

Hernández v. Mesa: A Case for a More Meaningful Partnership with the Inter-American Commission on Human Rights

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INTRODUCTION

The foundation of the justice system in the United States is built upon the idea that “where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.”¹ Ideally, this means that when an individual suffers harm, they can turn to the court system to find redress. Unfortunately, this principle is not always upheld when a case is politically charged and implicates persisting problems in American governance. For example, a case involving the treatment of noncitizens

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1. *Marbury v. Madison*, 5 U.S. 137, 163 (1803) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *23).

and the practice of holding law enforcement accountable for their unlawful behavior can present insurmountable barriers to meaningful relief.

Hernández v. Mesa, a United States Supreme Court case decided in 2020, demonstrates how these two thematic problems in policy and jurisprudence can act as an exception to the age old “when there is a right, there is a remedy” claim that supposedly forms the bedrock of judicial governance in the United States.² The case highlights the ways in which political and judicial doctrine can prevent even the most egregious of harms from being addressed, ultimately leaving an injured party without access to justice.

If a domestic system is incapable of addressing certain harms in a meaningful way, a separate, independent body should be able to review the merits and issue reparations where appropriate. International human rights courts and commissions can play this role if given the tools and opportunity to do so. But, in order to have an especially meaningful effect, international human rights remedies require the cooperation of individual nation states. Because the United States refuses to engage with international human rights courts in a proactive way, these bodies are often prevented from effectively bringing attention to human rights abuses and ensuring that the remedies they find appropriate are delivered.³

Through an in-depth examination of *Hernández*, the Inter-American Human Rights System, and the success of Mexico’s partnership with said system, this Note will make a case for embracing human rights bodies—specifically, the Inter-American System on Human Rights—as an appropriate and necessary check on the structures that form the United States government. Part I will look closely at the reasoning and judicially created doctrine that guided the decision in *Hernández*, with the goal of providing a better understanding of the complicated path through the courts that led to a seemingly straightforward yet unsatisfying result. Part II will illustrate the scope and purpose of the Inter-American Human Rights system and highlight how the system has addressed harms that reflect the themes in *Hernández* in the past. Part II will also argue that the Inter-American system provides a positive and necessary check on the domestic justice system in the United States. Part III will discuss Mexico’s relationship with the Inter-American System, and how the country has used its relationship with the body to provide meaningful relief to individuals who have been unable to access redress through available domestic remedies. Overall, the Note will argue that if invested in and embraced, the Inter-American System for Human Rights can provide meaningful and independent oversight to claims and problems that present

2. See generally *Hernández v. Mesa*, 140 S. Ct. 735 (2020).

3. See *infra* Section II.A.

specific politically sourced challenges and ultimately, that the United States should take a more open and proactive approach to engaging with it.

I. *HERNÁNDEZ V. MESA*: THE EXHAUSTION OF DOMESTIC REMEDIES

On June 7, 2010, Sergio Hernández was playing a game with his friends in a concrete culvert that separates El Paso, Texas, from Ciudad Juárez, Mexico.⁴ The boys were running up an incline in the culvert to touch the barbed wire of the American border fence before turning around and running back, further into Mexico.⁵ As they played, a U.S. Border Patrol Agent, Jesus Mesa, arrived on the scene.⁶ The accounts of what occurred next are varied.⁷ Court documents state that Mesa came upon the boys while they were on the El Paso side of the border and that he managed to detain one of the children for illegal border crossing.⁸ While his friend was detained, Sergio Hernández ran back into Mexico.⁹ As Sergio was running away, Agent Mesa fired at least two shots in his direction.¹⁰ One of the shots hit Sergio in the face and killed him.¹¹ Since Sergio's death, the United States government and Agent Mesa have consistently claimed that Agent Mesa feared for his life and fired his weapon only after the boys began throwing rocks at him.¹² In contrast, the Hernández family and multiple eyewitnesses insist that Sergio was unarmed and unthreatening at the time of the shooting.¹³

4. Adam Liptak, *Supreme Court Rules for U.S. Agent Who Shot Mexican Teenager*, N.Y. TIMES (Feb. 25, 2020), <https://www.nytimes.com/2020/02/25/us/politics/supreme-court-mexico-shooting-death-penalty.html> [<https://perma.cc/3J34-NUG8>].

5. *Id.* This account is also disputed by the U.S. Justice Department, which stated in a press release that the shooting occurred while smugglers attempted to cross the border illegally. Press Release, U.S. Dep't of Just., Federal Officials Close Investigation into the Death of Sergio Hernandez-Guereca (Apr. 27, 2012), <https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-sergio-hernandez-guereca> [<https://perma.cc/LL3C-NNUD>] [hereinafter Federal Officials Close Investigation]. Multiple sources recounting the events of the shooting, including the Supreme Court, make no mention of an attempt by any party involved to intentionally cross the border illegally. See *Hernández v. Mesa*, 140 S. Ct. 735 (2020).

6. *Hernández v. Mesa*, 137 S. Ct. 2003, 2005 (2017).

7. Vanessa Romo, *Supreme Court Rules Border Patrol Agents Who Shoot Foreign Nationals Can't Be Sued*, NPR (Feb. 25, 2020), <https://www.npr.org/2020/02/25/809401334/supreme-court-rules-border-patrol-agents-who-shoot-foreign-nationals-cant-be-sue> [<https://perma.cc/U5K8-V8CS>].

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* The use of force by Border Patrol in response to rock throwing has been a persistent issue for over a decade. Between 2010 and 2012, seven people other than Sergio Hernández were killed by agents while allegedly throwing rocks from the Mexico side of the border. Ted Robbins, *Border Killings Prompt Scrutiny Over Use of Force*, NPR (Nov. 24, 2012), <https://www.npr.org/2012/11/24/165822846/border-killings-prompt-scrutiny-over-use-of-force> [<https://perma.cc/CRU2-UTHL>].

13. *Id.*

After Sergio was killed, his family's civil suit against the border patrol agent who shot him, *Hernández v. Mesa*, reached the U.S. Supreme Court twice before resulting in a final judgment in February of 2020.¹⁴ The unsatisfactory result in the case raises questions about the ability of the United States judiciary to deliver justice in the face of factual situations that involve foreign nationals and law enforcement.

A. Criminal Charges?

Following a reportedly thorough and comprehensive investigation of the shooting, the United States government determined that Agent Mesa would not face criminal homicide charges or charges related to civil rights violations.¹⁵ Federal prosecutors declined to pursue homicide charges because, according to the government, there was insufficient evidence to prove that Agent Mesa's actions amounted to an unreasonable use of force or that his actions were inconsistent with Border Patrol policy.¹⁶ The Justice Department also concluded that under the applicable civil rights statutes, Agent Mesa did not act willfully to deprive Sergio of his constitutional rights and that there was not enough evidence to show that he acted with the deliberate and specific intent to violate the law.¹⁷ These determinations from the Justice Department raise concerns about the government's ability to police itself, adding weight to the call for an impartial, unbiased body of review. The decision not to press charges against Agent Mesa also speaks to the dangers of allowing a powerful, militarized federal agency to operate without meaningful accountability measures in place.

