

*Before the*

**INTER-AMERICAN COMMISSION ON  
HUMAN RIGHTS**

Family Members of Anastasio Hernández-Rojas,  
*Petitioners*

– v. –

United States,  
*Respondent.*

**COMPLAINT**

**March, 2016**

Submitted on Behalf of Petitioners by

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## I. STATEMENT OF CASE

The Petitioners are the family members of Anastasio Hernández Rojas who died on May 31, 2010 after he was brutally beaten by law enforcement agents.<sup>1</sup> Since 2010, agents of U.S. Customs Border and Protection (CBP), the largest law enforcement agency in the United States, have killed nearly fifty unarmed migrants and U.S. citizens at the U.S.-Mexico border. The victims include unarmed minors shot in the back and head, U.S. citizens killed while riding in moving vehicles, and a Mexican national who died after being beaten and shot with a Taser by CBP agents. With one exception, U.S. prosecutors have failed to file criminal charges against federal agents and officers and found that the agents' use of force was reasonable. CBP has taken no known disciplinary action against agents involved in these deaths. In many cases, family members of the victims are denied access to information about the investigation, including the identities of the responsible agents.

On May 28, 2010, CBP agents detained Anastasio Hernández Rojas, a long-time resident of San Diego and father of five. He was taken to a detention center where agents used escalating force against the unarmed and injured detainee. CBP agents punched, kicked, dragged, Tased, hogtied, and denied Anastasio medical attention. Autopsy reports confirmed that Anastasio suffered extensive injuries while in custody, including bruising and abrasions on his face and body, five broken ribs, and hemorrhaging of internal organs. Anastasio died after suffering a heart attack, cardiac arrest, and brain damage. His death was ruled a homicide.

Petitioners have long struggled to obtain redress for Anastasio's death. Actions and omissions by the United States have undermined these efforts. CBP was allowed control of the crime scene during an early and crucial stage of the investigation. CBP agents acted quickly to scatter eye-witnesses from the scene and destroyed images, video, and audio taken by witnesses of agents beating Anastasio. Police investigators did not start the criminal investigation or interview the agents who used force against Anastasio until the day after the beating. Criminal investigators interviewed few of the dozens of civilian eyewitnesses of the incident during the investigation. Prosecutors refused to provide Petitioners with information about the criminal investigation and failed to identify or interview key witnesses until two years after Anastasio's death. Despite video and audio evidence of the beating, prosecutors closed the criminal investigation on November 6, 2015 without pursuing any criminal charges against the agents.

The violence and impunity described by this Petition are not unique. To the contrary, Latinos, particularly undocumented migrants, are routinely the victims of excessive use of force at the U.S.-Mexico border. The vast majority of abuses and misconduct by CBP agents remain shrouded in absolute impunity. Indeed, a recent government investigation of CBP's use of force policy and disciplinary system found that the system was so broken it failed to effectively deter abuse or misconduct by CBP agents.

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<sup>1</sup> Roxanna Altholz, Associate Director of the International Human Rights Law Clinic, University of California, Berkeley, School of Law (Boalt Hall) and Andrea Guerrero, Executive Director of Alliance San Diego represent Petitioners: María Puga (Anastasio's partner); María de la Luz Rojas (Anastasio's mother); Porfirio Hernández (Anastasio's father); Bernardo Hernández Rojas (Anastasio's brother); Martín Hernández Rojas (Anastasio's brother); Daisy Alejandra Hernández (Anastasio's daughter).

The American Declaration on the Rights and Duties of Man (“American Declaration” or “Declaration”) prohibits torture, excessive use of force, and discrimination. The American Declaration also protects the rights of family members to an effective remedy and personal integrity. In addition, the Declaration requires States to protect against violations of the right to life and personal integrity by law enforcement by adopting reasonable measures to prevent violations, investigate deaths, and in cases where violations may have occurred, to prosecute perpetrators and provide family members with redress.

Petitioners bring this case to vindicate violations of their human rights guaranteed by the American Declaration. The United States is responsible for torturing and arbitrarily depriving Anastasio of his life in violation of Articles I, XXV, and XXVI of the American Declaration. The United States also failed to conduct an independent, impartial, or prompt criminal investigation of Anastasio’s death or provide his family members full reparations in violation of Articles I and XVIII. The impact of Anastasio’s death as a result of excessive use of force by law enforcement followed by the United States’ failure to effectively clarify the facts and punish those responsible violates Articles I and XXVI. Finally, the United States is responsible for ineffective laws, procedures, and policies related to use of force. The laws and policies have a disparate impact on undocumented migrants at the U.S.-Mexico border and amount to discrimination under Articles I and II.

Petitioners respectfully request that the Inter-Commission on Human Rights (“Inter-American Commission” or “Commission”) expedite the initial processing of this Petition in accordance with Article 29(2) of the Rules of Procedure of the Inter-American Commission on Human Rights (“Rules of Procedure”). This Petition addresses structural and legal factors that have legitimated the use of excessive force by law enforcement against persons of color in the United States. Additionally, Petitioners respectfully request that the Commission declare this Petition admissible and find the United States has violated Anastasio Hernández Rojas and his relatives’ rights enshrined in Articles I, II, XVIII, XXV, and XXVI of the American Declaration.

## II. FACTUAL AND PROCEDURAL BACKGROUND

### A. The Killing of Anastasio Hernández Rojas

Anastasio Hernández Rojas was born on May 2, 1968 to Porfirio Hernández Rojas and Maria de la Luz Rojas Olivo in the city of San Luis Potosi, Mexico. He was the third oldest of nine children.<sup>2</sup> At the age of fifteen, Anastasio moved to San Diego, California to seek work and help support his family.<sup>3</sup> At twenty-one, Anastasio met Maria de Jesus Puga Moran. Over the course of twenty years, the couple had five children, all born in San Diego: Yeimi Judith (born March 20, 1990), Daisy Alejandra (born April 16, 1992), Fabian Anastasio (born September 19, 1998), and the twins Daniel

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<sup>2</sup> Third Amended Complaint (Mar. 23, 2012) (Ex. 1) at 5. Anastasio siblings in order of birth are Porfirio Martin Hernandez Rojas, Juan Ricardo Hernandez Rojas, Bernardo Hernandez Rojas, Benjamin Noe Hernandez Rojas, Jesus Daniel, Claudia Judit Hernandez Rojas, Erica Margarita Hernandez Rojas, and Pedro Paulo Hernandez Rojas.

<sup>3</sup> *Id.* at 5.

and Daniela (born March 29, 2006).<sup>4</sup> Anastasio supported his family by working in construction and demolition.<sup>5</sup>

On May 10, 2010, Mexican Mother's Day, Anastasio was arrested for allegedly stealing grocery items for his family and detained in the United States.<sup>6</sup> Two weeks later, he was removed from the United States to Mexico.<sup>7</sup> On May 28, 2010, he attempted to rejoin his family in San Diego by re-entering the United States with his brother, Pedro Hernández Rojas.<sup>8</sup> CBP agents apprehended Anastasio and Pedro, and transported them to the Chula Vista Border Patrol Facility and Detention Center ("Chula Vista" or "the facility").<sup>9</sup> After a search, agents found that Anastasio and Pedro were carrying only a gallon of water and ham sandwiches.<sup>10</sup>

