

June 6, 2023

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Washington, DC 20528-0190

*Via Electronic Mail*

**Re: Request for an investigation into the Department of Homeland Security’s reliance on noncredible information provided by human rights abusing authorities in El Salvador**

Dear Officer Wadhia,

National Immigrant Justice Center (“NIJC”), Access Now, Cristosal, and Stanford Law School’s International Human Rights & Conflict Resolution Clinic write to request an investigation into rights violations resulting from the Department of Homeland Security’s (“DHS”) use of unreliable information originating from El Salvador’s authorities in immigration proceedings. We request that DHS’s Office of Civil Rights and Civil Liberties (“CRCL”) conduct an immediate investigation into the abuses detailed in this complaint and the policies underlying this practice.

The undersigned organizations have provided here a detailed set of information regarding the situation in El Salvador and U.S.-El Salvador data-sharing agreements that lead to unreliable information entering the U.S. immigration system, and the potential violations of DHS standards and legal concerns arising from DHS’s use of such data.

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## 1. Introduction

The United States maintains data-sharing agreements and operates programs with the government of El Salvador. This allows for a steady stream of unverifiable information to enter databases used by immigration enforcement and adjudication agencies, as well as other authorities. While the United States has information-sharing agreements with many countries,<sup>1</sup> this complaint focuses on El Salvador due to growing human rights concerns stemming from recent events in the country.

On March 27, 2022, the government of El Salvador enacted a “state of exception”<sup>2</sup> under which they suspended many civil rights, such as the right to be informed of the reasons for one’s detention. Simultaneously, the government empowered the National Civil Police (“National Police”) to, among other things, arbitrarily detain individuals based on allegations of being a gang member.<sup>3</sup> Over the past year, El Salvador’s security forces have committed widespread human rights abuses, including mass warrantless arrests, arbitrary detention, torture of people in custody, and extrajudicial killings.<sup>4</sup>

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<sup>1</sup> See, e.g., JESSE FRANZBLAU, NAT’L IMMIGRANT JUST. CTR., CAUGHT IN THE WEB: THE ROLE OF TRANSNATIONAL DATA SHARING IN THE U.S. IMMIGRATION SYSTEM 6-7 (2022), <https://immigrantjustice.org/research-items/policy-brief-caught-web-role-transnational-data-sharing-us-immigration-system> [hereinafter NIJC POLICY BRIEF] (describing the United States’ data-sharing agreements with El Salvador, Honduras, and Guatemala).

<sup>2</sup> “State of exception” and “state of emergency” are interchangeable terms in this context.

<sup>3</sup> U.S. DEP’T OF STATE of State, EL SALVADOR 2022 HUMAN RIGHTS REPORT 1-2, 8-13 (2023), [https://www.state.gov/wp-content/uploads/2023/02/415610\\_EL-SALVADOR-2022-HUMAN-RIGHTS-REPORT.pdf](https://www.state.gov/wp-content/uploads/2023/02/415610_EL-SALVADOR-2022-HUMAN-RIGHTS-REPORT.pdf); see also HUM. RTS. WATCH & CRISTOSAL, “WE CAN ARREST ANYONE WE WANT”: WIDESPREAD HUMAN RIGHTS VIOLATIONS UNDER EL SALVADOR’S “STATE OF EMERGENCY” 1-3, 90 (2022), [https://www.hrw.org/sites/default/files/media\\_2022/12/elsalvador1222web.pdf](https://www.hrw.org/sites/default/files/media_2022/12/elsalvador1222web.pdf).

<sup>4</sup> U.S. DEP’T OF STATE, *supra* note 3, at 1-2, 4, 9.

The data-sharing agreements between the United States and El Salvador facilitate the sharing of names and biometrics with U.S. authorities of people accused by Salvadoran authorities of committing a crime or belonging to a gang. However, those accusations are often based on prejudicial evidence or unfounded allegations. When Salvadorans flee, the unsubstantiated information about them appears in U.S. immigration proceedings and seriously impairs their ability to seek asylum and other forms of immigration relief. Asylum seekers can then be deported back to El Salvador without a chance to view the data or challenge the veracity or authenticity of the evidence presented against them. Back in El Salvador, they can be arrested, imprisoned, and subject to further abuse.

U.S. authorities should be especially wary of any data coming from Salvadoran agencies like the National Police. Relying on such personal data in court as derogatory evidence violates U.S. regulations and DHS procedures in the following ways. First, it does not meet the fundamentally fair standard of evidence in immigration court. Second, it does not satisfy comparable standards applied to U.S. criminal databases. Next, DHS's use of unreliable information also likely subverts the Privacy Act of 1974 and violates DHS's stated privacy requirements. In addition, the use of unreliable information originating from Salvadoran agencies in U.S. immigration proceedings fails to meet due process requirements, especially where the police units providing the information are identified in the U.S. government's own reporting as unreliable and responsible for rights abuses. Finally, collecting and using such unreliable data is contrary to international human rights treaties and norms.

We urge CRCL to issue recommendations to ensure that U.S. agencies end data-sharing agreements with the Salvadoran government, stop relying on data provided by Salvadoran security forces, and immediately put into place procedures through which non-citizens can challenge unverifiable evidence used against them on the basis of such data. U.S. immigration agencies should also provide greater transparency about the use of transnational databases and the extent to which DHS relies on information gathered by human rights abusing Salvadoran authorities.<sup>5</sup>

**2. Information shared with DHS is collected by Salvadoran agencies that violate human rights and fail to provide minimal due process rights under the current state of exception**

The El Salvador government has a long history of failing to address gang violence in a sustainable and meaningful way with due regard for human rights and democracy.<sup>6</sup> Perpetuating El Salvador's cycle of "severe repression and severe appeasement" of gangs, in March 2022 President Nayib

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<sup>5</sup> The information contained in this complaint was compiled by the below-signed organizations, with assistance from immigration lawyers across the United States.

<sup>6</sup> Juan Pappier, *Bukele's Old Recipes to Address Gang Violence Are Set to Fail*, HUM. RTS. WATCH (June 21, 2022, 1:30 PM EDT), <https://www.hrw.org/news/2022/06/21/bukeles-old-recipes-address-gang-violence-are-set-fail> (noting that the El Salvador government's response to endemic gang violence in the country has "typically oscillated between two failed strategies: obscure negotiations with gangs and iron fist security policies that led to rights violations").

Bukele requested the national legislature enact an unprecedented state of exception.<sup>7</sup> Although the state of exception was initially authorized for a 30-day period, it has been extended monthly since.<sup>8</sup>

The United States government has repeatedly recognized the serious violations of democratic norms and human rights occurring in El Salvador under the state of exception. The U.S. Department of State's 2022 Human Rights Report identified credible allegations of widespread and serious rights abuses by the National Police, including forced disappearances, arbitrary arrests, and home invasions.<sup>9</sup> The Congressional Research Service noted in a 2022 report that the state of exception has "enabled mass arrests, and resulted in other human rights abuses."<sup>10</sup> The House of Representatives has introduced a resolution calling for El Salvador to reinforce judicial protections<sup>11</sup> and has held hearings before the bipartisan Tom Lantos Human Rights Commission on the state of exception, where experts testified to arbitrary arrests, over-policing, and conditions of distrust and fear.<sup>12</sup> Nevertheless, U.S. immigration authorities continue to rely on information obtained by the Salvadoran government without considering its lack of veracity and credibility.

Under the state of exception, the government has stripped citizens of El Salvador of key rights.<sup>13</sup> The government no longer affords Salvadorans the right to be immediately informed of the reason for their detention.<sup>14</sup> They no longer have the right to remain silent.<sup>15</sup> They no longer have the

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<sup>7</sup> José Miguel Cruz & Mary Speck, *Ending El Salvador's Cycle of Gang Violence*, U.S. INST. OF PEACE (Oct. 13, 2022), <https://www.usip.org/publications/2022/10/ending-el-salvadors-cycle-gang-violence>.

<sup>8</sup> Press Release, United Nations, Human Rights Office of the High Commissioner, *El Salvador: Extended State of Emergency Undermines Right to Fair Trial, UN Experts Say* (May 22, 2023), <https://www.ohchr.org/en/press-releases/2023/05/el-salvador-extended-state-emergency-undermines-right-fair-trial-un-experts> <https://www.ohchr.org/en/press-releases/2023/05/el-salvador-extended-state-emergency-undermines-right-fair-trial-un-experts>. Although purportedly an emergency measure, this situation has become "normalized." See Tamara Taraciuk Broner, *Living Without Rights Feels Normal in El Salvador. It Shouldn't Be*, HUM. RTS. WATCH (Sept. 13, 2022, 10:00 AM EDT), <https://www.hrw.org/news/2022/09/13/living-without-rights-feels-normal-el-salvador-it-shouldnt-be>.

<sup>9</sup> U.S. DEP'T OF STATE, *supra* note 3, at 1-2, 8-13.

<sup>10</sup> CLAIRE RIBANDO SEELKE & JOSHUA KLEIN, CONG. RSCH. SERV., R47083, *EL SALVADOR: IN BRIEF*, executive summary (2022), <https://crsreports.congress.gov/product/pdf/R/R47083>.

<sup>11</sup> H.R. 408, 117th Cong. (2021).

<sup>12</sup> *State of Exception in El Salvador: Hearing Before the H. Tom Lantos Hum. Rts. Comm.*, 117th Cong. (2022), <https://humanrightscommission.house.gov/events/hearings/state-exception-el-salvador>. The Commission's Chairman, Representative James McGovern, specifically noted his concern regarding continuing law enforcement partnerships between the United States and El Salvador. Representative McGovern was highly skeptical of the claim "that democratic backsliding has 'had limited impact on El Salvador's ability to act as a cooperative and willing partner for the United States in counternarcotics efforts.'" *Id.* at 2 (statement of Rep. James P. McGovern), [https://humanrightscommission.house.gov/sites/humanrightscommission.house.gov/files/documents/Opening%20Remarks\\_JPM\\_ElSalvador\\_final.pdf](https://humanrightscommission.house.gov/sites/humanrightscommission.house.gov/files/documents/Opening%20Remarks_JPM_ElSalvador_final.pdf).

<sup>13</sup> CRISTOSAL, *UN AÑO BAJO EL RÉGIMEN DE EXCEPCIÓN: UNA MEDIDA PERMANENTE DE REPRESIÓN Y DE VIOLACIONES A LOS DERECHOS HUMANOS [A YEAR UNDER THE STATE OF EXCEPTION: A PERMANENT MEASURE OF REPRESSION AND HUMAN RIGHTS VIOLATIONS]* 88-91 (2023), [https://cristosal.org/wp-content/uploads/2023/05/Informe-1-ano-regimen-de-excepcion\\_digital.pdf](https://cristosal.org/wp-content/uploads/2023/05/Informe-1-ano-regimen-de-excepcion_digital.pdf) (providing a table listing key rights that have been suspended, both formally and in practice, during the state of exception); HUM. RTS. WATCH & CRISTOSAL, *supra* note 3, at 47 (listing rights that have been stripped during the first year of the state of exception, including key due process protections).

<sup>14</sup> *State of Exception in El Salvador: Hearing Before the H. Tom Lantos Hum. Rts. Comm.*, 117th Cong. 1 (2022) (statement of Emily Mandrala, Deputy Assistant Secretary, Bureau of Western Hemisphere Affairs, State Department), <https://humanrightscommission.house.gov/events/hearings/state-exception-el-salvador>.

<sup>15</sup> HUM. RTS. WATCH & CRISTOSAL, *supra* note 3, at 42.

right to appear before a judge within 72 hours of their arrest.<sup>16</sup> They no longer have the right to private communications.<sup>17</sup> And with defense lawyers' activities frustrated by lack of access to their clients, they can no longer put forth a meaningful defense.<sup>18</sup>

The National Police, at the same time, are empowered with sweeping authority. Police officers no longer need a warrant to arrest someone.<sup>19</sup> They have arrested huge portions of neighborhoods without explanation.<sup>20</sup> They have arrested people out of personal dislike.<sup>21</sup> And they have increasingly identified Salvadorans as gang members or criminals in transnational databases without any verifiable evidence of an alleged crime.<sup>22</sup>

As of March 27, 2023, Cristosal has received 3,275 reports of human rights violations by Salvadoran security forces, 98.5% of which involved arbitrary detention.<sup>23</sup> Cristosal's findings indicate that police regularly take people from their homes or detain them on the street, virtually always without a warrant.<sup>24</sup> Salvadorans—particularly young men in areas with high rates of crime and poverty—are frequently detained based on arbitrary criteria or no evidence at all.<sup>25</sup> As one Salvadoran citizen put it, “being poor is now a crime in El Salvador.”<sup>26</sup>

### **Case Example 1 – Arbitrary arrest**<sup>27</sup>

*Antonio (pseudonym) worked at a school in San Salvador and managed a rental car business. Prior to the state of exception, police officers repeatedly extorted Antonio and threatened to confiscate his vehicles. Two days after the state of exception began, officers arrested Antonio without warning. They refused to allow his wife to visit him in detention or bring him his diabetes and hypertension medications. Antonio's wife hired a private attorney, who was not allowed to access Antonio's file or any investigative proceedings and was never informed of the hearing where Antonio was sentenced to provisional detention. Antonio's wife herself was threatened with arrest for seeking out this lawyer. Antonio remains detained without due process.*

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<sup>16</sup> *El Salvador: President Bukele Engulfs the Country in a Human Rights Crisis After Three Years in Government*, AMNESTY INT'L (June 2, 2022), <https://www.amnesty.org/en/latest/news/2022/06/el-salvador-president-bukele-human-rights-crisis/>.