A press release announcing the decision expressly stated the United States' commitment to working with Mexico to bring justice for the Hernández family.¹⁸ Yet, the Obama Administration denied a request from the Mexican government to extradite Agent Mesa to Sergio's home country, where he still faces criminal homicide charges.¹⁹ The administration denied the request despite an existing extradition treaty between the United States and Mexico.²⁰ Left without potential remedy in terms of criminal prosecution, the Hernández family brought a civil suit seeking damages against Agent Mesa.²¹

14. See *Hernández v. Mesa*, 140 S. Ct. 735 (2020).

15. Federal Officials Close Investigation, *supra* note 5.

16. *Id.*

17. *Id.*

18. See *id.*

19. Romo, *supra* note 7.

20. See Protocol to Extradition Treaty with Mexico, Mex.-U.S., Nov. 13, 1997, Senate Treaty Documents 105-46.

21. *Hernández v. United States*, 802 F. Supp. 2d 834, 838 (W.D. Tex. 2011).

B. Civil Redress?

Following the conclusion of the Justice Department's investigation, the Hernández family was left with one option: bringing a constitutional challenge to Agent Mesa's use of force against their son in federal court.²² But, as a result of both common law and judicially created legal doctrine, it can be difficult to obtain civil redress following an injury caused by law enforcement officials.²³ Even when a case involves a seemingly blatant violation of constitutional rights, such a violation can be overlooked by courts in favor of deference to the decision-making powers of state or federal law enforcement.²⁴ *Hernández v. Mesa* demonstrates that when law enforcement's unconstitutional actions implicate foreign nationals, redress is likely near impossible.

Hernández v. Mesa's movement forward hinged on the question of whether the Hernández family, as citizens of Mexico, had legal standing to sue Agent Mesa, acting as an agent for the United States government, for damages resulting from the killing of their son.²⁵ The case was first filed in the U.S. District Court for the Western District of Texas, where the Hernández family alleged that, among other things,²⁶ their son's Fourth and Fifth Amendment rights were violated by Agent Mesa's fatal actions.²⁷ The District Court dismissed the claim and the dismissal was affirmed by the Fifth Circuit, which noted that Hernández was not entitled

22. In 1988, Congress passed the Westfall Act, which accords federal employees' absolute immunity from state common law tort claims arising out of acts they undertake in the course of their official duties. See 28 U.S.C. § 2679(b)(1). With common law claims barred, a suit alleging constitutional violations remained the only option for the family.

23. Qualified immunity often prevents lawsuits from moving forward. It is a judicially created doctrine that shields public officials from civil liability. WHITNEY K. NOVAK, CONG. RSCH. SERV., LSB10492, POLICING THE POLICE: QUALIFIED IMMUNITY AND CONSIDERATIONS FOR CONGRESS 1 (2020). The doctrine makes it difficult for citizens to successfully bring claims against police officers and federal agents, as it affords these actors a great deal of deference in their decision-making process, often at the "expense of accountability" and undermining of constitutional rights. *Id.* The doctrine "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

24. See generally Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995 (2017) (examining the widespread use of judicial deference to police officers within Fourth Amendment jurisprudence and arguing that courts in the twentieth century have invoked this deference in order to expand police authority in multiple areas of the law).

25. See *Hernández v. United States*, 785 F.3d 117, 119–20 (5th Cir. 2017) (per curiam).

26. The Hernández family also pursued claims under the Federal Tort Claims Act (FTCA) and the Alien Tort Statute (ATS). See *id.* Under the doctrine of sovereign immunity, which derives from British common law, the government cannot be sued without its consent. *Sovereign Immunity*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/sovereign_immunity [<https://perma.cc/KGW6-MZK5>]. The FTCA waives this immunity for numerous types of tort claims. *Id.* The ATS grants jurisdiction to U.S. federal courts over civil actions brought by foreign nationals for a tort in violation of international law or U.S. treaty. *Alien Tort Claims Act*, BRITANNICA, <https://www.britannica.com/topic/Alien-Tort-Claims-Act> [<https://perma.cc/7T62-W47D>].

27. See *Hernández*, 785 F.3d 117.

to Fourth Amendment protection because he was a “Mexican citizen who has ‘no significant voluntary connection’ to the United States” and “was on Mexican soil as the time he was shot.”²⁸ The Fifth Circuit also concluded that Agent Mesa was entitled to qualified immunity in regard to the alleged Fifth Amendment violations.²⁹

When the case reached the Supreme Court in February of 2020, the Hernández family was relying on an implied remedy for damages stemming from a 1971 Supreme Court case, *Bivens v. Six Unknown Named Agents*.³⁰ In that case, the Supreme Court held that despite the lack of express statutory permission, the plaintiff could sue federal agents who had broken into his home and arrested him on drug charges before questioning and strip searching him, in violation of the Fourth Amendment.³¹ Writing for the Court, Justice Brennan explained that when there are “no special factors counseling hesitation,” constitutional claims could be brought against federal agents even absent specific consent from Congress.³²

In the decade following *Bivens*, the Court extended the doctrine to cover two additional types of constitutional claims.³³ The first claim was established in *Davis v. Passman*.³⁴ In that case, a former staff member brought suit against a United States Congressman, alleging that he had discriminated against her on the basis of her sex, in violation of her Fifth Amendment rights.³⁵ The Court justified its role in widening *Bivens* in *Davis* by acknowledging that though Congress normally creates rights of action through legislation, “a cause of action may be implied directly under the equal protection component of the Due Process Clause of the Fifth Amendment[.]”³⁶ The second claim extended *Bivens* once more in *Carlson v. Green*³⁷ to include a federal prisoner’s Eighth Amendment claim against prison officials for failure to provide adequate medical treatment.³⁸ Since these two cases were decided, the Court has backtracked

28. *Id.* at 119.

29. *Id.* at 120; see NOVAK, *supra* note 23.

30. Hernández v. Mesa, 140 S. Ct. 735, 739, 741 (2020); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

31. *Id.* See KELSEY Y. SANTAMARIA, CONG. RSCH. SERV., LSB10361, BIVENS AT THE BORDER: SUPREME COURT TO CONSIDER WHETHER CROSS-BORDER SHOOTING CASE CAN PROCEED 4–5 (Nov. 7, 2019) for a prediction of how the issues outlined in *Bivens* would play out in *Hernández v. Mesa*.

32. *Bivens*, 403 U.S. at 396.

33. *Hernández*, 140 S. Ct. at 737.

34. See generally *Davis v. Passman*, 442 U.S. 228 (1979).

35. *Id.* at 231.

36. *Id.* at 242 (citing *Jacobs v. United States*, 290 U.S. 13, 54 (1933)).

37. *Carlson v. Green*, 446 U.S. 14 (1980).