Upon arrival at the Chula Vista facility, Border Patrol agent Gabriel Ducoing ("Ducoing") directed Anastasio to put the water he was carrying into a trashcan.<sup>11</sup> When Anastasio poured the water out of the jug into the trashcan, Ducoing became angry.<sup>12</sup> He slapped the water jug out of Anastasio's hands, pushed Anastasio against a wall, and repeatedly kicked his ankles apart.<sup>13</sup> Anastasio cried out in pain and asked, "Why are you doing this to us? Why are you hitting us? We haven't done anything wrong."<sup>14</sup> Ducoing retorted, "You don't want to be beaten?"<sup>15</sup> Ducoing then handcuffed Anastasio and took him to an interview room.<sup>16</sup> There, Anastasio complained that Ducoing had injured his ankle,<sup>17</sup> which had been broken years before and was held together by a metal screw.<sup>18</sup> During the interview, Anastasio complained about the pain, rubbed his ankle, and requested the opportunity to appear before an immigration judge.<sup>19</sup> At no time during the interview did Ducoing inform his supervisor that Anastasio had complained about mistreatment or requested medical attention, as required by CBP policy.<sup>20</sup>

Anastasio was then taken to a processing area and handcuffed to a bench. While in the processing area, Anastasio repeatedly requested medical treatment, asked for the opportunity to make a phone call, asserted his right to appear before an immigration judge, and complained about mistreatment.<sup>21</sup> After hours in the processing area, the Facility Supervisor Agent Ismael Finn ("Finn") spoke with Anastasio who repeated his request for medical care and complaints of mistreatment.

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<sup>4</sup> *Id.* at 6.

<sup>5</sup> *Id.* at 5.

<sup>6</sup> San Diego Police Department, San Diego Regional Arrest Report (May 5, 2010) (Ex. 2) at 5.

<sup>7</sup> Motion for Summary Judgment by Customs and Border Protection Officer S (May, 31, 2013) (Ex. 3) at 11.

<sup>8</sup> *Id.*

<sup>9</sup> Declaration of Border Patrol Agent Jose Galvan (May 17, 2013) [hereinafter Declaration of Galvan] (Ex. 4).

<sup>10</sup> Transcript of Videotaped Deposition of Philip J. Krasielwicz (Dec. 19, 2012) [hereinafter Deposition of Krasielwicz] (Ex. 5) at 51:11-16.

<sup>11</sup> Transcript of Videotaped Deposition of Gabriel Ducoing (Dec. 19, 2010) [hereinafter Deposition of Ducoing] (Ex. 6) at 27:15 – 28:8.

<sup>12</sup> San Diego Police Department, Transcript of Interview of Pedro Hernandez (May 29, 2010) [hereinafter Interview of Hernandez] (Ex. 7) at 15. *See* Chula Vista Camera Video (May 28, 2010) (Ex. 8); Chula Vista Camera Video with Outline of Ducoing (May 28, 2010) (Ex. 9)

<sup>13</sup> Third Amended Complaint Ex. 1 at 7.

<sup>14</sup> Interview of Hernandez Ex. 7 at 15.

<sup>15</sup> *Id.* at 15.

<sup>16</sup> Plaintiff's Response in Opposition to All Defendants' Motions for Summary Judgment (Sept. 11, 2013) (Ex. 10) at 4.

<sup>17</sup> *Id.* at 4.

<sup>18</sup> County of San Diego Autopsy Report (Jun. 1, 2010) [hereinafter County Autopsy Report] (Ex. 25) at 10.

<sup>19</sup> Plaintiff's Response in Opposition to All Defendants' Motions for Summary Judgment Ex. 10 at 16-17.

<sup>20</sup> *Id.* at 17.

<sup>21</sup> Third Amended Complaint Ex. 1 at 8.

Rather than taking action to address Anastasio's complaints, Supervisor Finn ordered his agents to immediately remove Anastasio from the United States to Mexico.<sup>22</sup>

Agents later stated that Anastasio did not behave like a "typical alien" during processing.<sup>23</sup> Unlike "typical aliens" who quietly face the wall, agents reported that Anastasio talked loudly, looked directly at the agents, and complained about the agents' mistreatment.<sup>24</sup> One CBP agent, Philip Krasielwicz ("Krasielwicz") reported feeling disdain for Anastasio because he had complained in a loud voice and failed to show Krasielwicz the respect that he wanted as an officer.<sup>25</sup> Another agent, Jose Galvan ("Galvan"), testified that Anastasio's behavior during processing was "out of the norm" because he did not comply with instructions to remain quiet, but gesticulated and talked loudly.<sup>26</sup> Finn testified that Anastasio was "vocal and argumentative."<sup>27</sup> Agent Sandra Cardenas ("Cardenas") explained that Finn arranged for Anastasio to be transported to Mexico right away because he was disrespectful and problematic.<sup>28</sup>

Finn instructed Ducoing and Krasielwicz, the same agents Anastasio had complained about earlier, to transport Anastasio in handcuffs to the Whiskey 2 area at the San Ysidro Port of Entry for removal to Mexico.<sup>29</sup> Anastasio's brother Pedro, with whom he was detained, was not transported to the border and remained at the Chula Vista facility.<sup>30</sup> As Anastasio noticeably limped toward the transport vehicle, he complained that he had difficulty walking.<sup>31</sup>

Agents took Anastasio to an area known as Whiskey 2. Whiskey 2 was the primary area for deportations and was also known as the "Deportation Gate". It was an enclosed and secured area where access was restricted to federal officials.<sup>32</sup> Once at Whiskey 2, Ducoing and Krasielwicz exited the vehicle and removed Anastasio's handcuffs. Agents testified that as they un-handcuffed him, Anastasio lowered his hands to his waist instead of putting them on top of his head as instructed<sup>33</sup> and "moved around too much".<sup>34</sup> Ducoing and Krasielwicz "grabbed" Anastasio and, according to agents, a struggle ensued.<sup>35</sup> Two Immigration and Customs Enforcement ("ICE") agents, Andre Piligrino ("Piligrino") and Harinzo Narainesingh ("Narainesingh"), quickly intervened and used retractable steel batons to repeatedly strike Anastasio's chest and diaphragm.<sup>36</sup> Piligrino and Narainesingh swung their batons widely and struck Ducoing and Krasielwicz who yelled for them to stop.<sup>37</sup> During the course

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<sup>22</sup> Plaintiff's Response in Opposition to All Defendants' Motions for Summary Judgment Ex. 10 at 19.

<sup>23</sup> Declaration of Galvan Ex. 4 at ¶6.

<sup>24</sup> *Id.* at ¶¶ 6-8.

<sup>25</sup> Plaintiff's Response in Opposition to All Defendants' Motions for Summary Judgment Ex. 10 at 18.

<sup>26</sup> Declaration of Galvan Ex. 4 at ¶6.

<sup>27</sup> Plaintiff's Response in Opposition to All Defendants' Motions for Summary Judgment Ex. 10 at 90.

<sup>28</sup> Transcript of Sandra Cardenas SDPD Audio Interview (May 29, 2010) (Ex. 11) at 11-12.

<sup>29</sup> Plaintiff's Response in Opposition to All Defendants' Motions for Summary Judgment Ex. 10 at 30.

<sup>30</sup> *Id.* at 90.

<sup>31</sup> *Id.* at 30.

<sup>32</sup> *See* Photograph of Whiskey 2 area (Sept. 11, 2011) (Ex. 15).

<sup>33</sup> Plaintiff's Response in Opposition to All Defendants' Motions for Summary Judgment Ex. 10 at 30.

<sup>34</sup> *Id.* at 31.

<sup>35</sup> *Id.* at 31.

<sup>36</sup> *Id.* at 31, 159. Agent Piligrino testified about his training on baton use at the Federal Law Enforcement Training Center, stating that proper areas for baton use are the thigh, the calves, and the arms; secondary areas to strike are the mid-section and joints, and an officer cannot strike the cranium, sternum, spine or chest. *Id.* at 38. One autopsy noted a long "railroad track" hematoma ¾-inch deep and 1.5-inch long in his abdomen. *Id.* at 16.