<sup>17</sup> HUM. RTS. WATCH & CRISTOSAL, *supra* note 3, at 42.

<sup>18</sup> *See id.* at 84-85 (reporting findings that public defenders are only given clients' files the day of a hearing and are given unmanageable case loads); Julia Gavarrete, *Diary of a Public Defender Drowning in the State of Exception*, EL FARO (July 5, 2022), [https://elfaro.net/en/202207/el\\_salvador/26253/diary-of-a-public-defender-drowning-in-the-state-of-exception](https://elfaro.net/en/202207/el_salvador/26253/diary-of-a-public-defender-drowning-in-the-state-of-exception); Case Example 19.

<sup>19</sup> HUM. RTS. WATCH & CRISTOSAL, *supra* note 3, at 60 (“Salvadoran authorities argue that an arrest warrant is not required to arrest alleged gang members because, in their view, these people are in permanent flagrancy as gang membership is considered a continuous offense.”) (internal quotation marks omitted).

<sup>20</sup> *Id.* at 58-9.

<sup>21</sup> *Id.* at 65.

<sup>22</sup> *See, e.g.*, Case Example 10.

<sup>23</sup> CRISTOSAL, *supra* note 13, at 21-22.

<sup>24</sup> HUM. RTS. WATCH & CRISTOSAL, *supra* note 3, at 60.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Interview conducted with service provider. Notes on file with authors.

Human rights organizations in El Salvador have documented how police officers accuse people of gang membership or affiliation based on arbitrary reasons.<sup>28</sup> If someone has an artistic tattoo or lives in a neighborhood controlled by a gang, police can label them a gang member.<sup>29</sup> Police officers have arrested people for “suspicious” or “nervous appearance[s].”<sup>30</sup> Other people have been arrested because they were walking in a different neighborhood than the one listed on their identification document.<sup>31</sup> Police officers have also conducted sweeping raids of neighborhoods, especially low-income neighborhoods, where they pack their cars full of random people who are supposedly gang members in order to meet arrest quotas.<sup>32</sup> Officers have also arrested people based on anonymous phone calls reporting them as gang members or criminals or because of uncorroborated allegations on social media.<sup>33</sup> American citizens have been swept up in this over-policing wave and have been arrested and detained.<sup>34</sup>

### **Case Example 2 – False gang affiliation allegation**<sup>35</sup>

*Juan (pseudonym) suffers from severe kidney disease, which began after he was attacked by local gang members because he refused to join their gang. Juan later defended his wife in an altercation with one of the tenants of an inn that she managed. In retaliation, the tenant falsely reported Juan as a gang member to the National Police, who arrested him without any investigation or evidence. In detention, Juan did not receive the necessary treatment for his kidney condition for four months, until he was transferred to the hospital in critical condition. Juan remains in detention.*

The state of exception shields National Police officers from liability for making such arbitrary arrests, leaving little incentive to ensure they are accurately identifying gang members.<sup>36</sup> Human rights organizations have also identified the high risk of “retaliatory data” entering the El Salvador criminal system—police officers simply input charges against people based on personal vendettas or bribes.<sup>37</sup> For example, a National Police officer told the relative of a detained man he had arrested him because he didn’t “like” him.<sup>38</sup> Given these human rights abuses, the *New York Times* has described El Salvador as an “increasingly autocratic police state.”<sup>39</sup>

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<sup>28</sup> HUM. RTS. WATCH & CRISTOSAL, *supra* note 3, at 5.

<sup>29</sup> U.S. DEP’T OF STATE, *supra* note 3, at 1-2, 8-13.

<sup>30</sup> HUM. RTS. WATCH & CRISTOSAL, *supra* note 3, at 60 (quoting Efren Lemus and Gabriela Cáceres, *State of Exception Files: Hundreds Arrested for Prior Convictions or ‘Looking Nervous,’* EL FARO (Aug. 8, 2022), [https://elfaro.net/en/202208/el\\_salvador/26298/State-of-Exception-Files-HundredsArrested-for-Prior-Convictions-or-%E2%80%9CLooking-Nervous%E2%80%9D.htm](https://elfaro.net/en/202208/el_salvador/26298/State-of-Exception-Files-HundredsArrested-for-Prior-Convictions-or-%E2%80%9CLooking-Nervous%E2%80%9D.htm)).

<sup>31</sup> *Id.* at 67.

<sup>32</sup> *Id.* at 67-68.

<sup>33</sup> *Id.* at 60.

<sup>34</sup> Ricardo J. Valencia, *U.S. Citizens Are Getting Caught Up in El Salvador’s Mass Arrests*, AMS. QUARTERLY (May 3, 2023), <https://www.americasquarterly.org/article/u-s-citizens-are-getting-caught-up-in-el-salvadors-mass-arrests/>

<sup>35</sup> Interview conducted with service provider. Notes on file with authors.

<sup>36</sup> HUM. RTS. WATCH & CRISTOSAL, *supra* note 3, at 59.

<sup>37</sup> *See, e.g.*, Case Examples 2, 4 & ■ CRISTOSAL, *supra* note 13, at 24 (arrest apparently based on arbitrary tip from neighbor); HUM. RTS. WATCH & CRISTOSAL, *supra* note 3, at 65.

<sup>38</sup> HUM. RTS. WATCH & CRISTOSAL, *supra* note 3, at 65.

<sup>39</sup> Natalie Kitroeff, *El Salvador Decimated Its Ruthless Gangs. But at What Cost?*, N.Y. TIMES (Apr. 9, 2023), <https://www.nytimes.com/2023/04/09/world/americas/el-salvador-gangs.html>.

### **Case Example 3 – Politically-motivated harassment by National Police**<sup>40</sup>

*Don (pseudonym) worked at the Casa Presidencial (main venue of El Salvador's president) prior to Bukele's election. Since he left this role in 2020, he has been repeatedly harassed, persecuted, and assaulted by police officers, who demand information about his time working in the Casa Presidencial. These officers also invaded Don's home while he was not present and threatened his 13- and 16-year-old children. Don was forced to flee El Salvador and seek asylum in a European country due to his politically based persecution and concerns about his daughters' safety during the state of exception.*

### **Case Example 4 – Threat of arbitrary arrest on family members**<sup>41</sup>

*Berta and her children, Luz María and Joaquín (pseudonyms), worked together operating a food stand. During the state of exception, National Police officers arbitrarily arrested Joaquín without a warrant. They also threatened to arrest Berta when she attempted to explain that Joaquín worked with her and was not a gang member. An officer used slurs against Berta and claimed that he could put her in jail if he wanted to. Following Joaquín's arrest, officers continued to harass Berta and Luz María by invading and searching their home without a warrant, as well as stealing merchandise from their food stand. The police officers' abuse forced Berta and Luz María to flee the area and lose their only source of income.*

Many Salvadorans have been arrested under the newly-expanded charge of *agrupacion ilicita* (unlawful association), a vaguely-defined and overly-broad charge which imposes a 20-to-30-year prison sentence for anyone found to have been involved in, or tangentially supported, gang activity.<sup>42</sup> Even when authorities release defendants from custody, individuals are only provided with a piece of paper with no official stamp and are deemed to be “on parole,” so they are restricted in their activities and face the risk of repeated and unjustified re-arrest.<sup>43</sup> Since the state of exception began, the National Police have detained more than 66,000 people and over 100,000 are currently incarcerated.<sup>44</sup> El Salvador now has the highest *per capita* incarceration rate in the world.<sup>45</sup>

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<sup>40</sup> Interview conducted with service provider. Notes on file with authors.

<sup>41</sup> Interview conducted with service provider. Notes on file with authors.

<sup>42</sup> Amendments to the El Salvador Criminal Code, Decree 337, art. 2. This would be clearly unconstitutional if brought in the United States as an impingement of First Amendment Rights. *El Salvador: Sweeping New Laws Endanger Rights*, HUM. RTS. WATCH (Apr. 8, 2022, 8:00 AM EDT), <https://www.hrw.org/report/2020/02/05/deported-danger/united-states-deportation-policies-expose-salvadorans-death-and>; *see also* *Medrano v. Salazar*, No. 19-cv-00549, 2020 WL 589537, at \*5 (W.D. Tex. Feb. 5, 2020) (gang database will be found invalid if it chills defendant's First Amendment right to associate).

<sup>43</sup> Interview conducted with Cristosal. Notes on file with authors.

<sup>44</sup> León Krauze, *The Scale of El Salvador's New Prison Is Difficult to Comprehend*, WASH. POST (Feb. 26, 2022, 6:30 AM EST), <https://www.washingtonpost.com/opinions/2023/02/26/el-salvador-prison-nayib-bukele-gangs-crime/>.

<sup>45</sup> *Highest to Lowest – Prison Population Rate*, WORLD PRISON BRIEF, [https://www.prisonstudies.org/highest-to-lowest/prison\\_population\\_rate?field\\_region\\_taxonomy\\_tid=All](https://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All) (last visited May 30, 2023); *see also* Sarah Kinoshian, *El Salvador Opens 40,000-Person Prison as Arrests Soar in Gang Crackdown*, REUTERS (Feb. 1, 2023, 1:14 PM PST), <https://www.reuters.com/world/americas/el-salvador-opens-40000-person-prison-arrests-soar-gang-crackdown-2023-02-01/>.

### **Case Example 5 – Arbitrary arrest based on “unlawful association” charge after deportation**<sup>46</sup>

*Gustavo (pseudonym) was an entrepreneur who was dedicated to his cooperative business in El Salvador but faced repeated death threats against himself and his family by a former member of the cooperative. To escape this harassment, Gustavo and his family migrated to the United States, where they were detained at the border for a month. Upon the family’s deportation back to El Salvador without explanation by U.S. authorities, Gustavo was immediately arrested at the airport by a Salvadoran agent, allegedly under the charge of “unlawful association.” He was never shown an arrest warrant or given an explanation for this arrest. There are no indications that Gustavo has ever belonged to a gang. He is now detained in El Salvador, and his family is suffering without their primary breadwinner.*

During and after arrests, citizens have experienced torture, terror, and other forms of abuse at the hands of police officers, prison officials, and others.<sup>47</sup> People have fled their homes to avoid being questioned by the police or arbitrarily arrested.<sup>48</sup> During arrests, police officers frequently injure people, kicking and beating those they intend to arrest as well as relatives who try to defend them.<sup>49</sup> In one illustrative instance, a pregnant woman was pushed against a police car violently enough to put her pregnancy at risk and cause her to bleed for a week.<sup>50</sup> In another emblematic brutal case, a pregnant woman was pushed to the ground while being arrested and later had a miscarriage while in prison after the arrest.<sup>51</sup>

### **Case Example 6 – Police abuse of family members during an arrest and fear of reporting abuse**<sup>52</sup>

*Juana’s husband, Eladio (pseudonyms), was arrested in March 2022 and later died while in detention. During the arrest, her daughter Marielos, who was eight months pregnant, questioned the police officers about the basis for the arrest—in response, they hit her with the butt of their rifle in her lower back, causing her to suffer a hemorrhage and lose her pregnancy. However, the medical certificate stated that the cause of the miscarriage was a genetic condition and did not acknowledge the police’s abuse. In another incident, Juana’s sister Ana María was hit in the back by a police officer, deviating her bone. Police have continued to attack Juana and her young daughters, including through sexual assault and stealing their food and personal hygiene items. Although these officers deliberately hide their identification numbers (ONIs) to avoid detection, Juana states that she would not report them even if she knew their identity because of the clear risk of retaliation, including through more arbitrary arrests. Currently, Juana’s son, Nicolas, is also detained, and Juana was not informed of his location or whether he had a public defender.*

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<sup>46</sup> Interview conducted with service provider. Notes on file with authors.

<sup>47</sup> HUM. RTS. WATCH & CRISTOSAL, *supra* note 3, at 58.

<sup>48</sup> *Id.* at 68.

<sup>49</sup> *Id.* at 61-2.

<sup>50</sup> *Id.* at 62.

<sup>51</sup> *Id.* at 61-2.

<sup>52</sup> Interview conducted with service provider. Notes on file with authors.