38. *Id.* at 14.

on *Bivens* and narrowed the doctrine substantially.³⁹ Decisions from the more modern Court reflect a new tendency to exercise extreme caution in providing meaningful oversight for the unlawful actions of federal law enforcement under *Bivens*.⁴⁰ In fact, these three cases, *Bivens*, *Davis*, and *Carlson*, make up the entire body of precedent where “the Court has approved of an implied damages remedy under the Constitution”⁴¹ Justice Alito noted for the majority in *Hernández* that the holdings from *Bivens*, *Davis*, and *Carlson* were the result of an era when the Court regularly inferred causes of action that were not expressly present in the provision that was allegedly violated.⁴²

When *Hernández* reached the Supreme Court for the first time in 2017, the Justices vacated the Fifth Circuit’s decision, remanded the case, and instructed the lower court “to consider how the reasoning and analysis” of their most recent *Bivens* analysis, in *Ziglar v. Abbasi*, might affect its findings.⁴³ In *Abbasi*, the Court formalized a two-step inquiry for determining whether a set of facts allows for the proper extension of the *Bivens* doctrine.⁴⁴ First, the Court asked whether the plaintiff’s claims arose in a “new context” or involved a “new category of defendants.”⁴⁵ *Abbasi* defines “new” quite broadly, as any context that is “different in a meaningful way from previous *Bivens* cases” decided by the Court.⁴⁶ Second, if the Court finds that the context is “new,” it then determines whether any “special factors counse[l] hesitation” in granting the claim for damages to proceed.⁴⁷ This inquiry is focused on “whether the Judiciary is

39. In the years following *Carlson* and preceding *Hernández*, the Court dismissed a cause of action under *Bivens* at least nine times. See *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1869 (2017); *Minneci v. Pollard*, 565 U.S. 118, 120 (2012); *Wilkie v. Robbins*, 551 U.S. 537, 547-49 (2007); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 63 (2001); *FDIC v. Meyer*, 510 U.S. 471, 473 (1994); *Schweiker v. Chilicky*, 487 U.S. 412, 414 (1988); *United States v. Stanley*, 483 U.S. 669, 683084 (1987); *Chappell v. Wallace*, 462 U.S. 296, 304-05 (1983); *Bush v. Lucas*, 462 U.S. 367, 390 (1983).

40. See cases cited *supra* note 39. The Supreme Court recently granted certiorari in *Egbert v. Boule*, which presents questions on whether a plaintiff has a right to sue federal officers for First Amendment retaliation claims or for allegedly violating the individual’s Fourth Amendment rights while engaging in immigration-related functions. An opinion on this case which is set to be issued in June 2022 will likely provide further guidance on how the Supreme Court intends to handle *Bivens* cases going forward, specifically when Customs and Border Patrol agents allegedly violate a plaintiff’s constitutional rights. *Egbert v. Boule*, 998 F.3d 370 (9th Cir. 2021), *cert. granted*, 142 S. Ct. 457 (2021); *Egbert v. Boule*, OYEZ, <https://www.oyez.org/cases/2021/21-147> [<https://perma.cc/WSE5-2EP3>].

41. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017).

42. *Hernández v. Mesa*, 140 S. Ct. 735, 741 (2020).

43. *Id.* at 740.

44. *Abbasi*, 137 S. Ct. at 1859-60.

45. *Hernández*, 140 S. Ct. at 743 (2020) (quoting *Corr. Services Corp. v. Malesko*, 534 U.S. 61, 68 (2001)).

46. *Abbasi*, 137 S. Ct. at 1859.

47. *Id.* at 1857.

well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed.”⁴⁸

In *Abbasi*, the Court denied such an extension to noncitizen detainees who were held for immigration violations in the wake of the September 11 terrorist attacks.⁴⁹ The plaintiffs had attempted to sue federal executive officials and detention facility wardens, alleging that they had been physically and verbally abused, subjected to arbitrary strip searches, and subjected to prolonged detention in violation of their Fourth and Fifth Amendment rights.⁵⁰ The Court declined to extend the doctrine, holding that these facts bore little resemblance to the successful *Bivens* applications of the past.⁵¹ Moreover, the Court opined that considerations of national security cautioned hesitation about the involvement of the judicial branch.⁵²

Abbasi played a vital role in the Court’s ultimate reasoning in *Hernández*, with the majority promptly concluding that the case arose in a new context, distinct from the facts in *Bivens*, *Davis*, or *Carlson*.⁵³ In her dissent, Justice Ginsburg correctly pointed out that unlike in *Abbasi*, *Hernández* did not differ from *Bivens* with respect to the following:

[(1)] the rank of the officers involved; [(2)] the constitutional right at issue; [(3)] the generality or specificity of the official action; [(4)] the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; [or (5)] the statutory or other legal mandate under which the officer was operating.⁵⁴

From the majority’s perspective, the uniqueness of the cross-border nature of the shooting outweighed the existing similarities.⁵⁵

After the Court concluded that *Hernández* constituted a new context, the analysis proceeded to the second step of the inquiry that was developed in *Abbasi*.⁵⁶ Justice Alito stressed the following factors in the case that warranted the Court’s hesitation in extending *Bivens*: (1) the case had the potential to affect foreign relations, (2) the case implicated national security, and (3) if the doctrine were extended, the holding could possibly

48. *Id.* at 1858.

49. *See id.* at 1860.

50. *Id.* at 1847.

51. *Id.* at 1860.

52. *Id.* at 1861.

53. *See Hernández v. Mesa*, 140 S. Ct. 735, 744 (2020).

54. *Id.* at 756 n.3 (2020) (Ginsburg, J., dissenting (quoting *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1860 (2017))).

55. *Id.* at 744.

56. *Id.*

open up the doors to liability for other actions committed abroad by agents of the United States.⁵⁷

An amicus brief written on behalf of President Trump's administration reflected the ultimate decision of the Court.⁵⁸ The amicus brief stated that “[j]udicial examination of the government’s treatment of aliens outside the United States would inject the courts into sensitive matters of international diplomacy and risk ‘what [the Supreme] Court has called’ . . . [an] ‘embarrassment of our government abroad.’”⁵⁹ The Court acknowledged that decisions invoking foreign relations were best settled at the hands of the other branches of government through methods of diplomacy; however, it did not acknowledge that diplomacy had already failed to bring about a satisfactory result for the Hernández family.⁶⁰ In fact, in its amicus brief submitted to the court, Mexico had urged the Supreme Court to allow the suit to move forward, stating that:

When agents of the United States government violate fundamental rights of Mexican nationals and others within Mexico’s jurisdiction, it is a priority to Mexico to see that the United States has provided adequate means to hold the agents accountable and to compensate the victims. The United States would expect no less if the situation were reversed and a Mexican government agent had killed a U.S. national.⁶¹

The Court noted that both countries had important interests in the case; however, it ultimately exercised deference to the wishes of the United States Executive and emphasized that the two governments were already involved in diplomatic discussions about human rights conditions at the border.⁶²

The Court cautioned in *Abbasi* that “national-security concerns must not become a talisman used to ward off inconvenient claims.”⁶³ Yet it was quickly determined in *Hernández* that the case did not present one of those “inconvenient claims.”⁶⁴ The Mexican government stated in its brief that the case had “nothing to do with international terrorism, espionage, or any

57. *Id.* at 744–750.

58. Brief for the United States as Amicus Curiae Supporting Respondent at 18, *Hernández v. Mesa*, 140 S. Ct. 735 (2020) (No. 17-1678) (quoting *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985)).

59. *Id.*

60. See *Hernández*, 140 S. Ct. at 745.

61. Brief of the Government of the United Mexican States as Amicus Curiae in Support of the Petitioners at 2, *Hernández v. Mesa*, 140 S. Ct. 735 (2020) (No. 17-1678).

62. *Hernández*, 140 S. Ct. at 745.

63. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017).