<sup>37</sup> Plaintiff's Response in Opposition to All Defendants' Motions for Summary Judgment Ex. 10 at 6, 146.

of depositions, agents offered contradictory accounts of Anastasio's reactions: Ducoing and Krasielwicz testified that Anastasio had not punched the agents, while Piligrino and Narainasingh insisted that Anastasio punched all four agents.<sup>38</sup> According to agent testimony, Anastasio and the four agents then fell to the ground, with Anastasio on his stomach.<sup>39</sup> A fifth officer, CBP agent Derrick Llewellyn ("Llewellyn") arrived on the scene.<sup>40</sup> Anastasio's hands were handcuffed behind his back as Ducoing, Krasielwicz, and Piligrino pressed him facedown into the pavement, holding him by the legs, the waist, and the side.<sup>41</sup>

Immobilized on the ground, Anastasio cried out for help in Spanish.<sup>42</sup> His cries drew the attention of passersby and a group of witnesses gathered on a pedestrian bridge that overlooked the Whiskey 2 area.<sup>43</sup> From this vantage point, witnesses used cameras and cell phones to record the incident.<sup>44</sup> Two additional CBP Agents, Alan Boutwell ("Boutwell") and Kurt Sauer ("Sauer") arrived and joined the five other officers.<sup>45</sup> Together, the officers tried to force Anastasio into the back seat of a SUV vehicle, but Anastasio braced his feet against the door of the vehicle.<sup>46</sup> Officers then dragged Anastasio, who was still handcuffed, behind the SUV and again placed him, face-down on the pavement.<sup>47</sup> According to witnesses, agents kneeled on the back of Anastasio's neck and on his lower back, while others repeatedly punched, kicked, and stepped on his head and body.<sup>48</sup>

According to eye witness accounts, Anastasio did not try to harm the officers.<sup>49</sup> Two more vehicles arrived on the scene, and according to witnesses, one of the agents exited his vehicle and "went straight to Hernández, who was still on the ground (in handcuffs), and kicked him ... hard, like a soccer kick."<sup>50</sup> Witnesses then observed CBP agent Jerry Vales ("Vales") arrive at the scene and yell for Anastasio to "stop resisting," although Anastasio was handcuffed on the ground and not moving.<sup>51</sup> Additional agents arrived on the scene, and by this point, between fifteen and twenty-five agents were present.<sup>52</sup> Vales then warned the other officers that he intended to use his Taser X26 weapon.<sup>53</sup> The agents surrounded Anastasio, and partially blocked him from the view of eyewitnesses.<sup>54</sup> Video

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<sup>38</sup> *Id.* at 16.

<sup>39</sup> *Id.* at 32.

<sup>40</sup> *Id.* at 35.

<sup>41</sup> *Id.* at 17. In her deposition, Ashley Young testified that she observed only one officer holding Anastasio down by kneeling on his back, and another officer pacing nearby. She saw two more officers arrive on ATVs and together the officers tried to place Anastasio in the SUV. Transcript of Videotaped Deposition of Ashley Young (Jan. 24, 2013) [hereinafter Deposition of Young] (Ex. 12) at 24-26.

<sup>42</sup> Deposition of Young Ex. 12 at 91:16-18.

<sup>43</sup> See Photograph of Whiskey 2 area (Sept. 11, 2011) (Ex. 15).

<sup>44</sup> Third Amended Complaint Ex. 1 at 9.

<sup>45</sup> *Id.*

<sup>46</sup> Deposition of Young Ex. 12 at 93:13-94.

<sup>47</sup> Transcript of Videotaped Deposition of Humberto Navarrete (Jan. 9, 2013) [hereinafter Deposition of Navarrete] (Ex. 14) at 155:13-15; 156:20-157:9.

<sup>48</sup> Transcript of Videotaped Deposition of Sergio Gonzalez-Gomez (Jan. 10, 2013) [hereinafter Deposition of Gonzalez-Gomez] (Ex. 13) at 66:4-9; 74:8-20.

<sup>49</sup> Deposition of Young Ex. 12 at 223:2-20. See also Plaintiff's Response in Opposition to All Defendants' Motions for Summary Judgment Ex. 10 at 86-87, 96-97.

<sup>50</sup> Deposition of Navarrete Ex. 14 at 149:10-152:5.

<sup>51</sup> Deposition of Young Ex. 12 at 100:7-19.

<sup>52</sup> San Diego Police Department, Interview of Rafael Barriga [hereinafter Interview of Barriga] (Ex. 16) at ¶¶ 2.

<sup>53</sup> Deposition of Ducoing Ex. 6 at 82:2-6; Deposition of Krasielwicz Ex. 5 at 102:20 – 103:16.

<sup>54</sup> Deposition of Young Ex. 12 at 111:20 – 112:1; 112:9-10; Plaintiff's Response in Opposition to All Defendants' Motions for Summary Judgment Ex. 10 at 49, 52. See Videos Taken by Humberto Navarrete (May 28, 2010) [hereinafter Navarrete's Videos] (Ex. 22).



recording by witnesses nonetheless captured Vales administer multiple Taser X26 shocks while Anastasio laid on the ground in a fetal position with his hands handcuffed behind his back.<sup>55</sup>

Vales activated the Taser X-26 at least four times, according to the Taser's log, a program on the device that records the occurrence and duration of each shock.<sup>56</sup> This log recorded that the first and second administrations lasted five seconds, the third thirteen seconds, and the fourth for twelve seconds.<sup>57</sup> Of these four Taser X-26 activations, at least two successfully shocked Anastasio.<sup>58</sup> For the final shock, the agent set the Taser X26 to "drive stun" mode, and applied the twelve-second shock directly to Anastasio's chest, rather than through the darts.<sup>59</sup> Pilgrino testified that for this final shock, Vales applied the Taser directly to Anastasio's chest, which caused Anastasio to convulse until the Taser was removed.<sup>60</sup>

A witness recorded Anastasio's cries for help as he was beaten and subsequently Tased:

[Anastacio] "Que les hago?" (What did I do?)

[Anastacio] "Ayudenme." (Help me)

[Anastacio] "Ah. No! No! Ayuda! Ayúdenme! Ya! Por favor! Señores ayúdenme! Ay, ay, ay."

(Ah. No! No! Help! Help me! Please! People help me! Ay, ay, ay.)

[Male's voice] "Stop resisting"

[Anastacio] "Ayuden me por favor!" (Help me please! )

[Anastacio] "Me tratan como un animal" "Ah, ah, ah. No. Ayuda. No! Ay ay." ("You're treating me like an animal") ("Ah, ah, ah. No. Help. No! Ay ay.")

[Female voice] "Ya dejenlo!" (Leave him alone!)

[Anastacio] "No!"

[Female voice] "Hay, esta madre!" (Damn, this shit!)

[Anastacio] "No. No. No. Ay! No. No! Quitenmelo! Mama! Ay! No!" (No. No. No. Oh! No. No! Take him off me! Mother! Ay! No! ").<sup>61</sup>

On the same video recording, at least one witness can be heard yelling at the officers "Why are you guys using excessive force on him? He is not resisting!"<sup>62</sup>

After the final administration of the Taser, officers swarmed Anastasio and again pressed him facedown with knees on his head and in his back, which restricted his ability to breathe.<sup>63</sup> A witness testified that he observed officers punch Anastasio repeatedly in the ribs for "sessions of 10 to 15

<sup>55</sup> Videos Taken by Ashley Young (May 28, 2010) [hereinafter Young's Videos] (Ex. 17) at 00:01 – 00:11.

<sup>56</sup> Plaintiff's Response in Opposition to All Defendants' Motions for Summary Judgment Ex. 10 at 8, 88-89.

