

No. 15-16410

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ARACELI RODRIGUEZ, individually and as the surviving mother and
personal representative of J.A.,

Plaintiff-Appellee,

v.

LONNIE SWARTZ, Agent of the U.S. Border Patrol,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

**BRIEF OF HUMAN RIGHTS WATCH AS *AMICUS CURIAE* IN SUPPORT
OF PLAINTIFF-APPELLEE**

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STATEMENT OF INTEREST

Human Rights Watch respectfully submits this brief as *amicus curiae* in support of Plaintiff-Appellee.¹ Human Rights Watch is a non-profit, independent organization that investigates allegations of human rights violations in more than 90 countries around the world, including in the United States, by interviewing witnesses, gathering information from a variety of sources, and issuing detailed reports. Where human rights violations have been found, Human Rights Watch advocates for the enforcement of those rights with governments and international organizations and mobilizes public pressure for change.

Human Rights Watch believes that the constitutional questions raised by this matter need to be understood in the context of human rights norms and principles on the use of force in cross-border contexts. Human Rights Watch respectfully submits that such an understanding would be of assistance to this Court in deciding these issues.

¹ Counsel for all parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the *amicus* or their counsel made a monetary contribution to this brief's preparation or submission.

SUMMARY OF ARGUMENT

The present case concerns the killing of an unarmed Mexican teenager, J.A., by a United States Border Patrol agent, Lonnie Ray Swartz (“Agent Swartz”). Agent Swartz fired a gun from within the United States at J.A., who happened to be on the Mexican side of the border when he was killed by multiple gunshot wounds. *See* ER 52 ¶ 2 (First Amended Complaint).² The questions presented by this appeal are whether, if the allegations put forward by the plaintiff are true, the Fourth and Fifth Amendments to the U.S. Constitution apply to Agent Swartz’s shooting of J.A. and whether Agent Swartz is entitled to qualified immunity from civil suit for his actions.

Human Rights Watch respectfully submits that in considering these questions, this Court should draw on directly relevant principles of international human rights law that are binding on the U.S. government. These serve to bolster the District Court’s conclusion that J.A.’s family may bring this constitutional action. The shooting of J.A. stripped him of his most fundamental right—the right to life. Plaintiff alleges that the shooting occurred in a manner that unambiguously violated international law and human rights norms, both of which condemn the unnecessary and disproportionate use of force by border enforcement officials.

² In this appeal from the District Court’s motion to dismiss order, *Amicus* accepts as true the facts alleged in Plaintiff’s First Amended Complaint. *See Preschooler II v. Clark Cty. Sch. Bd. of Trustees*, 479 F.3d 1175, 1179-80 (9th Cir. 2007).

Indeed, the excessive use of lethal force on a child by a law enforcement officer is exactly the kind of tragic situation that international law requires states to prevent.

International norms further oblige the United States to respect all persons' human rights at its borders. As representatives of the state, border enforcement officials have a special obligation to respect and protect individuals' human rights to life, liberty, and security of person while carrying out their law enforcement and lawful border protection duties.

ARGUMENT

I. INTERNATIONAL LAW LIMITS THE USE OF FORCE BY LAW ENFORCEMENT OFFICERS

The United States, like other members of the international community, must abide by the rules of international law, which include “customary law,” “international agreement[s],” and “general principles common to the major legal systems of the world.” Restatement (Third) of Foreign Relations Law of the United States § 102(1) (1987) (hereinafter “Restatement”).³ A fundamental tenet