In El Salvador prisons, people suffer horrific conditions amounting to torture, including a lack of food, water, and health care.<sup>53</sup> Over 95,000 people have been crammed into prisons built to hold 27,000.<sup>54</sup> People have to sleep standing up or take turns to sleep on the floor.<sup>55</sup> The few people released from prison have reported degrading and inhumane treatment by the police, as well as torture in some prisons, including beatings and waterboarding.<sup>56</sup> The lack of medical care in the prisons has resulted in people dying from treatable health conditions or, in one case, having some of his limbs amputated because of a worsening of his diabetes.<sup>57</sup> As of May 2023, at least 153 people have died in custody.<sup>58</sup>

### **3. The U.S. maintains a web of data-sharing programs with El Salvador that lack transparency and credibility**

The United States has collected information from Salvadoran security forces for years through a variety of agreements and programs.<sup>59</sup> During the Trump Administration, this partnership intensified. On October 28, 2019, the United States and El Salvador signed two bilateral security cooperation and data-sharing agreements: the Border Security Agreement and the Biometric Data Sharing Program Agreement.<sup>60</sup> Under the Border Security Agreement, the United States deploys Immigration Customs and Enforcement (“ICE”) and Customs and Border Protection (“CBP”) agents to El Salvador to train, advise and work closely with Salvadoran police, border security, and immigration officials.<sup>61</sup> Under the Biometric Data Sharing Program Agreement, El Salvador agreed to exchange citizens’ biometric and identity data with DHS to “verify the identities of irregular migrants,” with a focus on detecting alleged criminal activity.<sup>62</sup> The Biden Administration appears to still enforce and participate in these agreements.

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<sup>53</sup> HUM. RTS. WATCH & CRISTOSAL, *supra* note 3, at 69.

<sup>54</sup> *Id.* at 69-70.

<sup>55</sup> *Id.* at 71.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 72, 77-79.

<sup>58</sup> Bryan Avelar & Tom Phillips, *At Least 153 Died in Custody in El Salvador’s Gang Crackdown—Report*, GUARDIAN (May 29, 2023, 3:17 EDT), <https://www.theguardian.com/world/2023/may/29/el-salvador-security-gangs-crackdown-cristosal-report-bukele>.

<sup>59</sup> For example, DHS and the El Salvador National Police signed a 2014 memorandum of cooperation (“MOC”) enhancing their joint ability to share immigration and criminal record information from repatriated Salvadorans. *See* Memorandum of Cooperation Between the Department of Homeland Security of the United States of America and the Civilian National Police of the Republic of El Salvador Concerning the Process and Exchange of Information on Salvadoran Nationals Repatriated To El Salvador, El Sal.-U.S., May 14, 2014, <https://immigrationlitigation.org/wp-content/uploads/2022/10/IARC-ICE.pdf>.

<sup>60</sup> DHS, *FACT SHEET: DHS AGREEMENTS WITH GUATEMALA, HONDURAS, AND EL SALVADOR* (n.d.), [https://www.dhs.gov/sites/default/files/publications/19\\_1028\\_opa\\_factsheet-northern-central-america-agreements\\_v2.pdf](https://www.dhs.gov/sites/default/files/publications/19_1028_opa_factsheet-northern-central-america-agreements_v2.pdf).

<sup>61</sup> *Id.* This also violates the Leahy Law because the U.S. is funding and assisting a police force that engages in gross violations of human rights. *See* Bureau of Democracy, Hum. Rts. & Lab., *About the Leahy Law*, U.S. DEP’T OF STATE (Jan. 20, 2021), <https://www.state.gov/key-topics-bureau-of-democracy-human-rights-and-labor/human-rights/leahy-law-fact-sheet/>.

<sup>62</sup> DHS, *supra* note 60.

In addition to these bilateral agreements, the United States collects data through ICE Homeland Security Investigations (“HSI”) agents on the ground<sup>63</sup> or other mechanisms and draws on information from El Salvador through various data-collection programs.

- The **Security Alliance for Fugitive Enforcement (“SAFE”)** program operates through ICE-led task forces in El Salvador and other countries. HSI agents gather information through the task forces and share it with ICE agents in the United States for investigations and immigration enforcement measures.<sup>64</sup>
- The FBI’s **Transnational Anti-Gang Task Force (“TAG”)** works parallel to ICE agents, collaborating with El Salvador security forces to identify alleged gang members.<sup>65</sup>
- Through the **Biometric Identification Transnational Migration Alert Program (“BITMAP”)**, ICE agents provide training and equipment to El Salvador law enforcement, allowing Salvadoran security forces to collect biometric data.<sup>66</sup> This data is then funneled into DHS databases, such as IDENT, that are used in asylum cases and in initiating deportation proceedings.<sup>67</sup>
- The State Department participates in a multinational data-sharing initiative, the **Grupo Conjunto de Inteligencia Fronteriza (“GCIF”)**, which allows CBP and U.S. law enforcement to access El Salvador-maintained intelligence identifying alleged criminals or gang members in the country.<sup>68</sup>

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<sup>63</sup> *Homeland Security Investigations*, ICE, <https://www.ice.gov/about-ice/homeland-security-investigations> (last visited May 30, 2023) (background and overview of HSI’s functions); *International Operations*, ICE (Apr. 2021), <https://www.ice.gov/about-ice/homeland-security-investigations/international-operations>.

<sup>64</sup> Press Release, ICE, ICE ERO Hosts Security Alliance for Fugitive Enforcement Workshop for Central American Counterparts in El Salvador (Jan. 22, 2020), <https://www.ice.gov/news/releases/ice-ero-hosts-security-alliance-fugitive-enforcement-workshop-central-american>.

<sup>65</sup> *What We Investigate: Gangs*, FBI, <https://www.fbi.gov/investigate/violent-crime/gangs> (last visited May 30, 2023); NIJC POLICY BRIEF, *supra* note 1, at 4 (describing how the FBI works alongside ICE’s Homeland Security Investigations Transnational Criminal Investigative Units).

<sup>66</sup> *Biometric Identification Transnational Migration Alert Program (BITMAP)*, ICE, <https://www.ice.gov/investigations/terrorism-national-security-threats#bitmap> (last visited May 30, 2023).

<sup>67</sup> DHS is in the process of replacing its current biometrics database, IDENT, with a new and expanded biometrics database, the Homeland Advanced Recognition Technology System (“HART”). *See* DHS, DHS PRIVACY IMPACT ASSESSMENT FOR THE HOMELAND ADVANCED RECOGNITION TECHNOLOGY SYSTEM (HART) INCREMENT 1 PIA (2020),

[https://www.dhs.gov/sites/default/files/publications/privacy-pia-obim004-hartincrement1-february2020\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/privacy-pia-obim004-hartincrement1-february2020_0.pdf).

<sup>68</sup> *Bureau of International Narcotics and Law Enforcement Affairs: El Salvador Summary*, U.S. DEP’T OF STATE, <https://2017-2021.state.gov/bureau-of-international-narcotics-and-law-enforcement-affairs-work-by-country/el-salvador-summary/index.html> (last visited May 30, 2023) (“The GCIF allows CBP and U.S. law enforcement access to participating countries’ criminal databases and histories of suspected gang members and criminals entering into or already in the United States.”); *The Secretary’s Unit Award 2018 - CBP Grupo Conjunto de Inteligencia Fronteriza Team - U.S. Customs and Border Protection*, DHS (Nov. 6, 2018), <https://www.dhs.gov/medialibrary/assets/images/26924> (describing the GCIF as “focused on sharing information to identify Central American gang members attempting to make illegal entry into the United States”); *see also* Press Release, DHS, Joint Statement Outlines Clear Path Toward Historic Northern Triangle Compact (Feb. 22, 2019), <https://www.dhs.gov/news/2019/02/22/joint-statement-outlines-clear-path-toward-historic-northern-triangle-compact> (committing to “enhance the GCIF as a regional model for information exchange”); Through the GCIF, the State Department has also funded a joint DHS, FBI, and-El Salvador “fusion” information center in San Salvador. The center employs Salvadoran police forces as analysts who work alongside DHS. Melissa del Bosque, *Immigration Officials Use Secretive Gang Databases to Deny Migrant Asylum Claims*, ProPublica (July 8, 2019, 2:06 PM EDT), <https://www.propublica.org/article/immigration-officials-use>

- The **Criminal History Information Sharing (“CHIS”)** program allows DHS to share criminal history information with partner foreign governments, including El Salvador. ICE HSI agents enter data collected through CHIS into ICE’s **Enforcement Integrated Database (“EID”)**, which is used by ICE and CBP officers in enforcement actions.<sup>69</sup>
- Similarly, the **Criminal History Information Program (“CHIP”)** provides for the FBI to share criminal history, background, and biographical information with partner law enforcement agencies in Central America.<sup>70</sup>

Salvadoran police and security forces collect data on vast numbers of Salvadoran citizens, enter the information into databases, or share it directly with U.S. officials. The data is then channeled into a vast network of interconnected databases across DHS, the State Department, the Department of Justice (“DOJ”), and the FBI.<sup>71</sup> ICE and CBP officials can access this information in ways that impact immigration decisions, including detention and deportation decisions.

ICE’s **Alien Criminal Response Information Management (“ACRIME”)** database illustrates how unsubstantiated and unverifiable information collected through DHS data-sharing programs permeates the U.S. immigration system.<sup>72</sup> ACRIME collects information from at least seven other databases across ICE, CBP, United States Citizenship and Immigration Services (“USCIS”), and the DOJ, including databases that collect information gathered through cross-border data sharing, such as ICE’s aforementioned EID and IDENT.<sup>73</sup> ICE field officers in the United States then use ACRIME in deciding whether to initiate enforcement actions—such as detaining an individual or referring them to other ICE units—and in responding to queries from other law enforcement about an individual’s immigration status.<sup>74</sup> Similarly, the HART database—DHS’s newly-established clearinghouse for biometric data, replacing the older IDENT database—will include information collected through foreign data sharing and will be interoperable with other DHS data systems as well as the DOJ, the Department of Defense, the State Department, and state and local

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secretive-gang-databases-to-deny-migrant-asylum-claims; *see also* Melissa del Bosque, *Border Agents Can Now Get Classified Intelligence Information. Experts Call That Dangerous.*, DEF. ONE (Nov. 1, 2019), <https://www.defenseone.com/threats/2019/11/border-agents-can-now-get-classified-intelligence-information-experts-call-dangerous/161024/> (describing how the fusion center functions in practice).

<sup>69</sup> ICE, PRIVACY IMPACT ASSESSMENT UPDATE FOR THE ENFORCEMENT INTEGRATED DATABASE (EID) CRIMINAL HISTORY INFORMATION SHARING (CHIS) PROGRAM 1 (2016), <https://www.dhs.gov/sites/default/files/publications/privacy-pia-ice-eidchis-january2016.pdf>.

<sup>70</sup> *See Transnational Law Enforcement Efforts: Helping Stem Transnational Crime*, FBI (Sept. 6, 2013), <https://www.fbi.gov/news/stories/transnational-law-enforcement-efforts-helping-stem-transnational-crime>.

<sup>71</sup> *See generally* NAT’L IMMIGR. L. CTR., GLOSSARY AT A GLANCE: IMMIGRATION DATABASES, INFORMATION SHARING SYSTEMS, AND CASE MANAGEMENT SYSTEMS (2021), <https://www.nilc.org/wp-content/uploads/2018/01/databases-glossary.pdf> (documenting at least 36 databases currently in use across the U.S. immigration system).

<sup>72</sup> *Alien Criminal Response Information Management System (ACRIME)*, ABOLISH DATA CRIMINALIZATION, <https://abolishdatacrim.org/en/bestiar/acrime> (last visited May 30, 2023).

<sup>73</sup> ICE, PRIVACY IMPACT ASSESSMENT STATEMENT FOR THE ALIEN CRIMINAL RESPONSE INFORMATION MANAGEMENT SYSTEM (ACRIME) 7 (2018) <https://www.dhs.gov/sites/default/files/publications/privacy-pia-ice-acrime-september2018.pdf>.

<sup>74</sup> *Id.* at 2-5.

law enforcement.<sup>75</sup> Members of Congress have expressed concerns about the HART database and the family separations resulting from foreign data sharing.<sup>76</sup>

Finally, DHS relies on information from El Salvador through inter-governmental information-sharing mechanisms, such as INTERPOL Red Notices. INTERPOL member states issue “Red Notices” on an individual, signaling that they are wanted for an offense committed in that country.<sup>77</sup> ICE agents and attorneys frequently rely on Red Notices as evidence of criminality in U.S. immigration enforcement decisions and proceedings.<sup>78</sup> Using their discretion under the INTERPOL process, member states such as El Salvador regularly abuse Red Notices, including by issuing Red Notices to persecute their nationals abroad.<sup>79</sup> For example, in 2021 the El Salvador government under President Bukele issued Red Notices for members of the opposition party that had previously been in power.<sup>80</sup> These Red Notices were issued for political purposes, according to human rights observers, and were accompanied by arrests of other former officials in El Salvador without due process and without informing the defendants of the charges against them.<sup>81</sup> El Salvador continues to issue Red Notices at a disproportionately high rate; currently, El Salvador accounts for about 16% of active Red Notices, even though there are 195 INTERPOL member countries and El Salvador has a very small population relative to other member countries.<sup>82</sup> In a number of cases, the government of El Salvador has issued persecutory Red Notices proven in court to be based on false arrest warrants, baseless accusations, or other unsubstantiated evidence.<sup>83</sup>

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<sup>75</sup> IMMIGRANT DEF. PROJECT, JUST FUTURES L. & MIJENTE, HART ATTACK: HOW DHS’S MASSIVE BIOMETRICS DATABASE WILL SUPERCHARGE SURVEILLANCE AND THREATEN RIGHTS 25-27 (2022), <https://www.immigrantdefenseproject.org/wp-content/uploads/HART-Attack.pdf>.