<sup>57</sup> *Id.*

<sup>58</sup> Transcript of Videotaped Deposition of Glenn N. Wagner, D.O., (Oct. 4, 2012) [hereinafter Deposition of Wagner] (Ex. 18) at 13:10-11.

<sup>59</sup> Transcript of Videotaped Deposition of Guillermo Avila (Jan. 25, 2013) [hereinafter Deposition of Avila] (Ex. 19) at 40:1-25. Unlike other settings on the X26 Taser, which primarily aim to forcefully immobilize the victim, the "drive stun" mode does not incapacitate. Instead, the sole purpose of use in "drive stun" mode is to cause localized pain, or as ensure "pain compliance," as law enforcement refer to it. Cheryl W. Thompson & Mark Berman, *Improper Technique, Increased Risks*, WASHINGTON POST (Nov. 26, 2015), <http://www.washingtonpost.com/sf/investigative/2015/11/26/improper-techniques-increased-risks/>.

<sup>60</sup> Transcript of Videotaped Deposition of Andre T. Pilgrino (Dec. 18, 2012) [hereinafter Deposition of Pilgrino] (Ex. 20) at 32:8-18; 143:21-23.

<sup>61</sup> Transcripts of Humberto Navarrete's Videos (May 28, 2010) [hereinafter Transcript of Navarrete's Videos] (Ex. 21).

<sup>62</sup> *Id.* See also Navarrete's Videos Ex 22.

<sup>63</sup> Plaintiff's Response in Opposition to All Defendants' Motions for Summary Judgment Ex. 10 at 9; Transcript of Videotaped Deposition of Alan R. Boutwell (Nov. 29, 2012) [hereinafter Deposition of Boutwell] (Ex. 23) at 81:24-87:25.

seconds” while kneeling on his neck and back.<sup>64</sup> Officers then held Anastasio’s legs in a crossed “x” position.<sup>65</sup> Video shows a flashlight illuminating the scene with Anastasio on the ground facedown, and the legs of an officer kneeling on his head and neck.<sup>66</sup> Video also shows officers removing Anastasio’s pants.<sup>67</sup> Officers bound Anastasio’s ankles, zip-tying them to his already handcuffed hands.<sup>68</sup>

Still facedown, now handcuffed and bound, Anastasio became motionless.<sup>69</sup> Officers nudged him with their feet but Anastasio did not move.<sup>70</sup> Officers waited approximately two minutes before beginning CPR.<sup>71</sup> An ambulance arrived at the scene five to fifteen minutes after Anastasio became unresponsive.<sup>72</sup>

Anastasio was taken by ambulance to Sharp Chula Vista Hospital.<sup>73</sup> His brain was deprived of oxygen for eight minutes as a result of a heart attack he suffered at some point during the beating and Tasing.<sup>74</sup> Anastasio was diagnosed with an anoxic brain injury (the death of brain cells due to oxygen deprivation) secondary to his resuscitated cardiac arrest and was pronounced brain dead by physicians, when he was admitted to the hospital on the evening of May 29, 2010.<sup>75</sup> He remained briefly on life support until he went into asystole or cardiac standstill (also known as “flatlining”) and was pronounced dead on May 31, 2010 at 4:30 p.m.<sup>76</sup> Anastasio was forty-two years old.<sup>77</sup>

Anastasio’s death certificate reports his immediate cause of death as anoxic encephalopathy (i.e. brain damage caused by a lack of oxygen to the brain), with secondary causes listed as resuscitated cardiac arrest, acute myocardial infarct, and physical altercation with law enforcement officers.<sup>78</sup> Two autopsies were performed. Glenn N. Wagner, the chief medical examiner for San Diego County, performed the first autopsy on June 1, 2010.<sup>79</sup> The second was performed by Dr. Marvin Pietruszka, a board certified anatomic and clinical pathologist and the civil plaintiffs’ medical expert, on June 4, 2010.<sup>80</sup> In the first autopsy, Dr. Wagner confirmed that Anastasio’s [right or left] ankle had a previous injury and a metal screw and noted:

blunt force injuries of the forehead, right side of face, lips, flank, abdomen, hands and lower legs . . . The abdominal injury which shows underlying soft tissue hemorrhage is

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<sup>64</sup> Deposition of Navarrete Ex. 14 at 130:2-131:18..

<sup>65</sup> Deposition of Boutwell Ex. 23 at 81:24-87:25.

<sup>66</sup> Young’s Videos Ex. 17 at 00:01 – 00:11.

<sup>67</sup> *Id.* at 01:35 – 01:39.

<sup>68</sup> Plaintiff’s Response in Opposition to All Defendants’ Motions for Summary Judgment Ex. 10 at 66-67.

<sup>69</sup> Interview of Barriga Ex. 16 at ¶¶ 387-89.

<sup>70</sup> Plaintiff’s Response in Opposition to All Defendants’ Motions for Summary Judgment Ex. 10 at 57-58.

<sup>71</sup> Transcript of Videotaped Deposition of Kurt R. Sauer (Nov. 29, 2012) [hereinafter Deposition of Sauer] (Ex. 24) at 62:8-13.

<sup>72</sup> Interview of Barriga Ex. 16 at ¶¶ 403-11.

<sup>73</sup> *Id.* at ¶¶ 729-33.

<sup>74</sup> County Autopsy Report (Ex. 25) at 2.

<sup>75</sup> *Id.* at 1; Transcript of Videotaped Deposition I of Maria Puga (Jan. 23, 2013) [hereinafter Deposition I of Puga] (Ex. 26) at 89:6 – 90:9. Plaintiff’s Response in Opposition to All Defendants’ Motions for Summary Judgment Ex. 10 at 60.

<sup>76</sup> Marvin Pietruska, M.D., J.D., F.C.A.P, Autopsy (June 4, 2010) [hereinafter Expert Autopsy] (Ex. 27) at 7-10.

<sup>77</sup> Plaintiff’s Response in Opposition to All Defendants’ Motions for Summary Judgment Ex. 10 at 10.

<sup>78</sup> County Autopsy Report Ex. 25 at 1.

<sup>79</sup> *Id.* at 4.

<sup>80</sup> Expert Autopsy Ex. 27.

consistent with a collapsible baton strike. . . The puncture marks over the right flank and left buttock are believed to be Taser marks.<sup>81</sup>

Dr. Pietruszka noted there were contusions, abrasions, and bruises on the following areas of Anastasio's body: the right jaw, the upper jaw, the cheek area, both hands, right wrist, right thigh, extensive hematoma extending into the posterior paravertebral musculature near the left scapula (running along the upper left side of his back), abrasions of both knees and buttocks, contusions and abrasions of the upper and lower lips, the upper gum line, the left anterior chest, the left upper abdomen, the right pelvis, the left inner thigh, the right forearm, and the right anterior tibial region of the leg.<sup>82</sup> Dr. Pietruszka additionally noted that Anastasio sustained five broken ribs.<sup>83</sup>

Both autopsies ruled the manner of death a homicide.<sup>84</sup> When asked if the use of Tasers contributed to Anastasio's death, Dr. Wagner (the first physician to perform an autopsy) states, "There's no question in my mind."<sup>85</sup> He concluded that "I have no choice but to determine the manner of death as homicide . . . [His] heart attack . . . is clearly the result of oxygen deprivation to the whole heart . . . And the only way I know that you can get that is with an arrhythmia that oftentimes is triggered by a surge of norepinephrine or a blow to the chest."<sup>86</sup>

Anastasio's killing has had profound and serious on-going emotional, mental, and economic consequences for his family. Anastasio was a loving and attentive father who enjoyed spending time with his children. He would plan family outings to the beach, park, and the movies, and enjoyed coloring with children and sharing meals with his family. He was also a hard worker and the family's primary source of economic support. His death deprived his partner of more than twenty-years, Maria, and his five children of his love, affection, and support.