64. See *Hernández*, 140 S. Ct. at 745–46.

other national security concerns.”⁶⁵ Instead, the case “arose in the context of ordinary law enforcement activities, just as if Sergio had been shot on U.S. soil.”⁶⁶ The Court again exercised restraint and concluded that the matter did implicate national security given that the primary responsibility of the U.S. Customs and Border Protection Agency is to “detect, respond to, and interdict terrorists, drug smugglers and traffickers, human smugglers and traffickers, and other persons who may undermine the security of the United States.”⁶⁷

During oral arguments for the case, Justice Gorsuch noted his concern for the limiting principle on torts that occur transnationally.⁶⁸ Agent Mesa’s attorney argued successfully along similar lines that extending *Bivens* in this context would open doors to unlimited liability for United States torts committed abroad.⁶⁹ The Court opined that the concern for the limiting principle, along with past intentions from Congress when shaping torts related statutes that carved out exceptions for incidents abroad, were enough to caution refrain in extending *Bivens* in *Hernández*.⁷⁰

Although the Court declined to explicitly state why a path to damages poses a threat to the separation of powers, Justice Alito combined these factors to highlight that *Hernández* was, at its core, about exercising caution in respecting the traditional roles of the legislative and executive bodies.⁷¹ He wrote that “[f]oreign policy and national security decisions are ‘delicate, complex, and involve large elements of prophecy’ for which ‘the Judiciary has neither aptitude, facilities[,] nor responsibility.’”⁷² The majority noted that their decision was motivated by a desire to avoid upsetting the “delicate web of international relations” that typically falls within Congress’s job description.⁷³ In regards to Justice Alito’s point about prior *Bivens* related decisions, he reemphasized that deference to

65. Brief of the Government of the United Mexican States as Amicus Curiae in Support of the Petitioners at 13, *Hernández v. Mesa*, 140 S. Ct. 735 (2020) (No. 17-1678).

66. *Id.* at 5.

67. *Hernández*, 140 S. Ct. at 746 (citing 6 U.S.C. § 211(c)(5)).

68. Oral Arguments at 10:50, *Hernández v. Mesa*, 140 S. Ct. 735 (2020) (No. 17-1678), <https://www.oyez.org/cases/2019/17-1678> [<https://perma.cc/EGQ4-KVLH>].

69. See Nick Sibilla, *Border Agents Shouldn't Get Sued for Shooting Foreigners, Trump Administration Tells Supreme Court*, FORBES (Nov. 13, 2019), <https://www.forbes.com/sites/nicksibilla/2019/11/13/border-agents-shouldnt-get-sued-for-shooting-foreigners-trump-administration-tells-supreme-court/?sh=77da84d8302c> [<https://perma.cc/JUY2-KA48>].

70. See *Hernández*, 140 S. Ct. at 747–50.

71. *Id.*

72. *Id.* at 749 (quoting *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018) (Gorsuch, J., concurring in part and concurring in judgment)).

73. *Id.*

congressionally created causes of action is a crucial point of judicial restraint.⁷⁴

Notably, during oral argument, Agent Mesa’s attorney cautioned that if the doctrine were to be extended in the context of incidents occurring on foreign soil, the United States could face liability for a situation such as a drone pilot “hitting the wrong village in Syria.”⁷⁵ This hypothetical scenario clearly demonstrates the need for oversight from international human rights bodies like the Inter-American System. The argument encourages immunity for serious human rights violations committed at the hands of the United States. And the decision in *Hernández* shows that this argument played some role in invoking restraint from the American judiciary rather than the implementation of meaningful measures of accountability. The decision in *Hernández* illustrates that the most powerful actors in the American system of governance are comfortable with denying meaningful oversight to its own agents, even when it means contradicting one of the most basic principles of American law—the assurance of a path forward for injured parties seeking redress.

II. THE INTER-AMERICAN SYSTEM FOR HUMAN RIGHTS

After the Supreme Court’s final decision in *Hernández*, the Hernández family fully exhausted potential domestic remedies.⁷⁶ Considering the majority opinion’s strong aversion to the potential implication of foreign relations, the Hernández family’s best hope for justice ironically stood with the Inter-American Commission on Human Rights, an autonomous body that operates as an offshoot of the Organization of American States (“OAS”).⁷⁷

The OAS is the world’s oldest collaborative governmental body.⁷⁸ The OAS was established to promote “an order of peace and justice”⁷⁹ among member states and to encourage collaboration while

74. *Id.* at 749–50.

75. Oral Arguments at 47:02, *Hernández v. Mesa*, 140 S. Ct. 735 (2020) (No. 17–1678), <https://www.oyez.org/cases/2019/17-1678> [<https://perma.cc/EGQ4-KVLH>].

76. The Inter-American System for the protection of human rights includes an individual petition system, which requires that the petitioner first exhaust domestic remedies before presenting a complaint to the Commission. See Organization of American States, American Convention on Human Rights art. 46(1)(a), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123. Because the petitioners in *Hernández* have taken their case to the highest court in the applicable jurisdiction, and judicial remedies are unavailable in Mexico, this requirement is likely satisfied.

77. See generally *What Is the IACHR?*, ORG. OF AM. STATES, <https://www.oas.org/en/iachr/mandate/what.asp> [<https://perma.cc/YNA7-J9XA>].

78. *Who We Are*, ORG. OF AM. STATES, http://www.oas.org/en/about/who_we_are.asp [<https://perma.cc/9E2A=RP8A>].

79. Charter of the Organization of American States art. 1.

simultaneously respecting the sovereignty⁸⁰ of individual nations.⁸¹ In 1948, the development of the modern Inter-American Human Rights System began with the signing of the OAS Charter and American Declaration of the Rights and Duties of Man (“American Declaration”), the world’s first major international documents on human rights.⁸² The American Declaration establishes basic human rights standards for each member state, including but not limited to the right to equality before the law, to due process of the law, to protection from arbitrary arrest, and the inviolability of the home.⁸³ The Declaration has evolved to serve as an authoritative interpretation of the “fundamental rights of the individual” included in the OAS Charter.⁸⁴ The United States signed both documents with the inclusion of a reservation⁸⁵ emphasizing that its own federal Constitution would remain supreme to the law codified in the OAS Charter.⁸⁶ The OAS Charter and the American Declaration were substantial steps toward developing universal standards for human rights law and are legally binding for the states parties to it.⁸⁷

In the decades that followed, the OAS worked with member states to create more robust mechanisms for international accountability in the western hemisphere.⁸⁸ The American Convention on Human Rights (“American Convention”) was the result of these efforts.⁸⁹ The American

80. “The persistent intervention of the United States into domestic affairs of its Latin American neighbors in the early part of the twentieth century stimulated Latin American efforts to establish a regional public order system based on the principles of non-intervention and the sovereign equality of states.” Robert K. Goldman, *History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights*, 31 HUMAN RIGHTS Q. 856, 859 (2009). The reasoning for the creation of the Inter-American system provides an interesting juxtaposition with the reasoning behind the Supreme Court’s decision in *Hernández*.

81. Today, the OAS has thirty-five member states and serves as the principal political, juridical, and social government forum for the Western hemisphere. *Id.*; Charter of the Organization of American States art. 1.

82. *See* Goldman, *supra* note 81, at 860.

83. *Id.*

84. *See* Joseph Diab, Note, *United States Ratification of the American Convention on Human Rights*, 2 DUKE J. COMP. & INT’L L. 324, 329 (1992).

85. A reservation to a treaty is defined as “a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.” Vienna Convention on the Law of Treaties art. 2(1)(d), May 23, 1969, 1155 U.N.T.S. 331.

86. *See* Charter of the Organization of American States (A-41), ORG. OF AM. STATES, http://www.oas.org/en/sla/dil/inter_american_treaties_A-41_charter_OAS_signatories.asp [https://perma.cc/VJ9C-M889].