³ In addition, United States courts look to international and foreign law to guide their analysis of constitutional principles. *See, e.g., Graham v. Florida*, 560 U.S. 48, 80 (2010) (Supreme Court has “longstanding practice” of considering international and foreign law to affirm and inform constitutional interpretation); *Roper v. Simmons*, 543 U.S. 551, 575-78 (2005) (considering international authorities and covenants “instructive” for interpreting Eighth Amendment and finding “overwhelming weight of international opinion against the juvenile death penalty” supports constitutional ban on its practice); *Lawrence v. Texas*, 539 U.S. 558, 572-73 (2003) (citing European Court of Human Rights decision and special

of international law is that states must ensure no one is arbitrarily deprived of their life or deprived of their right to liberty and security of person. *See* G.A. Res. 2200 (XXI) A, International Covenant on Cultural and Political Rights, art. 6 (Dec. 16, 1966) (“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”); *id.* at art. 9 (“Everyone has the right to liberty and security of person. . . . No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”); *see* G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 3 (Dec. 10, 1948) (“Everyone has the right to life, liberty, and security of person.”); Restatement § 702 (“A state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . the murder . . . of individuals.”).

To meet this affirmative duty to respect and preserve life, a state must take steps to prevent arbitrary killings by its own security forces, “a matter of utmost

committee report to British Parliament in finding Texas law criminalizing consensual same-sex sodomy unconstitutional); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (citing international disapproval of the practice of executing developmentally disabled individuals); *Bockting v. Bayer*, 399 F.3d 1010, 1017 n.1 (9th Cir. 2005) (noting “the right of confrontation is well-established in international practice”), *rev’d sub nom. on other grounds, Whorton v. Bockting*, 549 U.S. 406 (2007); *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1043 (9th Cir. 2003) (citing International Convention on the Elimination of All Forms of Racial Discrimination as indication that freedom from discrimination on basis of race and ethnicity is “fundamental human right”).

gravity.” U.N. Human Rights Comm., General Comment No. 6, ¶ 3, U.N. Doc. HRI/Gen/1 (1982). “It is a particularly serious breach” of a state’s duties under international law when a state’s “own agents” violate the most basic human right to life. Christof Heyns (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Rep. to Human Rights Council on Extrajudicial, Summary or Arbitrary Executions*, ¶ 26, U.N. Doc. A/HRC/26/36 (April 1, 2014) (hereinafter “Heyns Report”). As the sworn protectors of a society, law enforcement officials have a special obligation to avoid human rights violations. States are thus responsible to the international community to avoid and prevent the arbitrary killing of individuals by their law enforcement officials.

II. AGENT SWARTZ’S SHOOTING OF J.A. WAS AN UNJUSTIFIABLE USE OF FORCE UNDER INTERNATIONAL STANDARDS

International law’s restrictions on the use of force by law enforcement involve three broad components: Force must be necessary; force must be proportionate; and sufficient precautions must be taken to avoid force. These rules are necessary to maintain the fundamental right to life for all individuals who may encounter overzealous police officers. *See* Heyns Report ¶ 26. As discussed below, these standards apply equally to law enforcement officials acting in border regions and the interior of any country. *See infra* Section III. Under the facts alleged, Agent Swartz’s shooting of J.A. fails to meet these standards.

A. Force Must Be Necessary or Unavoidable

International human rights norms stipulate that law enforcement officers should refrain from using of force unless necessary, and that lethal force should only be used as a matter of last resort. The U.N. Code of Conduct for Law Enforcement Officials (hereinafter “Code of Conduct”) states that the use of force by law enforcement officials should be limited to situations where it is “strictly necessary and . . . required for the performance of their duty.” G.A. Res. 34/169, art. 3, U.N. Doc. A/34/46 (Dec. 17, 1979); *see also* Restatement § 702 cmt. f (International law requires “the avoidance of any lethal use of force by law enforcement except in defense of themselves or other innocent persons, or to prevent serious crime.”); Amnesty International, *Deadly Force: Police Use of Lethal Force in the United States* 13 (June 2015) (hereinafter “Amnesty Report”), http://www.amnestyusa.org/sites/default/files/aiusa_deadlyforcereportjune2015.pdf (Officials should not use force unless “there are no other means available that are likely to achieve a legitimate objective.”).