Moreover, the family must contend with the horror of how he died. When Maria and Bernardo, the brother of Anastasio, first arrived to the hospital on May 29, 2010, border patrol officers were guarding Anastasio's room and the hospital denied them entry.<sup>87</sup> After the Mexican consulate and advocates intervened, Maria and other members of the family were allowed to see Anastasio shortly before he died.<sup>88</sup> Only two of Anastasio's children (Daisy and Fabian) were able to see their father before he passed away.<sup>89</sup> The children's last image of their father is of his severely bruised and beaten body on life support.<sup>90</sup> The three other children, including the twins, Daniel and Daniela, who were only 4 years old at the time, did not have a chance to say goodbye to their father before he died. The children have been traumatized by their father's killing. Daniel (Anastasio's youngest son) feels lonely, sad, and cries often, and Daniela (Anastasio's youngest daughter) also cries often and does not socialize at school.<sup>91</sup> Fabian (Anastasio's oldest son), who was eleven when his father died, was angry

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<sup>81</sup> County Autopsy Report Ex. 25 at 9.

<sup>82</sup> Expert Autopsy Ex. 27 at 2-5.

<sup>83</sup> *Id.* at 2.

<sup>84</sup> County Autopsy Report Ex. 25 at 4; Autopsy Ex. 27 at 8.

<sup>85</sup> Deposition of Wagner Ex. 18 at 210:13-20.

<sup>86</sup> *Id.* at 107:1 – 108:20.

<sup>87</sup> Transcript of Videotaped Deposition II of Maria Puga (Feb. 1, 2013) [hereinafter Deposition II of Puga] (Ex. 28) at 89:6 – 90:9.

<sup>88</sup> *Id.* at 90:3-9.

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

<sup>90</sup> Plaintiff's Response in Opposition to All Defendants' Motions for Summary Judgment Ex. 10 at 23.

<sup>91</sup> Deposition I of Puga Ex. 26 at 141:20 – 141:25.

and despondent after his father's death; he saw a psychiatrist for five months and was prescribed antidepressants.<sup>92</sup>

Anastasio's partner, parents, brothers, and children have relentlessly sought justice. Anastasio's family brought a civil case against the agents responsible for Anastasio's death,<sup>93</sup> consistently requested information about the criminal investigation, and traveled to Washington, D.C. to meet with federal authorities. During almost six years, Anastasio's family have participated in countless protests, organized campaigns, and made numerous media appearances with the aim of ensuring that Anastasio's death does not remain shrouded in impunity and no family experiences the anguish and pain they have suffered.

## B. Pattern of Killings and Abuses by CBP

Since Anastasio's death, CBP agents have killed at least forty-six Mexican and U.S. nationals along the U.S.-Mexico border. CBP is the largest law enforcement agency in the United States with over 60,000 employees.<sup>94</sup> Roughly twenty-thousand CBP agents monitor U.S. borders and enforce U.S. immigration laws.<sup>95</sup> CBP agents have the authority to apprehend individuals they suspect of violating immigration laws within one hundred miles of the border. Given this broad authority, the killings have occurred in diverse settings—ports of entry, suburbs of major U.S. cities like San Diego, remote rural areas, and Mexico.

Border killings have involved three scenarios: (1) foreign nationals killed in Mexico by CBP agents (i.e. a CBP agent shoots across the border killing a Mexican national); (2) foreign nationals killed in the United States by CBP agents; and (3) U.S. citizens killed in the United States by CBP agents. The victims include unarmed minors shot in the back and head, U.S. citizens killed while riding in moving vehicles, and Mexican nationals who died after being beaten, shot with Taser guns. The vast majority of victims are undocumented, Mexican migrants.<sup>96</sup> In the majority of border killings, a CBP agent has killed either an individual who allegedly threw a rock near the agent or an occupant of a moving vehicle.<sup>97</sup> In 2010, CBP reported that agents had responded to rock-throwing incidents with lethal force 43 times, resulting in 10 deaths.<sup>98</sup>

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<sup>92</sup> *Id.* at 3.

<sup>93</sup> See Third Amended Complaint Ex. 1.

<sup>94</sup> *Careers*, U.S. CUSTOMS & BORDER PROTECTION, <http://www.cbp.gov/careers> (last visited Mar. 19, 2016).

<sup>95</sup> The majority of the remaining 40,000 CBP agents screen passengers and cargo at ports of entry. *See id.*

<sup>96</sup> INTERNATIONAL HUMAN RIGHTS LAW CLINIC, ELUSIVE JUSTICE: PURSUING LEGAL REDRESS IN THE UNITED STATES AND MEXICO FOR KILLINGS BY U.S. BORDER AGENTS 64-71 (2015) [hereinafter ELUSIVE JUSTICE], <https://www.law.berkeley.edu/wp-content/uploads/2015/09/Working-Paper-Elusive-Justice-LARGE-FINAL.pdf>.

<sup>97</sup> POLICE EXECUTIVE RESEARCH FORUM, U.S. CUSTOMS & BORDER PROTECTION—USE OF FORCE REVIEW: CASES AND POLICIES 8–9 (2013) [hereinafter USE OF FORCE REVIEW], <http://www.cbp.gov/sites/default/files/documents/PERFReport.pdf>.

<sup>98</sup> Memorandum from Michael J. Fisher, Chief of U.S. Border Patrol, on Use of Safe Tactics and Techniques, to U.S. Customs and Border Protection Personnel 1 (Mar. 7, 2014) [hereinafter Memorandum on Use of Safe Tactics and Techniques], <https://www.cbp.gov/sites/default/files/documents/Use%20of%20Safe%20Tactics%20and%20Techniques.pdf>. Additionally, CBP policy requires agents to orally report information about any use of force to supervisors, including “[t]he identity and current location of any injured or deceased person(s), an assessment of the extent of their injuries and whether medical assistance has been requested.” U.S. CUSTOMS & BORDER PROTECTION, USE OF FORCE POLICY, GUIDELINES & PROCEDURES HANDBOOK 17 (2014), <http://www.cbp.gov/sites/default/files/documents/UseofForcePolicyHandbook.pdf>. CBP practice is most likely to inform local police of deaths resulting from use of force. Since 2013, CBP agents have killed at least five unidentified individuals. *Border Patrol Abuse Since 2010*, SOUTHERN BORDER COMMUNITIES COALITION, <http://soboco.org/border-patrol-brutality-since-2010/> (last visited Mar. 20, 2016).