87. *See* Goldman, *supra* note 80, at 860.

88. *See* Victor Rodriguez Rescia & Marc David Seitles, *The Development of the Inter-American Human Rights System: A Historical Perspective and a Modern-Day Critique*, 16 N.Y.L. SCH. J. HUMAN RIGHTS 593, 594–95 (2000).

89. *See* Goldman, *supra* note 80, at 861–66. The American Convention was negotiated at San José, Costa Rica in 1969, with the active participation of the United States. *See* Diab, *supra* note 84,

Convention, an “ambitious and far-reaching” binding treaty, outlines and elaborates on specific civil and political rights mentioned in the American Declaration.⁹⁰ It also provides for the establishment of the Inter-American Court and expands the authority of the Commission, which is empowered to receive petitions and decide cases against all OAS member states.⁹¹ The Commission is headquartered in Washington D.C. and is composed of seven independent members who are elected in an individual capacity by the OAS General Assembly and who do not represent their countries of origin.⁹² The organization examines allegations brought forth by petitioners, “and can make recommendations to the State responsible to restore the enjoyment of rights whenever possible, to prevent a recurrence of similar events, to investigate the facts and to make reparations.”⁹³ The Commission also has the authority to issue “precautionary measures” in response to a petition.⁹⁴ The precautionary measures mechanism is “designed to ensure a rapid response by the [Commission] in serious and urgent situations where there is an imminent risk of irreparable harm to persons or groups of persons in the 35 OAS member states.”⁹⁵ However, the Commission is restricted in its function in some ways. The Commission is limited to referring cases directed against states that have ratified the American Convention and that have expressly accepted the Court’s jurisdiction to the Inter-American Court, the judicial body capable of issuing legally binding judgments.

A. The Relationship Between the United States and the Inter-American Commission

The United States is one of few OAS Member States that has not ratified the American Convention or accepted the jurisdiction of the Inter-American Court of Human Rights.⁹⁶ Principally, the United States is reluctant to subject itself to the international obligations created by the

at 325. The Convention catalogs human rights to be protected in the region and provides for international monitoring and enforcement of those rights. *Id.*

90. See generally THOMAS ANTKOWIAK & ALEJANDRA GONZA, *THE AMERICAN CONVENTION ON HUMAN RIGHTS: ESSENTIAL RIGHTS* (2017).

91. See Goldman, *supra* note 81, at 866.

92. See *What Is the IACHR?*, *supra* note 77.

93. *Petition and Case System*, ORG. OF AM. STATES, <https://www.oas.org/en/iachr/mandate/petitions.asp> [<https://perma.cc/8DH3-N8YD>].

94. *Consultation on Module II: Precautionary Measures*, ORG. OF AM. STATES, https://www.oas.org/en/iachr/consultation/2_measures.asp#:~:text=The%20precautionary%20measures%20mechanism%20is,the%2035%20OAS%20member%20states [<https://perma.cc/3PEA-QZQY>].

95. *Id.*

96. Justin M. Loveland, *40 Years Later: It’s Time for U.S. Ratification of the American Convention on Human Rights*, 18 SEATTLE J. FOR SOC. JUST. 129, 132 (2020).

American Convention.⁹⁷ Thus, the Commission applies the principles of the American Declaration, rather than the Convention, when deciding cases against the United States.⁹⁸ Though the United States is technically obligated to uphold the rights defined in the OAS Charter *and* the American Declaration, it has reiterated explicitly before the Commission that it views the American Declaration as a non-binding instrument that does not create legal rights or impose binding legal obligations on signatory states.⁹⁹ In the past, when the Commission has issued decisions involving the United States, the United States has declined to take meaningful action to remedy the problems at the heart of the Commission's findings.¹⁰⁰ Instead, the United States has consistently treated the Commission's ordered remedies as merely optional recommendations.¹⁰¹

Though the United States has demonstrated its intentions to act passively in response to findings from the Commission on multiple occasions, there are plenty of reasons why a petitioner would seek to bring their case before the Inter-American system. In general, the organization has impartial, steadfast goals to foster strong, accountable democratic governance and promote the interests of sovereign citizens in furtherance of fundamental rights.¹⁰² For the Hernández family and their fellow petitioners, their efforts will likely further mainstream knowledge and understanding about the dangerous conditions and lack of accountability at the United States-Mexico border. A favorable decision from the Commission—a well-known and respected international agency—has the potential to illuminate the dangerous precedent of *Hernández v. Mesa*, which effectively indicates that United States law enforcement officers may shoot and kill unarmed children across the border without fear of repercussions. Even if a victory before the Commission lacks the practical effect required to give the Hernández family a sense of justice, it could prevent other families from facing similar tragedies by garnering international attention. The United States holds itself out to be a fiercely democratic nation that is committed to human rights, and the appearance of hypocrisy or double standards, particularly on issues of human rights,

97. Diab, *supra* note 84, at 327–28.

98. See Loveland, *supra* note 96, at 132–33.

99. INTER-AM. COMM'N ON HUM. RTS., HUMAN RIGHTS SITUATION OF REFUGEE AND MIGRANT FAMILIES AND UNACCOMPANIED CHILDREN IN THE UNITED STATES OF AMERICA 24 (2015).

100. See Michael Camilleri & Danielle Edmonds, An Institution Worth Defending: The Inter-American Human Rights System in the Trump Era 2 (The Dialogue, Working Paper, 2017), http://www.thedialogue.org/wp-content/uploads/2017/06/IACHR-Working-Paper_Download-Resolution.pdf [https://perma.cc/8Q5Q-8A6S].

101. *Id.*

102. *What Is the IACHR?*, *supra* note 77.

has the potential to undermine its position on the world stage. Lastly, the Commission's recommendations for how to remedy a human rights violation can include a wide range of solutions, making the body well suited for dealing with complicated issues that may not be solved by relief as simple as monetary damages.¹⁰³

In the past, the Commission has issued judgments against the United States that involve the thematic issues present in *Hernández*: the mistreatment of non-United States citizens and the inability to hold law enforcement accountable for their unlawful actions. That the Commission is fully familiar with and aware of these issues makes a stronger case for the important role that the Commission can play in addressing persisting issues festering in domestic systems. Specifically, the Commission has several years' experience remedying the abuses that occur on the southern border.¹⁰⁴ Beyond that, the Commission has also addressed the treatment of detainees at Guantanamo Bay in detail, acknowledging that the United States has duties under its international commitments to guarantee those held at Guantanamo the same rights it affords its citizens.¹⁰⁵ Responses from the Commission are examined below.

The Commission has spoken definitively on the poor conditions faced by migrants at the border and the United States' policies that have criminalized migration. Following a visit to the U.S.–Mexico border in 2019, the Commission reiterated that although the United States has the right to control its borders and establish its own migration policies, laws and practices must “respect and guarantee the human rights of all migrants, which are rights and freedoms that derive from their human dignity and that have been widely recognized by the States on the basis of the

103. For example, in 2020 the Commission issued a wide range of recommendations to the United States in a decision regarding a former Guantanamo Bay detainee. Press Release, Ctr. for Const. Rts., Inter-American Commission on Human Rights Issues Historic Decision on Former Guantanamo Detainee's Case (May 28, 2020) (on file with author). Some of the recommendations included:

the continuance of criminal investigations for the torture of [the petitioner] at Kandahar Airbase and Guantanamo Bay detention center; compensation for his years spent in arbitrary detention to address any lasting physical and psychological effects; medical and psychological care for his rehabilitation; and the issuance of a public apology by the United States president or any other high-ranking official to establish [the petitioner's] innocence.

