights and lack any interest in reform. This situation is untenable in that it could generate liability for the United States under international law for enabling human rights abuses.²⁵¹ It also generates an equally compelling moral imperative for BORTAC to cease all assistance to these national security forces.

C. BORTAC AND US BORDER PATROL MUST IMPLEMENT MEANINGFUL MECHANISMS FOR ACCOUNTABILITY.

No meaningful mechanism for accountability exists in the US Border Patrol, and therefore, within BORTAC.²⁵² Before the unit can satisfy international norms of policing accountability (and certainly before it can be qualified to instruct national security forces abroad) it must first implement mechanisms to hold its members accountable for wrongdoing. Creating a formal accountability mechanism through a complaint system that can hold members accountable through disciplinary action is the most pressing need. In order to gain compliance, BORTAC (and the US Border Patrol as a whole) must hold members accountable through disciplinary action. Improved transparency focused on increased communication and civilian oversight are also imperative to remedying BORTAC’s noncompliance with international policing norms related to accountability.

²⁴⁸ BAYLEY, *supra* note 67, at 35, 38.

²⁴⁹ See Good, *supra* note 47, at 36, 55 (noting that BORTAC trains security forces in Honduras and Guatemala); HUM. RTS. WATCH, *supra* note 125, at 1–2 (noting police corruption and police and military abuse including excessive force); Dep’t of State, *supra* note 135, at 28–29.

²⁵⁰ Joan Suazo & Anatoly Kurmanaev, *Former Honduras President Detained After a U.S. Extradition Request*, N.Y. TIMES (Feb. 15, 2022), <https://www.nytimes.com/2022/02/15/world/americas/honduras-president-juan-orlando-herandez-detained.html> [<https://perma.cc/5A6R-UN5V>].

²⁵¹ See generally Int’l L. Comm’n, *supra* note 242, at 31.

²⁵² See *infra* Part V.

The US Border Patrol's complaint system as it currently exists has been described as "ornamental," allowing agents, like those who comprise BORTAC, to act with "impunity."²⁵³ Complaints must be meaningfully investigated, then followed up with appropriate disciplinary action—including suspension, firing, and referral to the criminal justice system—where appropriate. Improved transparency regarding the number and content of complaints, as well as which disciplinary actions were taken, are low-cost adjustments which would go great lengths to improving BORTAC's accountability. Ensuring appropriate reparations are guaranteed where human rights are violated is also an important component to bringing the unit in compliance with international norms of police accountability.

Transparency should not be limited to the communication of data related to, or details of, formal complaints. Transparency also means active engagement with the public. Ideally, each BORTAC operation and effort, as well as its cost, should be made publicly available. Where confidentiality concerns might prevent the publication of certain operations, processes must be established that ensure eventual declassification, when appropriate. This would allow for citizen and press engagement and indirectly hold BORTAC as an organization accountable when formal mechanisms, like the complaint system, fail. Additionally, ensuring each BORTAC agent is individually identifiable (for example, with unit insignias and a badge number, in contrast to what occurred in Portland),²⁵⁴ would also improve accountability.

D. BORTAC MUST UNDERGO ORGANIZATIONAL RESTRUCTURING.

The US DOJ notes democratic policing requires the separation of police from the military.²⁵⁵ This is because policing duties (which are focused on serving the individual and require discretion and mediation) are "antithetical" to the military's "war-fighting" mission.²⁵⁶ In order to give appropriate consideration to the special needs of protected groups—an international norm of policing—the ICRC states that law enforcement agencies should "ensure general representativity of the law enforcement

²⁵³ The Editorial Board, *supra* note 199.

²⁵⁴ See *supra* Part I.C.

²⁵⁵ BAYLEY, *supra* note 67, at 38–39.

²⁵⁶ *Id.* at 13, 39.

agency.”²⁵⁷ Part of this obligation means ensuring there are enough women officers in the agency so that searches of women can be carried out by women officers.²⁵⁸

These two structural or organizational expectations of international norms of policing give rise to the need for at least two significant reforms to BORTAC. First, the separation of BORTAC into two units: one focused on military duties like combating organized crime and illicit trafficking of arms and drugs and another unit focused on regulating migration. Secondly, BORTAC should initiate recruiting efforts which prioritize candidates who are representative of the communities BORTAC polices. This means focusing on hiring more women and individuals with family connections to Central America. The result would be law enforcement which is simultaneously more effective at law enforcement while also meeting the unique humanitarian needs of individuals in migration.