The extra-judicial killings of undocumented migrants are part of a larger systemic pattern of violence by CBP with deep historical roots. There is a record of state and mob violence targeting Mexicans dating back to the 1800s.<sup>99</sup> Between 1848 and 1928, U.S. mobs and law enforcement murdered thousands of Mexicans.<sup>100</sup> More recent efforts by U.S. Border Patrol to prevent illegal crossings have been linked to an increase in deaths of undocumented migrants.<sup>101</sup> CBP agents are routinely accused of a range of abuses, including racial profiling, illegal stops and searches, mistreatment, and excessive use of force.<sup>102</sup> Eleven percent of respondents to a survey of recently repatriated migrants reported some form of physical abuse by border patrol agents.<sup>103</sup> Approximately 6% of respondents reported suffering lasting injuries and 3% reported sexual abuse while in U.S. custody.<sup>104</sup>

CBP's use of force policy establishes the conditions under which CBP agents may use lethal force. CBP policy authorizes agents to use lethal force if an agent has a "reasonable belief" that the subject poses imminent danger of death or serious physical injury to the agent or another person.<sup>105</sup> Though the policy appears facially neutral, the standard grants CBP agents broad discretion that has resulted in the disproportionate and illegal use of excessive force against undocumented migrants. Prior to 2014, CBP condoned the use of deadly force in response to rock throwers and allowed CBP agents to intentionally put themselves into the path of fleeing in vehicles.<sup>106</sup> These policies resulted in the death of numerous undocumented migrants.<sup>107</sup>

Agents are also trained on the use of non-lethal force. CBP's policies on Taser use are not publically available. During depositions, however, CBP agents confirmed that they are trained that the use of Tasers increases the danger of positional or restraint asphyxia and are instructed to avoid placing detainees in restraints on their stomach.<sup>108</sup> Three years after Anastasio's death, the Police Executive Research Forum (PERF) released a critical review of CBP use of force policies.<sup>109</sup> PERF recommended that CBP update its *Use of Force Handbook* to clarify that the use of electronic control weapons (Tasers) should be limited to situations in which the subject is resisting in a manner that will cause injury.<sup>110</sup> PERF also recommend that Tasers should be applied "for one standard cycle (five seconds) and then evaluate the situation to determine if subsequent cycles are necessary."<sup>111</sup> PERF

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<sup>99</sup> Richard Delgado, *The Law of the Noose: A History of Latino Lynching*, 44 HARV. C.R.-C.L. L. REV. 297, 299 (2009).

<sup>100</sup> See William D. Carrigan & Clive Webb, *The Lynching of Persons of Mexican Origin or Descent in the United States, 1848 to 1928*, 37 J. SOC. HIST. 411, 413 (2003) (citing this number and declaring it conservative).

<sup>101</sup> *Border Patrol History*, U.S. CUSTOMS & BORDER PROTECTION, <http://www.cbp.gov/border-security/along-us-borders/history> (last visited Mar. 19, 2016).

<sup>102</sup> JAMES LYALL, AMERICAN CIVIL LIBERTIES UNION OF ARIZONA, RECORD OF ABUSES, LAWLESSNESS AND IMPUNITY IN BORDER PATROL'S INTERIOR ENFORCEMENT OPERATIONS 2 (2015), [http://www.acluaz.org/sites/default/files/documents/Record\\_of\\_Abuse\\_101515\\_0.pdf](http://www.acluaz.org/sites/default/files/documents/Record_of_Abuse_101515_0.pdf).

<sup>103</sup> DANIEL E. MARTINEZ ET AL., AMERICAN IMMIGRATION COUNCIL, BORDERING ON CRIMINAL: THE ROUTINE OF MIGRANTS IN THE REMOVAL SYSTEM PART I: MIGRANT MISTREATMENT WHILE IN U.S. CUSTODY 4 (2013) [hereinafter BORDERING ON CRIMINAL].

<sup>104</sup> *Id.*

<sup>105</sup> Memorandum on Use of Safe Tactics and Techniques, *supra* note 98.

<sup>106</sup> USE OF FORCE REVIEW, *supra* note 97, at 6–7 (recommending that CBP's policy should explicitly prohibit the use of lethal force in response to rock throwers and subjects in moving vehicles).

<sup>107</sup> *Id.* at 8–9.

<sup>108</sup> Deposition of Ducoing Ex. 6 at 77:23–78:5.

<sup>109</sup> USE OF FORCE REVIEW, *supra* note 97.

<sup>110</sup> *Id.* at 19.

<sup>111</sup> *Id.*

further recommends that personnel “consider that exposure to the [Taser] for longer than 15 seconds (whether due to multiple applications or continuous cycling) may increase death or serious injury.”<sup>112</sup>

Officers and agents are also trained to use collapsible batons on “green,” “yellow,” and “red” zones on the human body.<sup>113</sup> The green zones are the proper areas for baton strikes and include muscle areas such as thighs, calves, and arms; strikes in this area are permitted in order to stop a subject who is threatening officers.<sup>114</sup> The yellow zone consists of the mid-section and joints.<sup>115</sup> Strikes in the yellow zone can inflict serious injury.<sup>116</sup> Officers are not permitted to strike within the red zone, which includes the head, spine, groin and chest, because strikes in these areas can be lethal.<sup>117</sup>

CBP policies on use of force have not effectively prevented incidence of abuse and misconduct. Indeed, reports of abuse and misconduct by CBP agents are pervasive and systemic.

### C. Pattern of Impunity for Killings

Successful disciplinary, civil, or criminal actions against U.S. border agents are exceedingly rare. CBP’s system for handling complaints of abuse and misconduct is largely ineffective. In a 2016 report, a panel of government experts concluded that the CBP’s “discipline system [was] broken” and “undermined the deterrence goals of discipline.”<sup>118</sup> It is unknown whether CBP agents involved in a killing on the U.S-Mexico border have ever been subject to disciplinary action. To date, no known civil plaintiff in a border killing case has won at trial.<sup>119</sup> Only a handful of federal claims involving killings on U.S. soil have survived dismissal and settled out of court. Criminal prosecutions for CBP killings are also remarkably rare. The U.S. Department of Justice (DOJ) has closed all but one criminal investigation of a border killing without pursuing charges. In the last twenty years, state authorities have only indicted two CBP agents for a border killing, but failed to obtain convictions in both cases.<sup>120</sup>

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<sup>112</sup> *Id.*

<sup>113</sup> Transcript of Videotaped Deposition of Harinzo R. Narainesingh (Dec. 18, 2012) [hereinafter Deposition of Narainesingh] (Ex. 29) at 28:9–12.

<sup>114</sup> Deposition of Piligrino Ex. 20 at 73:1–6; Deposition of Narainesingh Ex. 29 at 30:17–23.

<sup>115</sup> Deposition of Piligrino Ex. 20 at 73:1–6; Deposition of Narainesingh Ex. 29 at 28:9–12.

<sup>116</sup> Deposition of Narainesingh Ex. 29 at 30:9–11.

<sup>117</sup> *Id.* at 35:23–25; Deposition of Piligrino Ex. 20 at 73:1–6.

<sup>118</sup> HOMELAND SECURITY ADVISORY COUNCIL, FINAL REPORT OF THE CBP INTEGRITY ADVISORY PANEL 21 (2016) [hereinafter CBP INTEGRITY ADVISORY PANEL REPORT],

[https://www.dhs.gov/sites/default/files/publications/HSAC%20CBP%20IAP\\_Final%20Report\\_FINAL%20%28accessible%29\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/HSAC%20CBP%20IAP_Final%20Report_FINAL%20%28accessible%29_0.pdf).

<sup>119</sup> ELUSIVE JUSTICE, *supra* note 96.