<sup>76</sup> *Congress Wrangles with DHS over Biometric System Delays and Oversight*, FCW (July 18, 2022), <https://fcw.com/congress/2022/07/congress-wrangles-dhs-over-biometric-system-delays-and-oversight/374579/>.

<sup>77</sup> *Notices*, INTERPOL, <https://www.interpol.int/en/How-we-work/Notices/View-Red-Notices> (last visited May 30, 2023).

<sup>78</sup> NIJC POLICY BRIEF, *supra* note 1, at 5; *Hernandez-Lara v. Lyons*, 10 F.4th 19, 31, 46 (1st Cir. 2021) (holding that ICE violated an El Salvador immigrant’s due process rights by placing the burden on her to rebut a Red Notice allegation at a bond hearing, which “decisively exploited her inability to rebut the Red Notice, even though it did not specify a single act of criminal or dangerous conduct.”); *Barahona v. Garland*, 993 F.3d 1024, 1027-29 (8th Cir. 2021) (holding that a Red Notice, standing alone, does not satisfy the probable cause standard for the serious nonpolitical crime bar to asylum).

<sup>79</sup> See Sandra Grossman & Meg Hobbins, *Matter of W-E-R-B- and the Reliability of Red Notices: How to Successfully Advocate for Victims of Persecution*, 25 BENDER’S IMMIGR. BULL. 875-77 (2020) (describing El Salvador as a “notorious for abusing dissidents abroad” and noting that Interpol “does not properly vet” Red Notices, which are “not based on any evidence other than the unsupported allegation of the national office that made the request.”). See generally Sam Meacham, *Weaponizing the Police: Interpol as a Tool for Authoritarianism*, HARV. INT’L REV. (Apr. 11, 2022, 12:00 PM), <https://hir.harvard.edu/weaponizing-the-police-authoritarian-abuse-of-interpol/> (discussing how the INTERPOL system is vulnerable to abuse by corrupt governments).

<sup>80</sup> *Bukele Administration Risks Politicizing El Salvador’s Anti-Corruption Fight*, WASH. OFF. ON LATIN AM. (July 27, 2021), <https://www.wola.org/2021/07/bukele-el-salvador-anti-corruption/>.

<sup>81</sup> *Id.*

<sup>82</sup> *Notices*, INTERPOL, <https://www.interpol.int/en/How-we-work/Notices/View-Red-Notices> (last visited May 30, 2023) (showing that El Salvador has 1,106 active Red Notices out of 6,967 total Red Notices). As of May 30, 2023 and of the publicly available Red Notices on INTERPOL’s website, El Salvador’s 1,106 Red Notices (with a country population of about 6.5 million), which can be contrasted with countries like the United States (252 active Red Notices with a population of about 331 million). See *id.*; *Member Countries*, INTERPOL <https://www.interpol.int/en/Who-we-are/Member-countries> (last visited May 31, 2023); *El Salvador*, UNITED NATIONS DATA <https://data.un.org/en/iso/sv.html> (last visited May 30, 2023); *United States of America*, UNITED NATIONS DATA, <https://data.un.org/en/iso/us.html> (last visited May 30, 2023).

<sup>83</sup> See, e.g., Case Examples ■, 11, ■ 13.

We request CRCL closely examine DHS’s reliance on information in the above databases provided by the Salvadoran government, and investigate the ways in which U.S. immigration agencies rely on the unverified information in immigration detention and deportation decisions.

**4. The use of unreliable data originating from El Salvador violates U.S. regulations and DHS procedures**

*A. The use of unreliable data from El Salvador violates the fundamentally fair standard of evidence in immigration court*

Evidence admitted in immigration court must be “fundamentally fair,” described in the Immigration Judge Handbook on Evidence as evidence that is “reliable and trustworthy.”<sup>84</sup> Data shared with the United States by El Salvador fails to meet this standard. Information based on allegations of criminal history or gang membership provided by National Police officers is inherently unreliable given the lack of due process and National Police’s unchecked authority to arrest people in El Salvador.<sup>85</sup>

**Case Example 7 – [REDACTED]**<sup>86</sup> [approved for CRCL submission only]

[REDACTED]

**Case Example 8 – Incomplete arrest records abused by ICE attorneys**<sup>87</sup>

*Melissa (pseudonym) experienced gang harassment and persecution in El Salvador and later fled to the United States. Melissa had an arrest warrant against her in El Salvador for vague charges stemming from a dispute with her neighbor, which was flagged in an FBI database. Despite the vague language of the charges, in immigration proceedings ICE insisted that Melissa’s arrest was gang related with no supporting evidence, and claimed that the gang harassment she endured in El Salvador was “initiation.” Melissa’s attorney and mother attempted to obtain her judicial records from El Salvador to disprove this claim, but were repeatedly denied access by the courts.*

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<sup>84</sup> EXEC. OFF. FOR IMMIG. REV., IJ BENCHBOOK 2 (n.d.), <https://www.justice.gov/eoir/page/file/988046/download> [hereinafter IJ BENCHBOOK].

<sup>85</sup> CRISTOSAL, *supra* note 13, at 23.

<sup>86</sup> Interview conducted with service provider. Notes on file with authors.

<sup>87</sup> Interview conducted with service provider. Notes on file with authors.

Beyond the inaccuracy of data coming from El Salvador’s National Police, data shared by Salvadoran officials is unreliable because it consists of multiple layers of hearsay.<sup>88</sup> While hearsay is generally admissible in immigration court, when it is “highly unreliable,” including when there are multiple layers, the evidence can be fundamentally unfair.<sup>89</sup> Figure 1 below illustrates one example of how the collection of information transmitted from El Salvador to the United States involves many steps and multiple layers of hearsay.

**Figure 1 – Multiple Layers of Hearsay Involving Information in DHS Databases Shared by El Salvador**



Throughout the entire communication chain, there are dozens of ways information can be transmitted incorrectly or for persecutory purposes. The original anonymous caller could have been lying or mistaken. The police officer who received the tip may have recorded the wrong name, omitted critical information, or arbitrarily selected which details to include. Certain databases have analyst employees, who may then have typed the name incorrectly when they entered it into the database. The police officer or other government official could have entered or shared the information for political reasons.

The final printout from the database that is presented in immigration court is the result of at least five levels of hearsay. It is nearly impossible for the immigration judge to know whether the information presented by an ICE attorney is accurate. And because the original speaker—the anonymous caller or even police officer—is unavailable for questioning, there are few avenues to cure any inaccuracies. Such information is fundamentally prejudicial and unfair.

Courts have stated that hearsay evidence from foreign governments—like El Salvador’s National Police—can be especially unreliable because certain foreign governments have incentives to lie about the people that they persecute.<sup>90</sup> In El Salvador, police officers have arrest quotas, which incentivize baseless accusations and garner favor with El Salvador’s executive branch.<sup>91</sup> The Bukele Administration has mandated the arrest and imprisonment of all persons suspected of being gang members in El Salvador—even if that means having a “margin of error” that results in the sweeping arrest of innocent people as well.<sup>92</sup>

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<sup>88</sup> *Anim v. Mukasey*, 535 F.3d 243, 257 (4th Cir. 2008) (“Multiple hearsay, where the declarant is steps removed from the original speaker, is particularly problematic because the declarant in all likelihood has been unable to evaluate the trustworthiness of the original speaker.”).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*; *Ezeagwuna v. Ashcroft*, 325 F.3d 396, 406 (3d Cir. 2003); *Lin v. U.S. Dep't of Just.*, 459 F.3d 255, 269-70 (2d Cir. 2006).

<sup>91</sup> HUM. RTS. WATCH & CRISTOSAL, *supra* note 3, at 58-9.

<sup>92</sup> Natalie Kitroeff, *El Salvador Decimated Its Ruthless Gangs. But at What Cost?*, N.Y. TIMES (Apr. 9, 2023), <https://www.nytimes.com/2023/04/09/world/americas/el-salvador-gangs.html>.

**Case Example 9 – Records of arrests based on tattoos alone used to trigger serious nonpolitical crime bar<sup>93</sup>**

*John (pseudonym) fled El Salvador soon after the state of exception began out of fear he would be beaten and arrested by police he saw moving in large groups through his neighborhood. Salvadoran police had harassed and beaten John for years due to tattoos that the police assumed meant John was a gang member. John has never participated in any gang crimes, although police arrested him two different times for alleged crimes. John experienced torture in Salvadoran prisons both times he was detained. In immigration proceedings, ICE attorneys presented a SAFE document that flagged John as a gang member and listed John’s arrests as “criminal events,” even though John was not convicted of anything. ICE attorneys nevertheless argued John was ineligible for asylum because, they claimed, he had committed serious nonpolitical crimes. ICE attorneys also submitted an ICE press release about the SAFE program alongside this document, indicating the immigration judge would not be familiar with the secretive program. John has been detained for over a year in ICE detention facilities, pending the outcome of his case.*

Courts have also stated that documents in which a foreign government with a record of human rights violations has identified someone as a criminal or political dissident helps *prove* that person’s need for asylum.<sup>94</sup> If a government has labeled someone a criminal, or a gang member in the case of El Salvador, the government is more likely to persecute them through arbitrary arrest and other human rights violating methods. Documents originating from governments responsible for systematic human rights abuses that accuse citizens of being criminals should be considered inherently unreliable.

Finally, the fact that the information comes from databases run by trustworthy U.S. agencies does not cure its unreliability, as courts have recognized.<sup>95</sup> Instead, the transmitted information *itself* must contain sufficient indicia of reliability for it to be fairly introduced in immigration court. As one court of appeals put it, “the prestige of the State Department letterhead” cannot give credibility to unreliable information.<sup>96</sup> While information about Salvadoran immigrants may be stored in a DHS- or FBI-operated database, the National Police in El Salvador are the ultimate sources of the information and, as detailed above, are deeply unreliable.<sup>97</sup>

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<sup>93</sup> Interview conducted with service provider. Notes on file with authors.

<sup>94</sup> *Lin*, 459 F.3d at 270; *Anim*, 535 F.3d at 257 (“[C]oncerns about a report’s reliability are amplified when the report was prepared with the assistance of someone from the government from which [the applicant] is fleeing...”) (internal citations omitted).

<sup>95</sup> *Anim*, 535 F.3d at 258.

<sup>96</sup> *Ezeagwuna v. Ashcroft*, 325 F.3d 396, 407 (3d Cir. 2003).

<sup>97</sup> This unreliable information further indicates that the United States and El Salvador are not abiding by the terms of the 2019 Biometric Data Sharing Program Agreement. The memorandum of cooperation (MOC) between El Salvador and DHS mandates that each participating state must inform the other state if they share inaccurate personal data. *See* Memorando de Cooperación Entre el Ministerio de Justicia y Seguridad Pública y el Ministerio de Relaciones Exteriores de la República de El Salvador, por una parte y El Departamento de Seguridad Nacional de los Estados Unidos de América, por otra parte, Relativo a Mejorar La Cooperación para Prevenir y Combatir La Delincuencia y Otras Amenazas a la Seguridad Pública [Memorandum of Cooperation Between the Ministry of Justice and Public Security and the Minister of Foreign Affairs of the Republic of El Salvador and the U.S. DHS Regarding Improving Cooperation to Prevent and Combat Crime and Other Threats to Public Safety], section 9, subsection 2.b, El Sal.-U.S., Oct. 28, 2019, <https://www.uca.edu.sv/idhuca/wp-content/uploads/Acuerdo-Datos-Biometricos.pdf> [hereinafter DHS-El Salvador 2019 MOC].

In other circumstances, documents created by U.S. agencies are deemed untrustworthy and therefore inadmissible when there is proof that the information in the document is incorrect or obtained through coercion or duress.<sup>98</sup> When U.S. Border Patrol agents put incorrect information, or information obtained through coercion or distress, in an immigrant's I-213 form, the immigrant can challenge the admissibility of the I-213 form.<sup>99</sup> There is ample evidence that information originating from El Salvador entered into DHS databases is incorrect or obtained through coercion or duress. Just as U.S.-authored forms like I-213's can be deemed inadmissible, database information authored or provided by the unaccountable, repressive El Salvador National Police should not be considered valid or admissible on its own.

*B. DHS databases that rely on information originating from El Salvador do not satisfy the reasonable suspicion standard that applies to U.S. criminal databases*

In the context of information sharing between different U.S. jurisdictions, U.S. regulation (28 C.F.R. § 23.20) requires that any criminal intelligence information placed in an interjurisdictional-database meet a reasonable suspicion standard.<sup>100</sup> To have a reasonable suspicion, a trained law enforcement officer must believe there is a reasonable possibility that an individual is involved in a definable criminal activity.<sup>101</sup>

DHS databases with information obtained from U.S.-El Salvador databases are analogous to databases shared between different U.S. jurisdictions and subject to 28 C.F.R. § 23.20. They have the same goals (policing criminal activity, including gang activity) and procedures (information entered by law enforcement in one jurisdiction, to be used by law enforcement in a different jurisdiction). Further, DHS databases that contain information obtained from U.S.-El Salvador databases are used in the same way in immigration proceedings that U.S.-only databases are used in the criminal context.<sup>102</sup>

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<sup>98</sup> IJ BENCHMARK, *supra* note 84, at 17-18.