Id.

104. See Press Release, Inter-Am. Comm'n of Hum. Rts., IACHR Visits Southern Border of United States Concerned about Situation of Unaccompanied Children and Families (Sept. 22, 2014) [hereinafter Southern Border] [<https://perma.cc/HAC6-EFXC>]; Press Release, Inter-Am. Comm'n on Hum. Rts., IACHR Expresses Deep Concern About the Situation of Migrants and Refugees in the United States, Mexico, and Central America (July 23, 2019) [hereinafter Deep Concern] [<https://perma.cc/NY7S-3XBK>].

105. See generally Djamel Ameziane v. United States, Case 12.865, Inter-Am. Comm'n H.R., Report No. 29/20, OEA/Ser.L./V/II., doc. 39 (2020).

international obligations[.]”¹⁰⁶ The Commission stated specific concern for lack of access to due process for asylum seekers and inhumane detention conditions.¹⁰⁷ More recently, the Commission has specifically focused some of its attention on conditions at the border, acknowledging patterns of mistreatment toward migrants at the hands of the U.S. Border Patrol Agents and other federal agencies.¹⁰⁸ Generally, the Commission’s communications and judgments relating to conditions at the border indicate a problematic pattern of abuses suffered by non-United States citizens.

In the United States, immigration legislation has never boasted a comprehensive framework capable of fully maintaining humanity and consistency at the United States–Mexico border. Exacerbated in recent years by extreme partisanship and politicization, reports of flagrant human rights abuses¹⁰⁹ and a dangerous culture of impunity within American Border Patrol and immigration agencies¹¹⁰ are not unusual. Violence playing out in the region has had a far-reaching effect, including on the lives of Sergio Hernández and his family. This same violence has contributed to the stark politicization of immigration related issues in the

106. Press Release, Inter-Am. Comm’n of Hum. Rts., IACHR Conducted Visit to the United States’ Southern Border (Sept. 16, 2019), https://www.oas.org/en/iachr/media_center/PReleases/2019/228.asp [<https://perma.cc/6DF8-AWZR>].

107. *Id.*

108. Southern Border, *supra* note 104; Deep Concern, *supra* note 104.

109. See Matthew Haag, *Thousands of Immigrant Children Said They Were Sexually Abused in U.S. Detention Centers, Report Says*, N.Y. TIMES (Feb. 27, 2019), <https://www.nytimes.com/2019/02/27/us/immigrant-children-sexual-abuse.html> [<https://perma.cc/2AEE-RQPK>]; *US Move Puts More Asylum Seekers at Risk: Expanded ‘Remain in Mexico’ Program Undermines Due Process*, HUM. RTS. WATCH (Sept. 25, 2019), <https://www.hrw.org/news/2019/09/25/us-move-puts-more-asylum-seekers-risk#> [<https://perma.cc/NT48-V37Y>]; John Washington, *Family Separations at the Border Constitute Torture, New Report Claims*, INTERCEPT (Feb. 25, 2020), <https://theintercept.com/2020/02/25/family-separations-border-torture-report/> [<https://perma.cc/5QS7-BWCJ>]; Press Release, Hum. Rts. First, *With Asylum Effectively Blocked at Southern Border, Those Seeking Safety Face Escalating Violence, Punishing Conditions* (May 13, 2020), <https://www.humanrightsfirst.org/press-release/asylum-effectively-blocked-southern-border-those-seeking-safety-face-escalating> [<https://perma.cc/2DJL-Q2FD>].

110. See Press Release, *America’s Voice, A Culture of Impunity and Dehumanizing Cruelty on Display at CBP* (July 10, 2019), https://americasvoice.org/press_releases/a-culture-of-impunity-and-dehumanizing-cruelty-on-display-at-cbp/ [<https://perma.cc/M7GA-LBJS>]; Charles Davis, *U.S. Customs and Border Protection Has Killed Nearly 50 People in 10 Years. Most Were Unarmed.*, NEW REPUBLIC (Jan. 4, 2015), <https://newrepublic.com/article/120687/border-patrol-officers-get-impunity-anonymity-immigrant-killings> [<https://perma.cc/GND2-A43G>]; Chris Rickerd, *Whistleblower Says CBP Has Culture of Impunity and Violence*, ACLU (Aug. 15, 2014), <https://www.aclu.org/blog/immigrants-rights/ice-and-border-patrol-abuses/whistleblower-says-cbp-has-culture-impunity-and> [<https://perma.cc/5ZNB-ETZV>].

United States, which fuels bias and creates barriers for migrants seeking redress to individual harms.¹¹¹

Apart from the treatment of migrants, the Commission has also monitored human rights violations at Guantanamo Bay, the United States-run detention center located in Cuba, since it first opened in 2002.¹¹² In 2015, the Commission urged for the immediate closure of the prison center, citing multiple incidents at the facility that had violated basic rights outlined in the American Declaration.¹¹³ In 2020, the Commission, applying the American Declaration, held that the United States had violated detainee Djamel Ameziane's following rights:

[R]ights to protection from arbitrary detention []; humane treatment, in connection with the rights to religious freedom, health and well-being, and protection of private and family life []; freedom of assembly, expression, and petition []; due process and access to effective legal remedies []; equality under the law []; . . . right to protection of honor and personal reputation[]; . . . and, right to property.¹¹⁴

In issuing reparations to Mr. Ameziane, the Commission included recommendations for continued criminal investigations into the torture and abuse faced by the petitioner, monetary compensation for lasting physical and psychological effects, medical and mental health care, the issuance of a public apology by the United States government, and a public declaration of the petitioners innocence.¹¹⁵ The results in this case perfectly demonstrate the benefits of the Commission and its nuanced approach to addressing individual harms. Through the issuance of nontraditional¹¹⁶ remedies that fall outside of the authority of U.S. courts,

111. See generally Peter Beinart, *Why America is Fighting About Immigration*, ATLANTIC (Jan. 26, 2018), <https://www.theatlantic.com/politics/archive/2018/01/politicians-immigration/551537/> [<https://perma.cc/BC7J-CFRW>].

112. INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, ORG. OF AM. STATES, TOWARDS THE CLOSURE OF GUANTANAMO 25 (2015), <http://www.oas.org/en/iachr/reports/pdfs/Towards-Closure-Guantanamo.pdf> [<https://perma.cc/5KEC-H9NF>] [hereinafter TOWARDS THE CLOSURE OF GUANTANAMO].

113. See *id.* at 39–108.

114. IACHR Finds U.S. Responsible for Torture, Refoulement of Guantanamo Detainee, INT'L JUST. RES. CTR. (June 10, 2020), <https://ijrcenter.org/2020/06/10/iachr-finds-u-s-responsible-for-torture-refoulement-of-guantanamo-detainee/> [<https://perma.cc/LA2U-L7LU>].

115. Press Release, Ctr. for Const. Rts., Inter-American Commission on Human Rights Issues Historic Decision on Former Guantanamo Detainee's Case (May 28, 2020) (on file with author), <https://ccrjustice.org/home/press-center/press-releases/inter-american-commission-human-rights-issues-historic-decision> [<https://perma.cc/3PN7-TD28>].