<sup>120</sup> In 1994, Arizona prosecutors brought homicide charges in state court against CBP agent Michael Andrew Elmer. *Arizona v. Elmer*, No. 4:92-CR-456-JMR (D. Ariz. July 14, 1992). Elmer had shot Dario Miranda Valenzuela twice in the back with a high-powered rifle as the victim fled toward the border. Sebastian Rotella, *ExBorder Patrol Agent Acquitted in 1992 Slaying*, L.A. TIMES, Feb. 4, 1994, [http://articles.latimes.com/1994-02-04/news/mn-19149\\_1\\_border-patrol-academy](http://articles.latimes.com/1994-02-04/news/mn-19149_1_border-patrol-academy). Elmer suspected the twenty-six-year-old Mexican national of smuggling drugs and, after shooting him, dragged him to a ravine to hide his body. *Id.* Elmer also failed to call for medical assistance or report the event. *Arizona v. Elmer*, 21 F.3d 331, 333 (9th Cir. 1994). Arizona prosecutors charged Elmer with first-degree murder, civil rights violations, aggravated assault, and obstruction of justice. The case was removed to federal court and a federal jury acquitted Elmer, who claimed he had acted in self-defense. *Id.* Over a decade later in 2007, Arizona prosecutors brought homicide charges in state court against CBP agent Nicholas Corbett for the shooting death of Francisco Javier Dominguez Rivera. *Arizona v. Corbett*, No. S-0800-CR-200700536 (Cochise County Superior Court 2007). Dominguez Rivera was trying to cross into the United States from Mexico with his brother and two others when Corbett stopped the group. At trial, the victim’s brother testified that the victim had started to kneel when Corbett hit his head from behind and shot him through the heart at close range. Arthur H. Rotstein, *Witness: Agent Shot Surrendering Migrant*, TUCSON CITIZEN, Feb. 28, 2008, <http://tucsoncitizen.com/morgue/2008/02/28/78175-witness-agent-shot>

The shield of impunity protecting CBP agents from legal accountability is the result of historical factors and buttressed by ineffective administrative, civil, and criminal processes. Since 2001, CBP has rapidly increased the number of agents without implementing effective procedures to ensure agents are held accountable for misconduct and abuses.<sup>121</sup> A 2012 report by the Congressional Research Service on corruption investigations and prosecutions of CBP agents concluded that the agency had failed to assess the effectiveness of screening tools used for hiring, to adequately implement oversight controls (such as periodic polygraphs or background investigations), or to develop a comprehensive strategy to prevent, detect, and investigate corruption by agents.<sup>122</sup> One study concluded that CBP's Internal Affairs Office failed to take any disciplinary action in 97% of complaints about physical, sexual, and verbal abuse.<sup>123</sup>

Victims of border killings and their relatives struggle to access justice in U.S. courts. While civil claims offer the possibility of monetary compensation and access to information about the killings, they carry significant limitations. In the civil context, claims are unavailable to victims killed in Mexico because, in most cases, U.S. law does not protect Mexican nationals killed in Mexico.<sup>124</sup>

As for victims killed in the United States, civil claims face procedural hurdles and formidable legal defenses. Sovereign immunity has barred most civil suits against the U.S. government and federal officers. The purpose of sovereign immunity is to shield the U.S. government from suits by private individuals unless the government agrees to be sued.<sup>125</sup> Courts have viewed a lawsuit against a U.S. officer in his official capacity as an action against the U.S. government.<sup>126</sup> Under this approach, courts have held that CBP agents involved in killings at the border are entitled to sovereign immunity when

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surrendering-migrant/. Dominguez Rivera, a twenty-two year-old Mexican national who had been working in New York City for five years, died at the scene. *Id.* Corbett claimed he had acted in self-defense. Prosecutors charged Corbett with first-degree murder, second-degree murder, manslaughter, and negligent homicide under Arizona law. *See id.* The first-degree murder charge was dismissed following a preliminary hearing in Cochise County Justice Court shortly after the charges were brought. Notice of Removal at 2, *Arizona v. Corbett*, No. 4:07-cr-01508-DCB-BPV (D. Ariz. Aug. 23, 2007). The case was removed to federal court, where the trial proceeded on the state counts. Gentry Braswell, *Removal to Federal Court Goes Unopposed*, DOUGLAS DISPATCH, Aug. 31, 2007, [http://www.douglasdispatch.com/news/removal-to-federal-court-unopposed/article\\_b41ba140-961a-511f-9fdc-78411b668acb.html](http://www.douglasdispatch.com/news/removal-to-federal-court-unopposed/article_b41ba140-961a-511f-9fdc-78411b668acb.html). The case went to trial twice in federal court in Arizona, and both times ended in hung juries. Arthur H. Rotstein, *No 3rd Trial of Agent in Immigrant's Death*, TUCSON CITIZEN, Dec. 12, 2008, <http://tucsoncitizen.com/morgue2/2008/12/12/108973-no-3rd-trial-of-agent-in-immigrant-s-death/>.

<sup>121</sup> According to CBP, “the number of Border Patrol Agents [increased] by more than 50 percent from August 2006 through December 2009.” DEPARTMENT OF HOMELAND SECURITY OFFICER OF INSPECTOR GENERAL, CBP USE OF FORCE TRAINING AND ACTIONS TO ADDRESS USE OF FORCE INCIDENTS 3 (2013) [hereinafter CBP USE OF FORCE TRAINING AND ACTIONS TO ADDRESS USE OF FORCE INCIDENTS], [https://www.oig.dhs.gov/assets/Mgmt/2013/OIG\\_13-114\\_Sep13.pdf](https://www.oig.dhs.gov/assets/Mgmt/2013/OIG_13-114_Sep13.pdf).

<sup>122</sup> U.S. GOVERNMENT ACCOUNTABILITY OFFICE, BORDER SECURITY: ADDITIONAL ACTIONS NEEDED TO STRENGTHEN CBP EFFORTS TO MITIGATE RISK OF EMPLOYEE CORRUPTION AND MISCONDUCT 1 (2012), <http://www.gao.gov/products/GAO-13-59>; *See also* U.S. GOVERNMENT ACCOUNTABILITY OFFICE, BORDER SECURITY: U.S. CUSTOMS AND BORDER PROTECTION PROVIDES INTEGRITY-RELATED TRAINING TO ITS OFFICERS AND AGENTS THROUGHOUT THEIR CAREERS 7 (2012), <http://gao.gov/products/GAO-13-769R> (stating that CBP still had not developed a comprehensive integrity plan as of August 2013).

<sup>123</sup> DANIEL E. MARTINEZ ET AL., AMERICAN IMMIGRATION COUNCIL, NO ACTION TAKEN: LACK OF CBP ACCOUNTABILITY IN RESPONDING TO COMPLAINTS OF ABUSE 8 (2014) [hereinafter NO ACTION TAKEN], <http://www.immigrationpolicy.org/sites/default/files/docs/ipc/Border%20-%20Abuses%20FINAL.pdf>.

<sup>124</sup> *See Hernandez v. United States*, 785 F.3d 117 (5th Cir. 2015) (dismissing claims involving Mexican teenager fatally shot in Mexico because teenager was standing in Mexico when shot). *Compare Rodriguez v. Swartz*, 111 F.Supp. 3d 1025 (D. Ariz. 2015) (upholding claims involving Mexican teenager fatally shot in Mexico). This issue is currently pending before the U.S. Supreme Court. *Cases—Hernandez v. Mesa*, SCOTUS BLOG, <http://www.scotusblog.com/case-files/cases/hernandez-v-mesa/> (last visited Mar. 20, 2016).

<sup>125</sup> *See United States v. Mitchell*, 463 U.S. 206, 212–13 (1983).

<sup>126</sup> *Balser v. Department of Justice, Office of United States Trustee*, 327 F.3d 903, 907 (9th Cir. 2003) (holding any lawsuit “against an officer of the United States in his or her official capacity is considered an action against the United States.”).

sued in their *official* capacity. Other claims have been dismissed under the doctrine of qualified immunity which protects public officials from being sued for certain constitutional violations that did not violate “clearly established rights” when the violation was committed.<sup>127</sup> In 2015, an U.S. appeals court held that when a CBP agent fatally shot fifteen-year-old Mexican teenager across the border in Mexico in 2010, there was no “clearly established” law confirming that the U.S. Constitution could apply to injuries suffered in Mexico.<sup>128</sup> A small number of civil cases have overcome these hurdles<sup>129</sup> and even obtained monetary settlements,<sup>130</sup> while several other cases have been dismissed.<sup>131</sup> A few civil cases are ongoing.<sup>132</sup>

Redress through the U.S. criminal justice system is even less likely. Although state and federal prosecutors have the authority to bring criminal charges against CBP agents, they have rarely done so. Federal authorities have closed all but one criminal investigation into CBP killings without pursuing criminal charges.<sup>133</sup> In late 2015, a federal grand jury indicted CBP agent Lonnie Swartz for the second-degree murder of sixteen-year-old José Antonio Elena Rodríguez. On October 10, 2012, CBP agent Swartz opened fire into Mexico—emptying his .40 caliber pistol, reloading, then pulling the

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<sup>127</sup> See *Butz v. Economou*, 438 U.S. 478, 498 (1978).