<sup>99</sup> *Id.* at 18; *see also* Baliza v. INS, 709 F.2d 1231 (9th Cir. 1983) (holding government document inadmissible when immigrant challenged it as unauthenticated).

<sup>100</sup> 28 CFR § 23.20(a). This regulation applies to criminal databases funded under the Omnibus Crime Control Act of 1968 and requires a probable suspicion standard for information to be drawn from them. NANCY GIST, DIR., BUREAU OF JUST. ASSISTANCE, 28 CFR PART 23 CRIMINAL INTELLIGENCE SYSTEMS OPERATING POLICIES: EXECUTIVE ORDER 12291, 1998 POLICY CLARIFICATION, 1993 REVISION AND COMMENTARY (1998), [https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/28cfr\\_part\\_23.pdf](https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/28cfr_part_23.pdf). While not all of ICE's databases are funded by this Act, they regularly draw on information from databases that are, such as the FBI's NCIC database, which feeds into ICE's EIC database. Other ICE databases, such as ICEGangs, are directly bound by the Act's requirements. Because of this interconnected network, there may be instances where the probable cause standard is required, yet is not met in ICE enforcement decisions or proceedings. Congress has recently called on DHS to speak more clearly regarding whether its new HART database is in compliance with the probable cause standard. H. COMM. ON APPROPRIATIONS, 117TH CONG., DEPARTMENT OF HOMELAND SECURITY APPROPRIATIONS BILL, 2022 at 24 (Comm. Print 2021), <https://docs.house.gov/meetings/AP/AP00/20210713/112896/HMKP-117-AP00-20210713-SD002.pdf>. ("The Committee directs the OIG to conduct a review of HART technologies, data collection mechanisms, sharing agreements, and privacy protections and determine if OBIM is complying with 28 C.F.R. 23, Criminal Intelligence Systems Operating Policies.")

<sup>101</sup> 28 CFR § 23.20(c).

<sup>102</sup> *See* Diaz Ortiz v. Garland, 23 F.4th 1 (1st Cir. 2022) (ICE using alleged gang membership information from Boston database to argue for removal of Salvadoran immigrant).



Therefore, by analogy, information shared by foreign governments must be held to the same standards as information from the databases of other U.S. jurisdictions. In fact, databases shared by foreign governments may raise greater concerns about reliability and civil rights, as stated above. Thus, the guidelines in § 23.20 should be considered when analyzing appropriate policies limiting the use of information from DHS databases containing information obtained from El Salvador. Baseless allegations of gang membership or criminal activity in U.S.-El Salvador shared databases should be held to the same standard as U.S.-only interjurisdictional databases, particularly when the information from U.S.-only and U.S.-El Salvador shared databases are used identically in immigration removal proceedings against Salvadoran nationals.

In fact, when ICE agents used allegations of gang membership based on information in a Boston database to argue for the removal of a Salvadoran immigrant, the First Circuit found that information from this database did not satisfy the reasonable suspicion standard.<sup>103</sup> Information used by ICE officials from U.S.-El Salvador shared databases, which often provides no underlying information to support gang allegations, should be judged by the same standards and in most cases would likely fail to meet those standards.

#### **Case Example 10 – False arrest warrants introduced in immigration court**<sup>104</sup>

*As a young man in El Salvador, Simon (pseudonym) faced police harassment and brutality. Police invaded his home and repeatedly drove him to a remote area where they severely beat him. Police suspected that Simon was a gang member based on his age, the fact he had spent time in the United States, and his artistic tattoos. About a month after the state of exception began, Simon fled to the United States, where ICE detained him. Late in his removal proceedings, DHS introduced as impeachment evidence two arrest warrants from El Salvador, both issued after the state of exception began. Simon was surprised to learn of the arrest warrants and believes the allegations are false. DHS also introduced printouts, entirely in Spanish, with markings from the SAFE program. Simon's attorney has contacted two Salvadoran attorneys to investigate these arrest warrants and obtain the police and prosecutorial files against Simon in El Salvador, but the attorneys refused, stating that it was too risky.*

#### **Case Example 11 – ICE unreasonably relied on false accusations**<sup>105</sup>

*Rachel (pseudonym) sought asylum in the United States after fleeing an abusive relationship with a man she had learned was a gang member. Five years later, ICE arrested her based on a Salvadoran arrest warrant and INTERPOL Red Notice. The warrant falsely accused Rachel of "illicit association" and committing an alleged theft that had occurred more than six years before the warrant was issued. An immigration judge denied her bond solely because of the Red Notice, and the Board of Immigration Appeals ("BLA") affirmed. With the assistance of her attorney and expert testimony on the inaccuracies in the warrant and Red Notice, Rachel was initially granted asylum. DHS appealed, and Rachel remained in detention until her asylum was affirmed. Rachel spent nearly a year in detention and missed the first year of her son's life.*

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<sup>103</sup> *Id.* at 21.

<sup>104</sup> Interview conducted with service provider. Notes on file with authors.

<sup>105</sup> Interview conducted with service provider. Notes on file with authors.

C. *Data-sharing agreements and databases violate the privacy and accuracy principles set out in the Privacy Act of 1974 and in DHS policies*

i. *DHS subverts the privacy principles of the Privacy Act of 1974*

The Privacy Act of 1974 limits the federal government’s ability to collect and share information about individuals, providing a crucial privacy protection mechanism.<sup>106</sup> Under the Privacy Act, the government may only collect information for a discrete purpose and store it for the minimal time possible, and the government must make efforts to ensure the accuracy and protection of that data.<sup>107</sup> Although DHS has exempted some of its databases from the express terms of the Privacy Act,<sup>108</sup> DHS has stated that it must comply with the privacy principles underlying the Act in all of its operations, regardless of whether the affected individual is a U.S. citizen.<sup>109</sup>

The collection, storage, and dissemination of information originating from El Salvador appears to violate the Privacy Act’s core requirements. Salvadoran authorities, for example, enter information about Salvadorans into databases accessed by DHS or share information directly with U.S. officials as a matter of course, not for a specific investigation or any other discrete purpose.<sup>110</sup> Such information is then stored in U.S. databases for decades. The HART database, for instance, will store information for 75 years, in violation of the Privacy Act’s minimal storage time requirement.<sup>111</sup> U.S. agencies also have no transparent procedures in place to ensure the accuracy of the information submitted by officials in El Salvador. There is no visible judicial process in place to verify the validity of information shared by El Salvador or mechanisms to otherwise

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<sup>106</sup> Privacy Act of 1974, 5 U.S.C. § 552a.

<sup>107</sup> 5 U.S.C. § 552a(e)(1)-(5) (requiring agencies to “maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency” and to ensure that individual records used for adjudicatory purposes “with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual. . .”).

<sup>108</sup> *See, e.g.*, DHS, PRIVACY IMPACT ASSESSMENT UPDATE FOR THE TECS SYSTEM: CBP PRIMARY AND SECONDARY PROCESSING (TECS) NATIONAL SAR INITIATIVE 5 (2011), [https://www.dhs.gov/sites/default/files/publications/privacy-pia-cbp-tecs-sar-update\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/privacy-pia-cbp-tecs-sar-update_0.pdf) (“The Secretary of Homeland Security has exempted [TECS a border screening database] from the notification, access, and amendment procedures of the Privacy Act because it is a law enforcement system. However, CBP will consider individual requests to determine whether or not information may be released.”). As this example illustrates, even when DHS does exempt databases from the Privacy Act, it works to ensure that individuals have the opportunity to challenge possibly inaccurate personal data used against them in specific cases.

<sup>109</sup> DHS, DHS PRIVACY POLICY REGARDING COLLECTION, USE, RETENTION, AND DISSEMINATION OF PERSONALLY IDENTIFIABLE INFORMATION 1 (2022), [https://www.dhs.gov/sites/default/files/2022-05/DHS%20Mixed%20Systems%20Policy%20PII%20Instruction\\_1.pdf](https://www.dhs.gov/sites/default/files/2022-05/DHS%20Mixed%20Systems%20Policy%20PII%20Instruction_1.pdf) (stating that DHS’s privacy guidance “applies throughout DHS when PII is collected, used, maintained, and/or disseminated by DHS irrespective of an individual’s citizenship or immigration status”).

<sup>110</sup> The process by which Salvadoran authorities collect data is opaque. In 2022, Access Now submitted a FOIA request to Salvadoran authorities inquiring into the procedure or protocol used to guarantee that El Salvador officials only collect data for the specific purposes authorized Section 3 of the Biometric Data Sharing Program Agreement MOC. *See* DHS-El Salvador 2019 MOC, *supra* note 97, § 3.2. The authorities refused to provide this information. *See* Access Now et al., *Joint Statement: Mexico, Guatemala, Honduras, El Salvador and the United States Must Terminate their Agreements on Cross-Border Transfers of Migrants’ Biometric Data*, ACCESS NOW <https://www.accessnow.org/press-release/statement-terminate-agreements-biometric-data-migrants/> (last updated Apr. 24, 2023).

<sup>111</sup> DHS, PRIVACY IMPACT ASSESSMENT FOR THE HOMELAND ADVANCED RECOGNITION TECHNOLOGY SYSTEM (HART) INCREMENT 1 PIA 28 (2020), [https://www.dhs.gov/sites/default/files/publications/privacy-pia-obim004-hartincrement1-february2020\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/privacy-pia-obim004-hartincrement1-february2020_0.pdf).

substantiate the information flowing into DHS databases. In fact, ICE attorneys print information from the databases, sometimes the day of an immigration hearing, and present it to immigration courts as fact, without providing any transparency into whether any U.S. official made an effort to verify the information’s authenticity.<sup>112</sup>

*ii. DHS contradicts its own stated privacy principles and requirements*

DHS is obligated to ensure the accuracy of all information that it collects. The Homeland Security Act of 2002, which established DHS, demands that all personal information held in DHS’s systems “is handled in full compliance with fair information practices as set out in the Privacy Act of 1974.”<sup>113</sup> Additionally, DHS’s Chief Privacy Officer reaffirmed in a recent Privacy Impact Assessment (“PIA”)<sup>114</sup> that “DHS has an obligation as a data steward, separate and apart from the Privacy Act, to maintain accurate, relevant, timely, and complete records” of all individuals on whom it collects data.<sup>115</sup> DHS also states that it treats “all persons, *regardless of immigration status*,” consistent with eight Fair Information Practice Principles laid out in its policy documents, including data quality and integrity, individual participation, use limitation, and security.<sup>116</sup> These assurances of accuracy and quality are undercut by collecting and utilizing unreliable information originating from El Salvador and storing it in agencies’ databases.

ICE’s use of specific databases in court proceedings also may not comply with the requirements laid out in each database’s PIA. For example, the PIA for ICEGangs—a database that ICE field agents can query to access alleged gang membership history for suspected individuals<sup>117</sup>—requires that ICE agents “obtain and verify” the original source of data they plan to rely on, “rather than relying solely on the information in ICEGangs, to prevent inaccurate information from being relied upon during the investigation and any subsequent trial.”<sup>118</sup> Even if ICE agents contact National Police officers to “verify” the data, U.S. government agencies report that the National Police officers are noncredible information sources, meaning the information they provide cannot be verified absent other evidence collected by a reliable source.

Furthermore, ICE’s 2021-2025 Data Strategy Plan prioritizes “build[ing] in” privacy and civil liberties requirements into each data project that ICE undertakes. These privacy protections “need to be considered early in a data project and not treated as an afterthought later in the project life

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<sup>112</sup> See Case Example 15.

<sup>113</sup> 6 U.S.C. § 142.

<sup>114</sup> PIAs are documents that DHS components must issue to inform the public of programs and systems that collect personally identifiable information (“PII”). These documents must specify the purpose of collection and the ways in which PII will be used by the agency components. See *Privacy Impact Assessments*, DHS <https://www.dhs.gov/privacy-impact-assessments> (last updated Aug. 18, 2022).

<sup>115</sup> DHS, *supra* note 73, at 13.

<sup>116</sup> USCIS, POLICY MANUAL ch. 7, pt. B (2023), <https://www.uscis.gov/policy-manual/volume-1-part-a-chapter-7> (emphasis added).

<sup>117</sup> ICE, PRIVACY IMPACT ASSESSMENT FOR THE ICEGANGS DATABASE 2-5 (Jan. 15, 2010), [https://www.dhs.gov/xlibrary/assets/privacy/privacy\\_pia\\_ice\\_icegangs.pdf](https://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_ice_icegangs.pdf).

<sup>118</sup> *Id.* at 5. Other DHS databases have stated the same commitment. See, e.g., CBP, PRIVACY IMPACT ASSESSMENT FOR ARRIVAL AND DEPARTURE INFORMATION SYSTEM (ADIS) 19 (2020), <https://www.dhs.gov/sites/default/files/publications/privacy-pia-024c-adis-december2020.pdf> (“No action is taken based solely on ADIS (or any other system-generated) alerts”).

cycle.”<sup>119</sup> However, relying on noncredible information from El Salvador police corrupts privacy and civil liberties protections at the origins of the data collection and storage process. El Salvador’s violations of privacy and civil liberties in the collection of inputted information taint the rest of the data’s life cycle in U.S. data systems.