Given the likelihood of serious injury resulting from firearm use, “[a]ll uses of firearms against people should be treated as lethal or potentially lethal.” Heyns Report ¶ 70 (citing G.A. Res. 45/166, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, princ. 9 (Dec. 18, 1990) (“hereinafter “Basic Principles”)). Principle 9 of the Basic Principles restricts law enforcement

officials from using “firearms against persons except in self-defen[s]e or defen[s]e of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives.” Basic Principles, princ. 9; *see also id.* at princ. 4 (“[L]aw enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.”). The Basic Principles further restrict law enforcement officials from the “intentional lethal use of firearms” except “when strictly unavoidable in order to protect life.” *Id.* at princ. 9.

“Necessity in the context of lethal force has been said to have three components” Heyns Report ¶ 59. “*Qualitative* necessity means that the use of potentially lethal force . . . is not avoidable to achieve the objective”; “[*q*]uantitative necessity means the amount of force used does not exceed that which is required”; and “[*t*]emporal necessity means the use of force must be used against a person who presents an immediate threat.” *Id.* ¶ 60 (emphasis added).

Under the facts alleged by the plaintiff, Agent Swartz’s use of force against J.A. was not necessary. J.A. was an unarmed child walking down a public street.

See ER 52 ¶ 2. J.A. posed no threat to Agent Swartz, much less an unavoidable, lethal, and imminent one. Thus, even if Agent Swartz had a legitimate objective in restraining J.A., that objective could have been met in a nonviolent manner—and certainly a nonlethal one. Furthermore, Agent Swartz fired numerous shots—reportedly between 14 and 30—at least ten of which struck J.A. *See* ER 53-54 ¶¶ 10-12. The firing of so many shots in an urban environment like Nogales is reckless, at best, and indicates an intentional use of lethal force. By failing to avoid unnecessary violence, Agent Swartz violated the international standards on the use of force and firearms for law enforcement.

B. Force Must Be Limited and Proportionate

In addition to being necessary, “the use of force by law enforcement officials should be exceptional,” in accordance with “a principle of proportionality,” and considered an “extreme” measure. Code of Conduct, art. 3 cmts. b & c.

As discussed above, because firearms are always potentially lethal, they must only be used in the most limited of circumstances. When such potentially lethal force is used, “what is required . . . is . . . strict proportionality.” Heyns Report ¶ 67; *see* Amnesty Report, at 13 (Force “must be proportionate to the seriousness of the harm it is aiming to prevent, and designed to minimize damage and injury.”). Under strict proportionality, the only legitimate objective for the use of a firearm is “to save life or limb.” Heyns Report ¶ 67. Proportionality also

takes into account the identity of the person against whom force may be used. In particular and relevant here, “[e]very effort should be made to exclude the use of firearms, especially against children.” Code of Conduct, art. 3 cmt. c.

As it is alleged to have transpired, Agent Swartz’s shooting of J.A. would violate international use of force standards even if J.A. were an adult. But J.A. was an unarmed sixteen-year-old at the time of his death. *See* ER 52 ¶ 2. Agent Swartz’s use of potentially lethal force further violates the strict proportionality requirement because he failed to make “every effort” to avoid firearm use against a child. Agent Swartz’s shooting of an unarmed boy thus fails to meet either the necessity or the proportionality standard for the use of force and firearms.

C. The Unauthorized Use of Force Must Be Prevented

In addition to the rules that apply when force is used, human rights law has been interpreted as requiring states to adopt effective mechanisms to prevent the use of force. “Once a situation arises where the use of force is considered, it is often too late to rescue the situation.” Heyns Report ¶ 63. Thus, states should take “all possible measures” to avoid the situation “upstream” and to contain the damage if it does happen. *Id.* Considerable evidence shows that the United States has failed to meet this requirement with regard to the conduct of Border Patrol agents: Border Patrol policies on the use of force are widely ignored, and violent incidents that violate those policies often go unpunished.