116. The remedies issued in the Ameziane case are not traditional to the U.S. legal system, but are traditional in other contexts, such as other human rights courts or indigenous dispute mechanisms. See generally Sean Burke, *Indigenous Reparations Re-Imagined: Crafting a Settlement Mechanism for Indigenous Claims in the Inter-American Court of Human Rights*, 20 MINN. J. INT'L L. 123 (2011).

the Commission can take a more holistic approach to accountability and justice.

While some may argue that there are practical barriers to implementing remedies such as the ones recommended by the Commission in Mr. Ameziane's case, the United States would nonetheless benefit from embracing them and working to ensure that they come to fruition. If the United States were to further investigate alleged criminal abuses at Guantanamo Bay and follow up by putting measures in place to ensure non-repetition, trust in governmental processes among both foreign governments and the American public may be bandaged and repaired. Many of the remedies recommended by the Commission focus on broader recognition of the long-lasting effects of the abuses that Mr. Ameziane suffered while detained, and official acknowledgement by the United States would lend itself toward reconciliation with formerly detained individuals and the community at large. The benefits of following through with the Commission's recommendations far outweigh any practical, financial, or resource driven arguments against implementing them.

The reports and judgments regarding Guantanamo Bay also illustrate another reason why Sergio Hernandez's case is well-suited for an international body. The Commission emphasizes that under the OAS Charter and the American Declaration, "the United States is not only obligated to respect the rights of all persons within its territory, but also of those present in the territory of another State but subject to the effective authority and control of its agents."¹¹⁷ In the Guantanamo cases, this principle meant that the Commission was "competent to monitor the international human rights obligations of the United States vis-à-vis the persons detained" therein.¹¹⁸ Also, there are strong arguments to be made that the area surrounding the United States' southern border is strictly controlled by U.S. Border Patrol.¹¹⁹ In the El Paso area, close to where Sergio was killed, Border Patrol employs approximately 2,400 agents and operates six permanent checkpoints along the border.¹²⁰ In 2019, Border Patrol apprehended 182,143 migrants in the El Paso area, a situation that has been called a "humanitarian crisis" by advocacy groups.¹²¹ Given the

117. TOWARDS THE CLOSURE OF GUANTANAMO, *supra* note 112, at 25.

118. *Id.*

119. See, e.g., Amelia Cheatham, Claire Felter & Zachary Laub, *How the U.S. Patrols Its Borders*, COUNCIL ON FOREIGN RELS. (Apr. 12, 2021), <https://www.cfr.org/backgroundunder/how-us-patrols-its-borders> [<https://perma.cc/A4KD-WEMB>].

120. Gloria I. Chavez, *El Paso Sector Texas*, U.S. CUSTOMS AND BORDER PROT. (June 29, 2020), <https://www.cbp.gov/border-security/along-us-borders/border-patrol-sectors/el-paso-sector-texas#:~:text=The%20El%20Paso%20Sector%20employs,268%20miles%20of%20international%20border.> [<https://perma.cc/5RX3-E892>].

121. Adam Isacson, "I Can't Believe What's Happening—What We're Becoming": A Memo from El Paso and Ciudad Juárez, WOLA (Dec. 19, 2019), <https://www.wola.org/analysis/i-cant->

United States' arguable "control" over the region, it was obligated to uphold Sergio's human rights under relevant treaties.¹²²

In the United States, commitment to insulating law enforcement from liability has resulted in judicially created doctrine that makes it difficult to bring a successful constitutional claim. The struggle to hold local law enforcement officials accountable is reflected in *Hernández* and in other Supreme Court cases that have ended up before the commission.¹²³ For example, the Commission addressed the lack of affirmative duties that law enforcement have to protect their communities, a rule that the Supreme Court affirmed in 2005.¹²⁴

In 2005, the U.S. Supreme Court held in *Castle Rock v. Gonzales* that the holder of a restraining order cannot bring a due process claim against a local police force for its failure to enforce the order and protect the holder from violence.¹²⁵ Jessica Gonzales, a victim of domestic violence, had requested a restraining order against her husband to prevent him from seeing her or their three children, which was granted by a state trial court.¹²⁶ Despite the order, Gonzales's children were kidnapped and later murdered by her husband.¹²⁷ In her suit against the city and its police force, Gonzales alleged that the officers who handled her case made no reasonable effort to enforce the restraining order or to locate her children subsequent to their kidnapping, which violated her right to procedural Due Process.¹²⁸ Following the Supreme Court's favorable decision for the Castle Rock police, Jessica Gonzales (hereinafter "Jessica Lenahan") filed a petition before the Inter-American Commission.

Before the Commission, the United States argued that cases analyzing governmental action are not a "matter of international human rights law" and should not "be second-guessed by international bodies."¹²⁹ The United States also took the position that the Commission lacks sufficient fact-finding abilities and is not a formal judicial body capable of

believe-whats-happening-what-were-becoming-a-memo-from-el-paso-and-ciudad-juarez/
[<https://perma.cc/XU8R-EC3P>].

122. For a look at how the Commission has interpreted this doctrine, see Report No. 112/10, Inter-state Petition IP-02 Admissibility Franklin Guillermo Aisalla Molina, Inter-American Commission on Hum. Rts. (Oct. 21, 2011), <https://www.refworld.org/cases,IACHR,4e2d27912.html> [<https://perma.cc/T4F7-ML39>].

123. See *Castle Rock v. Gonzales*, 545 U.S. 748 (2005); *Jessica Lenahan v. United States*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11 (2011).

124. See *Castle Rock*, 545 U.S. at 768–69 (2005).

125. *Id.* at 748.

126. *Id.* at 751–52.

127. *Id.* at 753–54.

128. *Id.* at 754.

129. *Jessica Lenahan v. United States*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11 (2011).

nuanced decision-making,¹³⁰ which further demonstrates the United States' view of recommendations from the Commission as a mere procedural obstacle, rather than a binding judgment from a well-established legal body. The Commission ruled on the merits in favor of Jessica Lenahan, recommending that the United States conduct a "serious, impartial and exhaustive investigation into system failures" related to law enforcement and reinforce the protection of women through legislative measures.¹³¹ Overall, looking at past cases against the United States that have been presented to the Commission, it is not difficult to comprehend the result that occurred in *Hernández*.

III. MEXICO'S EXAMPLE

One can look to Sergio's home country as an example of effective engagement with the Inter-American Commission. Despite significant systemic human rights problems in Mexico,¹³² the country regularly collaborates with the Commission and works to adopt its recommendations when its own domestic systems fail to adequately bring justice to wronged parties.¹³³

For example, the Commission facilitated an amicable settlement agreement between Mexico and the family of a Mexican student who was shot and killed in 1991.¹³⁴ Because of familial connections to the Mexican government, the crime was not investigated, the perpetrator of the crime was not held appropriately responsible for their actions, and the family was forced to file a petition before the Commission.¹³⁵ In the years following the settlement, the Commission confirmed that Mexico had acknowledged its failure to properly investigate the incident. Mexico subsequently conducted an investigation into the case, disbursed monetary compensation to the victim's family, provided health coverage to the

130. *Id.* at 12.

131. Press Release, Inter-Am. Comm'n of Hum. Rts., IACHR Publishes Report on Case Jessica Lenahan of the United States (Aug. 17, 2011), https://www.oas.org/en/iachr/media_center/preleases/2011/092.asp [<https://perma.cc/EG6M-7E9B>].