## 5. The use of unreliable El Salvador data violates constitutional requirements

### *A. Further mechanisms to review and challenge unreliable data are needed to meet due process requirements*

Noncitizens in removal proceedings are entitled to due process of law. Although formal rules of evidence do not apply in immigration court, all proceedings must “conform to the traditional standards of fairness encompassed in due process.”<sup>120</sup> Specifically, in the removal hearing context, due process demands a full and fair hearing before an immigration judge, the right to proffer evidence, and a reasonable opportunity to examine the evidence brought against the individual.

#### *i. Evidence from El Salvador does not meet minimum standards of reliability*

Under well-settled precedent, a deficiency in judicial proceedings that prejudices the defendant constitutes a violation of due process. The use of information from El Salvador regularly prejudices defendants given the information is unreliable and often obtained in the context of political persecution and human rights violations.

In the aforementioned *Diaz Ortiz* decision, the First Circuit recognized the serious due process problems posed by reliance on interconnected gang databases. ICE officials detained 19-year-old Cristian Josue Diaz Ortiz based on flawed information in the “Gang Assessment Database” maintained by a Boston-DHS fusion center.<sup>121</sup> Similar to information collected by El Salvador, the fusion center’s data relied on “unsubstantiated inferences” and contained numerous “flaws,” including assigning “points” for normal teenage behavior, such as gathering in a public place. The court stressed the “fairness concerns” raised by the database and Diaz Ortiz’s inability to challenge the deeply flawed information used against him.<sup>122</sup> The opinion further criticized the BIA for relying on facts in the database “in a circular fashion” without inquiring into the problematic initial collection of these facts by police.<sup>123</sup>

In the El Salvador context, similarly flawed information enters DHS databases and becomes impervious to challenge. DHS databases then pose the same problem recognized in *Diaz Ortiz*—because information is shared between databases, initial due process violations during the collection of evidence can become downplayed or lost as evidence travels through the system without proper safeguards.

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<sup>119</sup> ICE, ICE DATA STRATEGY: FISCAL YEARS 2021-2025, at 7 (2020), <https://www.ice.gov/doclib/igp/iceDataStrategy.pdf>.

<sup>120</sup> Cuevas-Ortega v. INS, 588 F.2d 1274, 1277 (9th Cir. 1979).

<sup>121</sup> See *Fusion Center Locations and Contact Information*, DHS (Oct. 4, 2022), <https://www.dhs.gov/fusion-center-locations-and-contact-information>.

<sup>122</sup> *Diaz Ortiz v. Garland*, 23 F.4th 1, 14, 25 (1st Cir. 2022); see also del Bosque, *supra* note 68 (reporting on cases where government attorneys used database information against immigrants without fully sharing the information).

<sup>123</sup> *Diaz Ortiz*, 23 F.4th at 19.

Other courts have also emphasized the need for guarantees of reliability when the government seeks to use database information. In a 2017 case, when advocates did not introduce any evidence challenging the reliability of database information, the court found there was no due process violation.<sup>124</sup> Similarly, when government attorneys were able to show that other evidence corroborated the database information, the due process challenge to the database information failed.<sup>125</sup> By contrast, when there are no guarantees of reliability, courts do not accept database information. For example, regarding the use of a Russian database printout, the Second Circuit said “the database was not well-established and there was insufficient information concerning its affiliations” to grant a request to reopen proceedings.<sup>126</sup>

Further, U.S. law enforcement agencies have enacted remedial measures to address a lack of due process protections for domestic gang databases.<sup>127</sup> For example, California passed a law allowing people to check if they are in CalGangs and challenge the grounds for their inclusion.<sup>128</sup> Similarly, courts have demanded a redress mechanism for individuals placed on national “No Fly Lists” to identify and challenge their inclusion, in order for these lists to meet the requirements of due process.<sup>129</sup> Many scholars have criticized the lack of procedural due process among domestic gang databases—which are themselves subject to far greater protections than information collected by U.S. officials originating from Salvadoran authorities.<sup>130</sup>

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<sup>124</sup> *Guediara v. Sessions*, 701 F. App’x 60, 62 (2d Cir. 2017).

<sup>125</sup> *Singh v. Holder*, 461 F. App’x 596, 598 (9th Cir. 2011).

<sup>126</sup> *Talipov v. Holder*, 591 F. App’x 4, 8 (2d Cir. 2014).

<sup>127</sup> Notably, studies have found rampant errors in domestic gang databases, despite the far higher levels of due process granted in the United States than in El Salvador under the state of exception. NAT’L IMMIGR. LAW CTR., *UNTANGLING THE IMMIGRATION ENFORCEMENT WEB: BASIC INFORMATION FOR ADVOCATES ABOUT DATABASES AND INFORMATION-SHARING AMONG FEDERAL, STATE, AND LOCAL AGENCIES* 7 (2017), <https://www.nilc.org/wp-content/uploads/2017/09/Untangling-Immigration-Enforcement-Web-2017-09.pdf> (noting that an independent analysis of the FBI ADIS database found that the database incorrectly identifies visa overstays 42% of the time); CAL. STATE AUDITOR, *THE CALGANG CRIMINAL INTELLIGENCE SYSTEM: AS THE RESULT OF ITS WEAK OVERSIGHT STRUCTURE, IT CONTAINS QUESTIONABLE INFORMATION THAT MAY VIOLATE INDIVIDUALS’ PRIVACY RIGHTS* 39 (2016), <https://www.auditor.ca.gov/pdfs/reports/2015-130.pdf> (documenting glaring inaccuracies in CalGangs, including 28 babies under one year old who were identified in the database as having verbally confessed to gang membership).

<sup>128</sup> Jennifer Medina, *Gang Database Criticized for Denying Due Process May Be Used for Deportations*, N.Y. TIMES (Jan. 10, 2017), <https://www.nytimes.com/2017/01/10/us/gang-database-criticized-for-denying-due-process-may-be-used-for-deportations.html>.

<sup>129</sup> *Kashem, et al. v. Barr, et al. – ACLU Challenge to Government No Fly List*, ACLU, <https://www.aclu.org/cases/kashem-et-al-v-barr-et-al-aclu-challenge-government-no-fly-list> (last updated Apr. 7, 2021); JARED P. COLE, CONG. RSCH. SERV., R43730, *TERRORIST DATABASES AND THE NO FLY LIST: PROCEDURAL DUE PROCESS AND OTHER LEGAL ISSUES* 8 (2016), [https://www.everycrsreport.com/files/20160727\\_R43730\\_b68b9b840770108831e84a936c553db6e22cbc33.pdf](https://www.everycrsreport.com/files/20160727_R43730_b68b9b840770108831e84a936c553db6e22cbc33.pdf).

<sup>130</sup> See, e.g., Joshua D. Wright, *The Constitutional Failure of Gang Databases*, 2 STAN. J. C.R. & C.L. 115, 131-37 (2005); Rebecca A. Hufstader, *Immigration Reliance on Gang Databases: Unchecked Discretion and Undesirable Consequences*, 90 NYU L. REV. 671, 671 (2015); Katherine Conway, *Fundamentally Unfair: Databases, Deportation, and the Crimmigrant Gang Member*, 67 AM. U. L. REV. 269 (2017); Jasmine Johnson, *Gang Databases: Race and the Constitutional Failures of Contemporary Gang Policing in New York City*, 94 ST. JOHN’S L. REV. 1033 (2020).

**Case Example 12 – [REDACTED]**<sup>131</sup>  
**[approved for CRCL submission only]**



**Case Example 13 – Arrest warrant and Red Notice politically motivated and vague**<sup>132</sup>

*Eduardo (pseudonym) sought asylum in the United States after being repeatedly beaten and arrested by police because of his political views. Years after he fled El Salvador, local Salvadoran authorities issued an arrest warrant and INTERPOL Red Notice based on vague allegations that he was a member of a gang and involved in a robbery. In immigration proceedings, Eduardo argued the Red Notice, like his previous encounters with Salvadoran authorities, was politically motivated. The immigration judge granted him asylum, but the BIA reversed, finding him ineligible for asylum based only on the warrant and Red Notice. Interpol eventually deleted the Red Notice after Eduardo’s attorneys challenged it. Eduardo’s immigration case is still pending.*

**Case Example 14 – Arrest warrant and Red Notice inaccurate and unreliable**<sup>133</sup>

*Oscar fled El Salvador in 2014 after years of being beaten by police and gang members.<sup>134</sup> Oscar was later detained by immigration authorities, who argued against Oscar’s release on bond based on an INTERPOL Red Notice and a Salvadoran arrest warrant. However, the warrant misidentified Oscar’s parents, and the warrant was issued for alleged crimes without saying even in what year the alleged crimes occurred. The Red Notice similarly accused Oscar of crimes allegedly committed the year after he left El Salvador. Oscar’s pro se claims for release on bond were denied, although he was released two years later with the assistance of attorneys. In separate proceedings, the immigration judge denied Oscar relief based on an INTERPOL Red Notice. Oscar appealed, and the Court of Appeals for the Ninth Circuit reversed because the Red Notice on its own did not show probable cause that Oscar had committed a serious crime. Oscar’s case is still pending.*

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<sup>131</sup> Interview conducted with service provider. Notes on file with authors.

<sup>132</sup> Interview conducted with service provider. Notes on file with authors.

<sup>133</sup> Interview conducted with service provider. Notes on file with authors.

<sup>134</sup> Gonzalez-Castillo v. Garland, 47 F.4th 971, 974-5 (9th Cir. 2022).

- ii. *Evidence is not adequately disclosed, and even when it is, there is little way for a falsely accused person to correct inaccurate information*

In some cases, advocates only discovered ICE’s reliance on El Salvador-shared data “by chance,” through passing mention in briefs or affidavits.<sup>135</sup> Even when information is disclosed, it can be introduced late in the process, limiting the individual’s ability to challenge the evidence.<sup>136</sup> As noted above in Case Example 9, ICE submitted a brief press release on the SAFE program without any accompanying information, suggesting the court was not familiar with the program.<sup>137</sup> To the extent that ICE attorneys plan to use database printouts as exhibits,<sup>138</sup> the Immigration Court Practice Manual requires they be disclosed in the pre-hearing briefs.<sup>139</sup> Immigrants and their advocates should be aware of all exhibits ICE attorneys will use against them, as well as why that exhibit is being included. Freedom of Information Act (FOIA) requests should not be required for immigrants or their advocates to receive copies of their files held by ICE.<sup>140</sup> In several cases, however, ICE attorneys have shared database information late in the proceedings, such as after initial individual hearings<sup>141</sup> or during cross-examination<sup>142</sup> or impeachment.<sup>143</sup>

#### **Case Example 15 – Noncredible database printout introduced late in immigration court**<sup>144</sup>

*Alex (pseudonym) sought asylum in the United States. During immigration proceedings, at cross-examination, an ICE attorney introduced for the first time a printout allegedly from the TAG database, falsely accusing Alex of being in a gang. Alex’s attorney challenged the document’s admissibility and presented expert testimony that the evidence did not support the allegation that Alex was in a gang. Over a year later, the government submitted an email from a former FBI attaché, who confirmed the printout was based on information from the El Salvador police. The attaché claimed that Alex must be a gang member because he was placed in a jail unit for a specific gang and survived; if he wasn’t in that gang, he would have been killed. The email also listed criteria that El Salvador uses to deem someone a gang member, including their residential location, family members, manner of dress, and dialect used while speaking. Despite that email from a former FBI attaché, the FBI responded to a FOIA request from Alex’s attorney by saying it was unable to find any records about Alex. After Alex won several remands from the BLA back to the immigration judge and his case was transferred to another ICE attorney, Alex was granted deferral of removal under CAT.*

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<sup>135</sup> del Bosque, *supra* note 68; *see also, e.g.*, del Bosque, *supra* note 68 (describing a case in which a man’s attorney only learned that information from the fusion center was being used in his client’s case after months of litigation).

<sup>136</sup> NIJC POLICY Brief, *supra* note 1, at 5.

<sup>137</sup> *See* Case Example 9.

<sup>138</sup> In some cases, the documents submitted by ICE also lack key indicia of reliability such as official markings, translations or authentication. NIJC POLICY BRIEF, *supra* note 1, at 5.

<sup>139</sup> EXEC. OFF. FOR IMMIGR. REV., IMMIGRATION COURT PRACTICE MANUAL 81 (rev. 2022), <https://www.justice.gov/eoir/book/file/1528921/download> (Rule 4.18(b)).

<sup>140</sup> *Id.* (Rule 12.2(a)(1)(A)).

<sup>141</sup> Case Example █

<sup>142</sup> Case Example 15.

<sup>143</sup> Case Example 10.

<sup>144</sup> Interview conducted with service provider. Notes on file with authors.