Despite regulations purporting to limit the use of deadly force, U.S. Border Patrol has a disturbingly violent track record. *See* Bob Ortega and Rob O’Dell, *Deadly Border Agent Incidents Cloaked in Silence*, *Ariz. Republic* (Dec. 15, 2013), <http://bit.ly/1kFNx08> (concluding that, from February 2005 through December 2013, 42 individuals had been killed by on-duty Customs and Border Protection officers, including U.S. Border Patrol agents, and that “[i]n none of the 42 deaths is any agent or officer publicly known to have faced consequences”); *see also* Brian Bennett, *Border Patrol absolves itself in dozens of cases of lethal force*, *L.A. Times* (June 15, 2015), <http://www.latimes.com/nation/la-na-border-patrol-shootings-20150615-story.html#page=1>; Charles Davis, *U.S. Customs and Border Protection Has Killed Nearly 50 People in 10 Years. Most Were Unarmed*, *New Republic* (Jan. 4, 2015), <https://newrepublic.com/article/120687/border-patrol-officers-get-impunity-anonymity-immigrant-killings>.

Unfortunately, these violent incidents often go uninvestigated and unpunished. Neither U.S. Border Patrol nor its parent agency, U.S. Customs and Border Protection (“CBP”), have sufficient investigative structures to deter the unauthorized use of force by agents. One policy organization found that of 809 complaints of alleged abuse lodged against Border Patrol agents between January 2009 and January 2012, a full 97 percent resulted in a disposition of “no action taken” by the agency. American Immigration Council, *No Action Taken: Lack of*

CBP Accountability in Responding to Complaints of Abuse 1 (May 4, 2014), <http://www.immigrationpolicy.org/special-reports/no-action-taken-lack-cbp-accountability-responding-complaints-abuse>; see Damien Cave, *Complaints of Abuse by Border Agents Often Ignored, Records Show*, N.Y. Times (May 5, 2014), http://www.nytimes.com/2014/05/06/us/complaints-of-abuse-by-border-agents-often-ignored-records-show.html?_r=0. A June 2015 interim report of the CBP Integrity Advisory Panel similarly found that “CBP did not have sufficient IA [internal affairs] investigators to investigate these incidents, nor until recently did its IA investigators have authority to conduct investigations involving potential criminal misconduct in the exercise of use of force by CBP’s LEOs [Law Enforcement Officers.]” Homeland Security Advisory Council, *Interim Report of the CBP Integrity Advisory Panel* 14 n.19 (June 29, 2015), <https://www.dhs.gov/sites/default/files/publications/DHS-HSAC-CBP-IAP-Interim-Report.pdf>.

Disciplinary systems are equally in disarray. Former high-level internal affairs officials within the U.S. Border Patrol have spoken publicly about the agency’s dysfunctional mechanisms for disciplining the inappropriate use of force by its agents. The former CBP head of internal affairs, James Tomschek, said of his tenure at the agency from 2006 to 2014, “there were certainly many cases where border patrol agents or certainly CBP officers engaged in excessive use of

force or abuse of migrants at the border that should have resulted in discipline where [they] did not.” Anne Werner, *Border Patrol Killings Face Renewed Scrutiny*, CBS News (Aug. 18, 2014), <http://cbsn.ws/XXNUui>. James Wong, former deputy to Mr. Tomschek, reiterated much the same point: “With very serious misconduct—borderline criminal activity—senior management often gave Border Patrol agents a slap on the wrist or did nothing at all.” Andrew Becker, *Removal of border agency’s internal affairs chief raises alarms*, Center for Investigative Reporting (June 12, 2014), <http://cironline.org/reports/removal-border-agencys-internal-affairs-chief-raises-alarms-6443>. A 2011 study by the Homeland Security Studies and Analysis Institute on CBP workforce integrity found that the CBP disciplinary system fails to “foster timely discipline or exoneration.” *U.S. Customs and Border Protection (CBP) Workforce Integrity Study, Final Report 1* (Dec. 15, 2011), <http://s3.documentcloud.org/documents/1165309/workforce-integrity-study.pdf>. These delays, the report found, led to “the subject ‘walking’ without receiving final discipline appropriate for the misconduct” and violations of “norms of speedy disposition of cases.” *Id.* at 12. Five years later, the Homeland Security Integrity Advisory Council’s 2016 Integrity Advisory Panel found that the agency’s disciplinary system remained “broken” and its “disciplinary process takes far too long to be an effective deterrent.” Homeland Security Advisory Council, *Final Report of the CBP*

Integrity Advisory Panel 1-2 (March 15, 2016), https://www.dhs.gov/sites/default/files/publications/HSAC%20CBP%20IAP_Final%20Report_FINAL%20%28accessible%29_0.pdf.