132. Mexico faces several human rights crises, including widespread forced disappearances, extrajudicial executions, and barriers to access to justice. Press Release, Inter-Am. Comm'n of Hum. Rts., IACHR Publishes Report on the Human Rights Situation in Mexico (Mar. 2, 2016), https://www.oas.org/en/iachr/media_center/preleases/2016/023.asp [<https://perma.cc/8W4B-9956>].

133. See Press Release, Inter-Am. Comm'n of Hum. Rts., IACHR Congratulates the State of Mexico on Its Full Compliance with Friendly Settlement Agreement (Apr. 20, 2020), https://www.oas.org/en/iachr/media_center/PReleases/2020/082.asp [<https://perma.cc/2LWY-DEV7>].

134. *Id.*

135. *Id.*

family, and commissioned a memorial plaque to preserve the history of the case.¹³⁶

In response to recommendations from the Commission, Mexico has gone beyond issuing reparations for individual harms and has even in some instances attempted to remedy systemic issues affecting the quality of human rights in the country. In 2006, in response to a case involving sexual assault that went before the Commission, Mexico issued a settlement agreement that not only paid substantial reparations to the victim but also included a commitment to legal reform that sought to ensure non-repetition.¹³⁷ Because of the case, a federal decree calling for the “development and implementation” of new medical guidelines for sexual assault victims paved the way for legislative change to partially decriminalize abortion in Mexico City.¹³⁸

Because domestic systems are subject to human error and institutional and political biases, it is unrealistic to expect them to operate successfully in every case. But, where there has been clear and irreparable harm done to an individual, there should be an option for redress if the domestic system does fail. For Mexico, the Commission works to provide individuals with this option, and the state’s cooperation allows for the two bodies to collaborate in upholding Mexico’s obligations under the western hemisphere’s main human rights treaties.¹³⁹ Rather than expressing doubt and concern about international interference, Mexico’s past interactions with the Commission demonstrate an understanding of a need for independent, impartial review of complicated cases.¹⁴⁰ Moreover, the Commission’s reports on Mexico’s reality—that it still has a long way to go to meet universal basic standards of human rights¹⁴¹—do not scare the

136. *Id.*

137. See *Paulina Ramírez v. Mexico (Inter-American Commission on Human Rights)*, CTR. FOR REPRODUCTIVE RTS. (2006), <https://reproductiverights.org/case/paulina-ramirez-v-mexico-inter-american-commission-on-human-rights/> [<https://perma.cc/V2SN-F724>].

138. *Id.*

139. See, e.g., Press Release, Govt. of Mexico, Mexico Takes in 173rd Period of Sessions of the Inter-American Commission of Human Rights (Sept. 27, 2019), <https://www.gob.mx/sre/prensa/mexico-takes-part-in-173rd-period-of-sessions-of-the-inter-american-commission-on-human-rights?idiom=en> (noting that in addition to attending the Commission’s public hearings, “the Mexican delegation participated in nine private meetings related to compliance with friendly settlement agreements and to the recommendations and precautionary measures issued by the [] Inter-American Commission, in order to establish and take the appropriate actions.”); Press Release, Govt. of Mexico, Mexico Takes Part in the 170th Session of the Inter-American Commission of Human Rights (Dec. 8, 2018), <https://www.gob.mx/sre/prensa/mexico-takes-part-in-170th-session-of-the-inter-american-commission-on-human-rights> (reiterating Mexico’s commitment to the Inter-American Human Rights System and stating that the “new administration’s doors are open to international scrutiny”).

140. See generally sources and accompanying text cited, *supra* note 139.

141. See generally INTER-AM. COMM’N ON HUM. RTS., THE HUMAN RIGHTS SITUATION IN MEXICO (Dec. 31, 2015).

state away from collaboration. Mexico's commitment to working with the Commission has brought redress to many parties and serves as an example of how a collaborative relationship can work in favor of the most vulnerable injured parties in a state.

CONCLUSION

In October 2020, the Hernández family, along with multiple other families of victims of cross-border shootings,¹⁴² announced that they were taking their pursuit of justice on behalf of their loved ones to the Commission.¹⁴³ The petition to the Commission serves as an opportunity to remedy their injuries through reparations and to encourage the United States government to acknowledge and change harmful policies that play out in tragic and inhumane ways at the U.S.–Mexico border.¹⁴⁴

The press release announcing the petition alleges that the “U.S. Border Patrol agents systematically engage in extrajudicial killings of Mexican citizens along the U.S.–Mexico border.”¹⁴⁵ Additionally, the petition points to the United States' obligations under International Human Rights treaties, specifically the American Declaration on the Duties and Rights of Man.¹⁴⁶ According to the petitioners, the Border Patrol Agent's tendency to use deadly force in the absence of imminent threat and the federal government's failure to adequately investigate killings at the border violate these obligations.¹⁴⁷

Along with the Hernández family, the petitioners in the international suit include the family of Jose Antonio Rodriguez, a sixteen-year-old who was shot in the back ten times; the family of a man who was shot and killed by Border Patrol Agents while he was having a picnic with his wife and

142. On October 10, 2012, sixteen-year-old José Antonio Elena Rodriguez was walking home in his neighborhood of Nogales, Mexico near the U.S.–Mexico border when he was shot and killed by a Customs and Border Protection Agent named Lonnie Swartz, who was standing in Arizona. *See Rodriguez v. Swartz*, 899 F.3d 719, 726 (9th Cir. 2018). The Ninth Circuit held that the case against Agent Swartz could move forward, but the decision was later vacated by the Supreme Court in light of its decision in *Hernández v. Mesa*. *See Swartz v. Rodriguez*, 140 S. Ct. 1258 (2020). José Antonio Elena Rodriguez's family is also part of the petition to the Inter-American Commission on Human Rights. Hilliard Martinez Gonzales, LLP, *United States Charged with Human Rights Abuses for Border Patrol Slayings*, CISION PR NEWSWIRE (Oct. 1, 2020), <https://www.prnewswire.com/news-releases/united-states-charged-with-human-rights-abuses-for-border-patrol-slayings-301144561.html> [<https://perma.cc/YSV3-3SKR>].

143. *See infra* Part II; Hilliard Martinez Gonzales, LLP, *supra* note 142. The press release discussed the petition and specifically refers to the United States' obligations under the American Declaration of the Rights and Duties of Man. *See id.*

144. *See* Hilliard Martinez Gonzales, LLP, *supra* note 142.

145. *Id.*

146. *Id.*

147. *Id.*

daughters; and three other families.¹⁴⁸ If meaningful steps are taken to engage in international human rights systems, the family of Sergio Hernández and so many others will have a pathway to justice that is no longer confined solely by the limits of the United States' federal government and judiciary.

Overall, past judgments issued from the Commission against the United States have encapsulated points of contention in American law and policy that highlight patterns of human rights abuses. Due to the lack of active participation in the Inter-American System, these weak spots are rarely addressed or taken seriously, and harmed individuals are left without access to a remedy. As long as the United States continues to brush off its human rights obligations under the OAS Charter and the American Declaration and ignore recommendations from the Commission, cases implicating the treatment of noncitizens and the lack of accountability for law enforcement, like *Hernández v. Mesa*, will continue to appear before the Commission. Thus, it is crucial that the United States embrace collaboration with the Commission and allow injured petitioners access to its recommended remedies. Indeed, doing so would further the United States' ability to deliver on its foundational promise to ensure a remedy is available to an individual whose rights have been violated.

148. *Id.*