### **Case Example 16 – BITMAP data only discovered with attorney’s assistance**<sup>145</sup>

*In his initial hearing for asylum, Evan (pseudonym) represented himself pro se and DHS did not file any documents showing that the El Salvador or U.S. governments believed that he was a gang member. Only after Evan started working with an attorney, who was able to obtain Evan’s I-213 document through a FOIA request, did he learn that DHS BITMAP had flagged him as a possible gang member. Additionally, HSI JIOC could provide no additional information about this allegation.*

Even when ICE attorneys do disclose their reliance on information shared by El Salvador, they violate due process when they do not provide “sufficient information” to support their allegations or a “meaningful opportunity to rebut” their claims, as required to satisfy due process.<sup>146</sup> In *Grigoryan v. Barr*, the Ninth Circuit held that an immigration judge had violated the due process rights of the asylum seeker by denying him asylum solely based on a one-page “record of investigation” (“ROI”) document prepared by DHS.<sup>147</sup> Similarly, in one case documented by immigration attorneys, DHS relied on a one-page TAG printout that identified the name of the criminal organization the Salvadoran asylum seeker allegedly belonged to, with no substantiating evidence.

ICE attorneys again violate procedural due process when there is no way for a falsely accused person to correct the inaccurate information. The El Salvador government legally owns, for example, the data collected by the San Salvador fusion center and thus has unilateral discretion to correct or update information.<sup>148</sup> Under the state of exception, Salvadorans are unable to even challenge the bases of their arrests, let alone challenge their inclusion in opaque data-sharing systems relied on by DHS. As discussed in the cases shared in this complaint, corruption and threats by law enforcement are major reasons why Salvadorans are forced to flee in the first place and seek asylum in the United States.<sup>149</sup>

### **Case Example 17 – Retaliatory arrest and false gang allegation**<sup>150</sup>

*Prior to the state of exception, policemen harassed Rafael’s wife. Rafael (pseudonym) threatened to report an officer, who warned Rafael that he would regret this for the rest of his life. Those same policemen arrested Rafael during the state of exception, accusing him of being a gang member. Rafael’s family members were not informed of the date of his hearing or its result. Rafael’s attorney was also denied the opportunity to present a defense, and all documents that he provided were thrown in a cardboard box.*

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<sup>145</sup> Interview conducted with service provider. Notes on file with authors.

<sup>146</sup> *Grigoryan v. Barr*, 959 F.3d 1233, 1240 (9th Cir. 2020).

<sup>147</sup> *Id.*

<sup>148</sup> del Bosque, *supra* note 68 (quoting a State Department spokesperson).

<sup>149</sup> *See e.g.*, Case Example 6.

<sup>150</sup> Interview conducted with service provider. Notes on file with authors.



iii. *Evidence obtained in violation of the Fifth Amendment should be excluded*

Courts, including immigration courts, may exclude evidence that was obtained illegally or in violation of due process protections.<sup>151</sup> As described above, some criminal history information from El Salvador has been generated through mass and arbitrary arrests.<sup>152</sup> U.S. courts have held that the mere possibility of unlawful collection of data via certain methods requires that the defendant be able to fully examine and argue for the exclusion of that evidence.<sup>153</sup> Given the widespread human rights abuses by the National Police, ICE attorneys cannot reasonably assert that information from the National Police was obtained legally, necessitating a system for respondents to fully examine and challenge evidence used against them.

Evidence may also be excluded if it is obtained through coercion or other mechanisms that violate due process.<sup>154</sup> In one case, police officers attacked 18-year-old Lucas Sánchez in his home and informed him that he was under arrest simply due to the “state of emergency.”<sup>155</sup> Without sufficient protections, information regarding this arrest could be shared with U.S. immigration officials by the El Salvador police, resulting in evidence obtained in a manner that violates due process being used by U.S. immigration authorities.

**Case Example 18 – Police search and arrest man without warrant**<sup>156</sup>

*In May 2022, Salvadoran police raided Xander’s (pseudonym) apartment, where he lived with his partner and their children, a 15-year-old and a 19-year-old. The police did not have a search warrant and gave no justification for the search. They searched Xander for tattoos and, when they did not find any, physically assaulted him. Xander was then detained, still without explanation. When his partner went to the prosecutor’s office to find information about Xander’s case, the office collected the documents that she provided but did not introduce them into evidence at the hearing, where Xander was given a sentence of provisional detention.*

B. *Evidence collected by Salvadoran officials through acts of torture, terror, or abuse should be excluded*

In the criminal law context, evidence that has been gathered by foreign officials in ways that involve torture, terror, or abuse can and should be excluded under the Fourth Amendment.<sup>157</sup> While immigration is a civil proceeding, detention, deportation or removal carry grave consequences for immigrants. Due to those high stakes, immigrants should be given an opportunity to challenge evidence against them when the evidence comes from foreign officials who engage in abusive practices.

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<sup>151</sup> 18 U.S.C. § 3504.

<sup>152</sup> See *supra* Section 2.

<sup>153</sup> *In re Evans*, 452 F.2d 1239, 1247 (D.C. Cir. 1971).

<sup>154</sup> *Matter of Toro*, 17 I&N Dec. 340, 340 (BIA 1980) (“The circumstances surrounding an arrest and interrogation may in some cases render evidence inadmissible under the Due Process Clause of the Fifth Amendment.”); *Matter of Sandoval*, 17 I&N Dec. 70 (BIA 1979); *Matter of Garcia*, 17 I&N Dec. 319 (BIA 1980).

<sup>155</sup> HUM. RTS. WATCH & CRISTOSAL, *supra* note 3, at 62.

<sup>156</sup> Interview conducted with service provider. Notes on file with authors.

<sup>157</sup> *United States v. Getto*, 729 F.3d 221, 228-9 (2d Cir. 2013).

U.S. courts have refused in the criminal context to admit foreign evidence where indicia of torture, terror, or abusive custodial interrogations are present.<sup>158</sup> Many instances of abuse, including documented prison conditions, in El Salvador amount to torture.<sup>159</sup> Any information gathered by Salvadoran authorities during the interrogation, arrest, and imprisonment process would potentially violate due process rights in the United States if introduced against the person in court. This conduct also seriously undermines the quality and accuracy of any “evidence” produced. Excluding such evidence and providing an opportunity to challenge such egregiously obtained evidence would bring U.S. immigration proceedings in alignment with the civil and due process rights enshrined in the United States legal processes.

## **6. The use of unreliable data from El Salvador violates international human rights law**

*A. The Salvadoran government under the state of exception is violating its human rights obligations and by using unreliable information from El Salvador the United States is turning a blind eye to those violations*

The government of El Salvador is currently violating both the International Covenant on Civil and Political Rights (ICCPR)<sup>160</sup> and the Convention Against Torture (CAT),<sup>161</sup> two international human rights treaties that El Salvador is obligated to uphold. By using information generated in a human rights abusing context, U.S. authorities are impermissibly ignoring El Salvador’s ICCPR and CAT violations.

El Salvador’s declared state of exception does not meet international standards of a public emergency, meaning the Salvadoran government should not have derogated any human rights.<sup>162</sup> However, even if the situation in El Salvador conformed to international standards of a public emergency, the ICCPR prohibits derogation of the right to life or the right not to be tortured or subjected to degrading treatment, under any circumstances.<sup>163</sup> El Salvador also cannot forgo their obligations under the CAT no matter the circumstances.<sup>164</sup> As detailed above, the climbing number of deaths in Salvadoran prisons implicate the right to life, while harsh conditions in the prisons

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<sup>158</sup> *Id.* at 229 (stating that evidence can be suppressed if obtained through abusive conduct of foreign agents); *Rochin v. California*, 342 U.S. 165, 173 (1952) (holding confessions extracted via coercion or physical abuse violate due process).

<sup>159</sup> CRISTOSAL, *supra* note 13, at 25.

<sup>160</sup> International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, T.I.A.S. 92-908 (entered into force Mar. 23, 1976) [hereafter ICCPR].

<sup>161</sup> Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, T.I.A.S. 94-1120.1 (entered into force for United States Nov. 20, 1994) [hereafter CAT].

<sup>162</sup> While governments may derogate certain human rights contained in the ICCPR during a legitimate public emergency, the situation in El Salvador does not meet international standards for a public emergency, and therefore suspension or derogation of any human rights guaranteed by the ICCPR is a violation of Article 4. Article 4 permits derogation of certain rights only in cases of a “public emergency which threatens the life of the nation.” Although the Salvadoran government cited a string of homicides in March of 2022 as the emergency that justified the state of exception and its attendant suspension of rights, the murders themselves, even if concerning and traumatic, did not “threaten[] the life of the nation.” Nor does an isolated week of violence in March of last year justify the continual re-authorization of the state of exception, which has extended it to the present day. *See* Committee Against Torture, *Concluding Observations Third Periodic Report of El Salvador*, ¶ 10-11, U.N. Doc. CAT/C/SLV/CO/3 (Dec. 19, 2022) (noting the declared state of exception and stating El Salvador should restore civil rights and rewrite its emergency legislation to comply with international human rights standards).

<sup>163</sup> ICCPR, *supra* note 160, art. 4, 6, 7.

<sup>164</sup> CAT, *supra* note 161, art. 2, ¶ 2.

likely violate the right to be free from torture or degrading treatment. Further, cases of torture by prison officials have been well-documented, including waterboarding, and the denial of space, food, healthcare, drinking water, and other necessities, which inflicts “severe pain or suffering.”<sup>165</sup>

El Salvador has also suspended human rights that should not have been derogated in the absence of a public emergency that conforms to international standards. First, under the state of exception, El Salvador has suspended due process rights, including the right to be informed of the reason for one’s arrest, the right to private communication, and the ability to put on a meaningful defense. El Salvador’s actions violate the ICCPR, which require individuals to be informed of arrest charges, to be free from arbitrary arrest, and to have access to legal counsel.<sup>166</sup>

Next, Salvadoran prisons are overcrowded and lack basic necessities, while officials have subjected detainees to torture in documented instances.<sup>167</sup> Such conditions violate the ICCPR’s requirements that prisons have humane and dignified conditions.<sup>168</sup> After being imprisoned, Salvadorans face long waits before they are brought before a judge, violating the ICCPR requirement that arrested people are brought promptly before a judge.<sup>169</sup> The ICCPR also guarantees a fair public hearing, which is clearly violated in El Salvador when hundreds of people are given mass hearings before a judge over a video call.<sup>170</sup>

### **Case Example 19 – Detained person given only mass hearing**<sup>171</sup>

*Christian (pseudonym) was 25 years old and working as a bricklayer’s assistant when he was arrested and detained by police without a warrant or any justification. Christian’s boss helped his mother, Esperanza (pseudonym), hire an attorney to represent Christian. However, the attorney informed Esperanza that Christian’s case was heard at a massive virtual hearing where she was not allowed to speak. Christian’s attorney was not even informed which prison Christian is currently detained in.*

El Salvador’s granting of vast authority to the National Police to raid neighborhoods and arrest people in their homes without warrants also violates the ICCPR, which guarantees that no one shall have their privacy, family, or home arbitrarily interfered with.<sup>172</sup> Further, even before the state of exception began, journalists and members of civil society have had their phones infected with spyware, and experienced other privacy violations that may be the result of government action.<sup>173</sup> General Comment No. 16 to ICCPR Article 17 states that any state acts impinging on privacy rights “must specify in detail the precise circumstances in which” interferences with privacy are authorized. Decisions to make use of such data must then be authorized on a “case-by-case

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<sup>165</sup> CAT, *supra* note 161, art. 1, ¶ 1.

<sup>166</sup> The ICCPR enshrines some of those rights in Article 9, including the right to be free from arbitrary arrest and detention (paragraph 1) and the right to be informed of arrest charges (paragraph 2). Other procedural guarantees are protected by Article 14, including the right to be informed of criminal charges (paragraph 3(a)) and to access a defense attorney (paragraph 3(d)).

<sup>167</sup> HUM. RTS. WATCH & CRISTOSAL, *supra* note 3, at 69, 71.

<sup>168</sup> ICCPR, *supra* note 160, art. 10, ¶ 1.

<sup>169</sup> *Id.* art. 9, ¶ 3.

<sup>170</sup> *Id.* art. 14, ¶ 1.

<sup>171</sup> Interview conducted with service provider. Notes on file with authors.

<sup>172</sup> ICCPR, *supra* note 160, art. 17, ¶ 1.

<sup>173</sup> Press Release, Access Now et al., Pegasus Attacks in El Salvador: Spyware Used to Target Journalists and Activists, (Jan. 26, 2023), <https://www.accessnow.org/press-release/pegasus-el-salvador-spyware-targets-journalists/>.

basis.”<sup>174</sup> Unlike as required under General Comment No. 16, El Salvador has given no specification of “the precise circumstances in which” the current privacy violations are authorized.<sup>175</sup> Further, the National Police and U.S. agents do not make case-by-case decisions on whether to use the data gathered in violation of people’s privacy rights.