1. BORTAC Should be Split into Two Distinct Units to Allow For Separation of Police and Military Duties.

BORTAC’s dual responsibilities of fighting organized criminals and arms traffickers and addressing humanitarian migration crises mean the unit has responsibilities generally held by both police organizations and militaries. Individuals who are trained to go to war, trained to respond to each situation as a threat, and trained to shoot terrorists from helicopters,²⁵⁹ are unlikely to be effective at providing trauma-informed policing that meets the unique needs of vulnerable individuals.

Allowing two distinct BORTAC units to specialize in violent crime interdiction or the humanitarian needs of migrants would make the unit a more effective law enforcement agency. For example, the US Border Patrol knows in advance if their mission is raiding a drug operation or operating a checkpoint to check for immigration and identity papers. Agents who have military-style training would be most capable of carrying out the raid, while agents with training on immigration law and trauma-informed policing could best ensure immigration law is

²⁵⁷ INT’L COMM. OF THE RED CROSS, *supra* note 67, at 29.

²⁵⁸ *Id.*

²⁵⁹ See U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 12, at 35; see also Altovise Love-Craighead, *Building Trust Through Trauma-Informed Policing*, VERA (Mar. 20, 2015), <https://www.vera.org/blog/police-perspectives/building-trust-through-trauma-informed-policing> [<https://perma.cc/9UB9-TK6M>].

enforced in context of international obligations to refugees and in context of the unique needs of these communities. Viewed alternatively, BORTAC should be reserved for violent crime interdiction, while the US Border Patrol should form a different unit focused on ensuring orderly migration into the United States in a manner compliant with US law and international obligations.

2. *BORTAC Should Initiate Recruitment Efforts Prioritizing Candidates Who Reflect the Populations BORTAC Polices.*

While ensuring military-trained BORTAC agents do not come into contact with individuals fleeing violence is an important first step to bring the unit into compliance with international norms of policing, other important organizational reforms are needed. In order to comply with the international norm of “general representativity” of law enforcement agencies as whole, BORTAC should initiate recruitment efforts focused on expanding the diversity in their ranks. Specifically, hiring more women and individuals with family connections to the regions in which BORTAC is deployed is an important first step to improving representativity and compliance with international norms related to policing.

More women officers would mean BORTAC could comply with ICRC’s requirement that women are searched by women officers, or that women who are detained are under the supervision of women.²⁶⁰ This would also bring a unique and important perspective to the unit. For example, perhaps a woman officer would better understand the situation of the migrant mother and her two-year-old son who were repatriated to Honduras (against the principle of non-refoulment) simply because the mother did not have official documentation from her son’s father.²⁶¹

BORTAC should hire more individuals with family connections to the regions in which the unit operates. Doing so would improve the unit’s overall cultural sensitivity and ability to meet the unique needs of individuals in migration through the region. Especially when many migrants’ first interactions with Americans are the interactions they have with law enforcement, it is exceptionally important that US law enforcement agencies abroad are representative and sensitive to the

²⁶⁰ INT’L COMM. OF THE RED CROSS, *supra* note 67, at 29.

²⁶¹ Carcamo, *supra* note 65.

needs of these individuals who are owed special obligations under international law.

V. CONCLUSION

BORTAC's law enforcement activities place the unit in tension with several international norms of policing. Among these norms are those related to the fulfillment and protection of human rights. These norms also require that restrictions on human rights only take place when necessary, and that they are proportional to law enforcement objectives. BORTAC also does not satisfy international norms of policing related to accountability. The unit lacks transparency in its activities and has no meaningful means of redress for agents' wrongdoing.

Major reforms are needed in order to bring BORTAC into compliance with international norms of policing. First, BORTAC should end all support—including training and financing—of national security forces who demonstrate lack of respect for human rights. Secondly, accountability must be improved through increased transparency and the creation of a meaningful complaint system which results in disciplinary action when appropriate. Structural reforms are needed as well. Most important among these is the need for BORTAC to be split into two units: one focused on addressing violent organized crime and another focused on regulating migration. At the very least, until this split is complete, BORTAC should not be deployed in scenarios where they are likely to interact with refugee populations. Finally, the organization must increase representativity.

Undertaking these reforms are important first steps in bringing the unit into compliance with international norms of policing. They also will make BORTAC a more capable law enforcement unit better prepared to enforce the law and respond to the unique needs of certain populations.