The CBP's broken investigative and disciplinary systems undercut the preventative structures CBP has put in place to avoid violence. The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has found that a state's failure to take effective steps to prevent the use of force in and of itself "constitutes a violation of the right to life." Heyns Report ¶ 64. In the context of CBP's failures, it is unfortunately not surprising that Agent Swartz is alleged to have used unnecessary and disproportionate force against J.A. The agency's broken violence prevention system also makes it all the more important that the Fourth and Fifth Amendments be applied to the actions of border patrol agents like Agent Swartz. In these circumstances, the Court's ability to consider such claims is a particularly important avenue for victims of serious human rights abuse to secure the redress and accountability to which they are entitled under international human rights law. Such application will help ensure that the U.S. government meets its fundamental human rights obligations to prevent and avoid the arbitrary use of force by Border Patrol agents.

III. A STATE'S OBLIGATION TO LIMIT THE USE OF FORCE EXTENDS TO BORDER ENFORCEMENT

International human rights experts recognize that borders raise a number of specific human rights challenges, as law enforcement officers contend with security, immigration, and customs concerns. But there is no exception for law enforcement obligations in the context of border enforcement. “[T]he human rights of all persons at international borders must be respected in the pursuit of border control, law enforcement and other State objectives, regardless of which authorities perform border governance measures and where such measures take place.” Office of the U.N. High Comm’r for Human Rights, *Recommended Principles and Guidelines on Human Rights at International Borders* 1 (2014), http://www.ohchr.org/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines.pdf. “International borders are not zones of exclusion or exception for human rights obligations.” *Id.* To prevent human rights abuses at the border, states’ codes of conduct for their border enforcement authorities should be “in accordance with international human rights standards and best practice, including the UN Code of Conduct for Law Enforcement Officials.” *Id.* at 19. As discussed above, CBP fails to meet this standard by failing to investigate and punish violations of its use of force policies. *See supra* Section II.C.

The European Court of Human Rights considered the issue of human rights at the border after Turkish border patrol officers shot and killed Iranian individuals

from a helicopter. *See Pad and Others v. Turkey*, Eur. Ct. H.R., App. No. 60167/00, ¶¶ 52-55 (June 28, 2007). The Court held that the question of the exact location of the Iranians at the time of their death—whether they were on Turkish or Iranian soil—was irrelevant: The Court “is not required to determine the exact location of the impugned events, given that the [Turkish] Government has already admitted that the fire discharged from the helicopters had caused the killing of the applicants’ relatives.” *Id.* ¶¶ 53-54.⁴ The border patrol agents’ use of force, not the location of the victims, triggered Turkey’s human rights obligations. The European Court of Human Rights subsequently applied the same principle to other cases. *See Pisari v. Moldova & Russia*, Eur. Ct. H.R., App. No. 42139/12, ¶ 33 (April 21, 2015) (applying international convention to Russian soldier’s killing of Moldovan citizen outside of Russian territory).

Each Border Patrol officer, including Agent Swartz, has an obligation to “respect and protect human dignity and maintain and uphold the human rights of all persons.” Code of Conduct, art. 2. Under the facts alleged, Agent Swartz’s use of lethal force against an unarmed teenager failed to meet this international standard. The border context is irrelevant to the inquiry of whether Agent Swartz was justified in using potentially lethal force against J.A.

⁴ *Pad* was ultimately dismissed for failure to exhaust domestic remedies, as required by the European Convention on Human Rights.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that this brief contains 3,565 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this brief complies with typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6).

Dated: May 6, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2016, I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system. There are no unregistered participants.

Dated: May 6, 2016

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