Additionally, case law around Article 17 demands that any interference with privacy be necessary and proportionate to the specified purposes of collection.<sup>176</sup> The reasons specified in the U.S.-El Salvador data-sharing agreements—to generally reduce international crimes such as drug- and human-trafficking—are not reasonable or proportionate to the vast amount of personal and biometric information internationally processed through DHS’s interoperable systems. The U.S.-El Salvador data collection systems also collect far more information than is required to fulfill their stated purpose, thus violating the proportionality principle. For example, the databases include criminal history or gang membership of extended family members. Including such information does not reliably indicate whether the actual individual has a criminal history or is a member of a gang. In using unreliable data from El Salvador, U.S. officials also violate the ICCPR.<sup>177</sup>

The ICCPR’s Human Rights Committee has also held that electronic surveillance by states must include “guarantees of impartiality and effectiveness” and “[a]ccess of affected persons to effective remedies in cases of abuse.”<sup>178</sup> El Salvador data fails to meet this threshold. Given the complete lack of due process in El Salvador and known instances of politically motivated or biased detentions, there are no guarantees of impartiality in the collected data. Affected persons also lack any remedies in El Salvador against police abuse. Nor do affected people have any way to correct the data once they arrive in the United States.

El Salvador is currently violating numerous provisions of human rights treaties. The United States has ratified those same international human rights treaties<sup>179</sup> and incorporated most articles into domestic law.<sup>180</sup> By using information collected by a human rights abusing government in official U.S. immigration enforcement operations and adjudication proceedings, the United States is tacitly approving El Salvador’s violations. In addition, after denying Salvadorans asylum or other status based on that information, the United States deports Salvadorans back to El Salvador, where they

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<sup>174</sup> ICCPR General Comment No. 16. Article 17 (Right to privacy); U.N. Doc. CCPR/GEC/6624 (1988), §7.

<sup>175</sup> *Id.*

<sup>176</sup> Van Hulst v. Netherlands, Communication No. 903/1999, U.N. Doc. CCPR/C/82/D/903/1999 (2004), §7.3 (ICCPR Human Rights Committee); *see also* Toonen v. Australia, Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (1994), §8.3 (ICCPR Human Rights Committee). The United States has made efforts to meet this requirement in other contexts, despite failing to do so here. For example, DHS and the Government of Canada have signed a Statement of Privacy Principles with respect to data sharing. Among other requirements, the agreement specifies that data collection must be necessary and proportionate to accomplish a clearly specified purpose. Beyond the Border Action Plan Statement of Privacy Principles by the United States and Canada, Can.-U.S., art. 2, May 30, 2012, [https://www.dhs.gov/sites/default/files/publications/beyond-the-border-action-plan-statement-of-privacy-principles\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/beyond-the-border-action-plan-statement-of-privacy-principles_0.pdf).

<sup>177</sup> ICCPR, *supra* note 160, art. 17, ¶ 1.

<sup>178</sup> Van Hulst, *supra* note 176; Toonen, *supra* note 176.

<sup>179</sup> United Nations Human Rights Treaty Bodies, *Ratification Status for United States of America*, U.N. TREATY BODY DATABASE, [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=187&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=187&Lang=EN) (last visited June 5, 2023).

<sup>180</sup> U.S. Const. amend. I-X; 8 CFR § 208.18.

can face torture, persecution, and other maltreatment under the state of exception.<sup>181</sup> That violates the United States' obligation of nonrefoulement under CAT and domestic refugee law.<sup>182</sup>

*B. The United States is in direct violation of the ICCPR by using unreliable information from El Salvador*

In using unreliable information from El Salvador, the United States violates the ICCPR right to the presumption of innocence and the right to privacy.<sup>183</sup> Article 14 guarantees that everyone is presumed innocent until proven guilty according to law. However, some of the information U.S. immigration officials receive from El Salvador is not adjudicated and often contains mere accusations of gang membership or alleged criminal histories. As previously mentioned, El Salvador submits thousands of Red Notices to the INTERPOL system, which does not ensure that police authorities have proof that someone has committed a crime.<sup>184</sup> DHS attorneys frequently introduce Red Notices to argue that it is sufficient to trigger the serious nonpolitical crime bar, which prevents someone from receiving asylum in the United States.<sup>185</sup> In doing so, DHS officials violate Article 14's presumption of innocence, when many Red Notices do not have an official warrant underlying them and are deleted by INTERPOL when advocates challenge their validity.<sup>186</sup>

Likewise, when El Salvador officials enter gang affiliation allegations into U.S.-El Salvador shared databases, the officials may lack proof.<sup>187</sup> When U.S. immigration officials use the information from U.S.-El Salvador shared databases to turn away, detain, or deport Salvadorans, those officials are not verifying the validity of those accusations, which violates immigrants' right to a presumption of innocence.

International privacy, immigrant rights, and human rights organizations have called for the end of such data-sharing agreements.<sup>188</sup> CRCL should investigate whether DHS officials are upholding the United States' obligations under the ICCPR, recommend the U.S. government end the data-sharing agreements it has with El Salvador and stop using any already collected data in immigration adjudication and enforcement decisions.

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<sup>181</sup> An immigration practitioner visiting El Salvador told the authors of this complaint how they observed people recently deported by the U.S. leaving a deportation center in the back of police vehicles. This suggests that deported individuals may be subjected to the arrest and detention conditions described above. Interview with immigration practitioner. Notes on file with authors.

<sup>182</sup> CAT, *supra* note 161, art. 3, ¶ 1.

<sup>183</sup> ICCPR, *supra* note 160, art. 14, ¶ 2.

<sup>184</sup> *Supra* note 86.

<sup>185</sup> NIJC POLICY BRIEF, *supra* note 1, at 5; Sandra Grossman & Meg Hobbins, *A Guide to Understanding and Challenging Persecutory Interpol Red Notices in Immigration Court and Before Interpol*, INT'L BAR ASS'N, <https://www.ibanet.org/article/C67767D4-7F92-4666-B32A-71EDD5258869> (last visited May 31, 2023).

<sup>186</sup> See Case Example 13, in which advocates got the Red Notice deleted.

<sup>187</sup> See, e.g., Al Jazeera English, *Investigating El Salvador's gang crackdown and forced disappearances | Fault Lines Documentary*, YOUTUBE at 7:19 (May 24, 2023), [https://www.youtube.com/watch?v=qJKt0hvzy7w&ab\\_channel=AlJazeeraEnglish](https://www.youtube.com/watch?v=qJKt0hvzy7w&ab_channel=AlJazeeraEnglish) (quoting a Salvadoran legislator that under the state of exception "you don't have the presumption of innocence; in the practice, we have the presumption of guilty.").

<sup>188</sup> Access Now et al., *supra* note 110.

C. *Data sharing with El Salvador is also not in line with international privacy norms*

In addition to directly violating the United States' obligations under the ICCPR, data sharing with El Salvador violates international agreements and guidelines that urge states to uphold human rights in their data collection practices.

The United Nations' 2030 Agenda<sup>189</sup> has developed a framework for a "human rights-based approach to data."<sup>190</sup> Under this framework, "[d]ata collectors are accountable for upholding human rights in their operations" and must take steps to ensure the reliability and adequacy of the information that they collect.<sup>191</sup> Neither the United States nor El Salvador ensures the reliability of the information collected and shared in related databases.

The American Convention on Human Rights also prohibits "arbitrary or abusive interference" with the "private life" of citizens.<sup>192</sup> As explained above, both the United States<sup>193</sup> and El Salvador arbitrarily interfere in the private lives of people when they collect and use false information or large amounts of personal data.

In addition, the Organisation for Economic Co-operation and Development ("OECD") Guidelines on the Protection of Privacy and Transborder Flows of Personal Data urges that all data collection must "be obtained by lawful and fair means."<sup>194</sup> As detailed above, massive amounts of individual data collected under the broad goal of stopping international crime is not proportional. Nor is the data stored for only a reasonable time; people's information can be stored for decades, without their knowledge and without any opportunity for review.

These various agreements reflect the consensus among international human rights bodies that unreliable and inaccurate data collection by states is a serious harm that impinges on the fundamental right to privacy.

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<sup>189</sup> A non-binding agreement to which the United States has signed on. *See generally* OFF. OF THE HIGH COMM'R, A HUMAN RIGHTS-BASED APPROACH TO DATA: LEAVING NO ONE BEHIND IN THE 2030 AGENDA FOR SUSTAINABLE DEVELOPMENT, UNITED NATIONS HUMAN RIGHTS (2018), <https://www.ohchr.org/sites/default/files/Documents/Issues/HRIndicators/GuidanceNoteonApproachtoData.pdf>.

<sup>190</sup> *Id.* at 2 (capitalization altered).

<sup>191</sup> *Id.* at 18.

<sup>192</sup> American Convention on Human Rights, art. 11, *opened for signature* Nov. 22, 1969, Treaties Pending in the Senate 6, (signed by the United States June 1, 1977), <https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>.

<sup>193</sup> The United States has signed the American Convention on Human Rights. *American Convention on Human Rights*, ORGANIZATION OF AMERICAN STATES, [https://www.oas.org/dil/treaties\\_b-32\\_american\\_convention\\_on\\_human\\_rights\\_sign.htm](https://www.oas.org/dil/treaties_b-32_american_convention_on_human_rights_sign.htm).

<sup>194</sup> ORG. FOR ECON. CO-OPERATION & DEV., OECD GUIDELINES ON THE PROTECTION OF PRIVACY AND TRANSBORDER FLOWS OF PERSONAL DATA 3 (1980), [https://bjaojp.gov/sites/g/files/xyckuh186/files/media/document/oecd\\_fips.pdf](https://bjaojp.gov/sites/g/files/xyckuh186/files/media/document/oecd_fips.pdf).

## 7. Recommendations

As detailed above, DHS authorities systematically rely on unsubstantiated and unreliable information collected by known human rights abusing authorities in El Salvador to deny people their lawful right to seek protection and immigration relief in the United States. These practices violate individuals' civil rights and liberties, including their due process rights, their right to a fair hearing, their rights under international law, and their privacy rights. CRCL should investigate DHS's data-sharing agreements, how DHS collects and uses transnational information against immigrants from El Salvador, and whether DHS is following its own procedures in introducing evidence.

Those persecuted in El Salvador under the state of exception find themselves stuck in a cycle of abuse, where DHS uses information provided by their persecutors to deny them safety in the United States. The undersigned organizations ask DHS CRCL to conduct an investigation into this policy and practice and issue the following recommendations to the relevant authorities.

We request CRCL recommend:

- *The Department of Homeland Security:*
  - **End data-sharing agreements and restrict access to certain databases by:**
    - Terminating the 2019 bilateral agreements with El Salvador (the Border Security Agreement and the Biometric Data Sharing Program Agreement).
    - Restricting accessing to information provided by Salvadoran police, such as the FBI TAG database, the ICE ERO SAFE database, and ICE HSI BITMAP database.
  - **Protect against the use of unreliable information collected by human rights violators in immigration proceedings by:**
    - Issuing guidance to ICE ERO, ICE Office of the Principal Legal Advisor, and CBP, stating that allegations, arrests or convictions for an offense in a foreign country known to lack due process protections, particularly where United Nations treaty bodies have raised concern,<sup>195</sup> should not be used as the sole source of evidence in enforcement decisions or immigration proceedings.
    - Creating a clear, publicly available set of minimum requirements that countries must meet for DHS allow their data to be used in immigration enforcement decisions or immigration proceedings.
    - Requiring ICE and CBP officers to provide a copy of any evidence, arrest warrants, or other documentation of allegations arising from foreign data-sharing programs to individuals (and, if represented, their attorneys) any time such information is utilized to render a determination that impacts the individual's liberty, due process, or family unity rights, and to provide an opportunity to rebut the allegations.

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<sup>195</sup> Committee Against Torture, *Concluding Observations Third Periodic Report of El Salvador*, ¶ 10-11, U.N. Doc. CAT/C/SLV/CO/3 (Dec. 19, 2022).

- **Adhere to its civil rights, civil liberties, and privacy laws and principles when operating international data-sharing programs by:**
  - Restricting all data collection to a narrow, clearly defined and lawful purpose.
  - Limiting storage of personal and biometric information in a database to a time period that is reasonable and proportionate to the purpose of collection.
  - Providing an administrative process for immigrants to challenge the veracity, authenticity, and inclusion of their personal data in the U.S. databases.
  - Strengthening remedies for those affected by inaccurate information in databases that later resulted in a prejudicial decision, including by providing opportunity to rebut and challenge the information.
- *Immigration and Customs Enforcement:*
  - **Instruct ICE attorneys to limit reliance on information from El Salvador in immigration proceedings by:**
    - Issuing guidance to instruct agents to limit their reliance on El Salvador information contained in data sources including INTERPOL Red Notices, SAFE, TAG, or BITMAP.
    - Requiring that this information, if it is introduced, be accompanied by proper context, justification and underlying proof.
  - **Establish policies and standards that prevent use of information from other similarly situated countries.**

Thank you for your time and careful attention to this submission. Please contact Jesse Franzblau, Senior Policy Analyst, NIJC, at [jfranzblau@heartlandalliance.org](mailto:jfranzblau@heartlandalliance.org); and, Shaw Drake, Clinical Supervising Attorney and Lecturer in Law, Stanford Law School International Human Rights & Conflict Resolution Clinic, at [sdrake1@law.stanford.edu](mailto:sdrake1@law.stanford.edu) regarding this submission. We look forward to your timely response.

Sincerely,

**National Immigrant Justice Center**

**Cristosal**

**Access Now**

**International Human Rights & Conflict Resolution Clinic, Stanford Law School**