<sup>128</sup> *Hernandez v. United States*, No. 11-50792, 2015 WL 1881566, at \*2 (5th Cir. Apr. 24, 2015). One additional consideration is exhaustion of administrative remedies. In some circumstances, plaintiffs must exhaust local remedies before filing their claims in court. A failure to exhaust local remedies may result in the dismissal of the cause of action. The ATS does not contain an exhaustion provision. See Regina Waugh, *Exhaustion of Remedies and the Alien Tort Statute*, 28 BERKELEY J. INT’L L. 555, 555 (2010). In general, most courts have not imposed an exhaustion requirement on ATS claimants. In contrast, courts have applied an exhaustion requirement in *Bivens* cases when a statute applicable to the underlying constitutional claim so requires. See, e.g., *Nyhuis v. Reno*, 204 F.3d 65, 67 (3d Cir. 2000) (discussing the PLRA’s mandatory exhaustion requirement). Finally, the FTCA sets forth administrative remedies which must be exhausted prior to filing suit. An FTCA suit will be dismissed for lack of subject matter jurisdiction if the plaintiff fails to exhaust administrative remedies. See, e.g., *McNeil v. United States*, 508 U.S. 106, 112 (1993).

<sup>129</sup> See e.g., *Rodríguez v. Swartz*, 111 F.Supp. 3d 1025 (D. Ariz. 2015) (Mexican teenager fatally shot in Mexico); *Estate of Anastasio Hernandez-Rojas v. United States*, 62 F.Supp. 3d 1169 (S.D. Cal. 2014) (Mexican national beaten to death by at least a dozen CBP agents in California); *Guerrero v. United States*, No. 4:12-cv-00370-TUC-JAS, 2015 WL 569875 (D. Ariz. Feb. 11, 2015) (U.S. citizen fatally shot in Arizona); *Perez v. United States*, 103 F.Supp. 3d 1180 (S.D. Cal. 2015) (Migrant was fatally shot for allegedly throwing rocks at Border Patrol Agents). See also cases involving border abuses, *Castro Romo v. United States*, No. 4:12-cv-00041-JAS (D. Ariz. Jan. 13, 2012) (Mexican national survived shooting in Arizona); *Gutierrez v. McLaws*, No. 2:13-cv-00585-SPL (D. Ariz. Mar. 21, 2013) (Mexican national beaten into a coma by eleven CBP agents in Arizona).

<sup>130</sup> *Sanchez Adorno v. United States*, No. 8:10-cv-00250-JVS-RNB (Mar. 2, 2010) (family members of Tomas Sanchez Orzuna, who died in 2008 after being pepper sprayed by CBP agents, settled a civil lawsuit for \$15,000); *Rodríguez v. United States*, 37 Trials Digest 13th 2, 2010 WL 3454114 (S.D. Cal. Apr. 21, 2010) (Verdict and Settlement Summary) (family members of Guillermo Rodríguez Martínez, who was fatally shot in the back by CBP agent Faustino Campos in 2005, settled a civil lawsuit for \$40,000); Janet Rose Jackman, *\$850 Settlement for Family of Slain Illegal Immigrant*, TUCSON SENTINEL, Sept. 8, 2011, [http://www.tucsonsentinel.com/local/report/090811\\_slain\\_immigrant\\_settlement/850k-settlement-family-slain-illegal-immigrant/](http://www.tucsonsentinel.com/local/report/090811_slain_immigrant_settlement/850k-settlement-family-slain-illegal-immigrant/) (reporting that the family of Francisco Javier Dominguez Rivera, who was fatally shot by CBP agent Nicholas Corbett in 2007, reached a settlement in a civil lawsuit for \$850,000 with the U.S. government); Miriam Davidson, *Settlement Sends Signal on Violence by Border Patrol*, CHRISTIAN SCIENCE MONITOR, June 6, 1995, <http://www.csmonitor.com/1995/0606/06032.html> (reporting that the family of Dario Miranda Valenzuela, who was fatally shot in the back by CBP agent Michael A. Elmer in 1992, reached a settlement in a civil lawsuit for \$612,000 with U.S. government and defendant’s private insurer).

<sup>131</sup> *Hernandez v. United States*, 785 F.3d 117 (5th Cir. 2015); *Mendez v. Poitevent*, No. 2:13-cv-00065-AM-VRG (W.D. Tex. Sept. 30, 2014), ECF No. 68; *Mena v. United States*, No. EP-10-CV-282-KC, 2012 WL 6047039, at \*1 (W.D. Tex. Dec. 5, 2012); *Yanez v. United States*, No. 4:06-cv-00595-JMR (D. Ariz. June 25, 2009).

<sup>132</sup> *Rico Andrade v. United States*, No. 2:15-cv-00103 (S.D. Tex. Feb. 27, 2015); *Estate of Valeria Tachiquin Alvarado v. Tackett*, No. 3:13-cv-01202-W-JMA (S.D. Cal. May 20, 2013); *Gallegos v. United States*, No. 5:14-cv-00136 (S.D. Tex. Aug. 27, 2014); *Estate of Julian Ramirez-Galindo v. United States*, No. 3:15-cv-01694-W-NLS (S.D. Cal. July 30, 2015); *Archila v. United States*, No. 4:14-cv-02448-RCC (D. Ariz. Oct. 28, 2014).

<sup>133</sup> EFE, *Activists Question Investigation that Exonerates Border Patrol Agents*, ALLIANCE SAN DIEGO, <http://www.alliancesd.org/activists-question-investigation-that-exonerates-border-patrol-agents/> (last visited Mar. 20, 2016).



trigger again—shooting José Antonio ten times and killing him.<sup>134</sup> Swartz alleged he shot in self-defense, in response to José Antonio allegedly throwing rocks.<sup>135</sup> According to the indictment, however, Swartz unlawfully killed the teenager “with malice aforethought”.<sup>136</sup>

#### D. Procedural History

##### i. Disciplinary Action

Petitioners are unaware of any disciplinary investigation or action taken against any of the agents involved. To Petitioners’ knowledge, all of the agents involved remain on active duty.

In response to concerns about a lack of transparency and accountability, CBP established a Use of Force Review Board (“Review Board”) in February, 2015.<sup>137</sup> The Review Board meets quarterly to review incidents to determine if an agent has violated policy and if disciplinary action is warranted. The Review Board met for the first time in December 2015, but did not disclose publicly the outcome of their review. The Review Board met for a second time on March 10, 2016 and discussed the killing of Anastasio. To date, CBP has not informed Petitioners of the outcome of that review.

##### ii. Civil Litigation

On March 23, 2011, Anastasio’s family filed a wrongful death claim in the United States District Court for the Southern District of California.<sup>138</sup> The complaint alleges that U.S. federal agents caused Anastasio’s death in violation of his constitutional rights.<sup>139</sup> Defendants moved for summary judgment (a request that the court dismiss the case), but the court denied their motions on September 29, 2014.<sup>140</sup> In denying the defendant agents’ motions for summary judgment, the district court noted that “[t]he officers all allege that Anastasio was an out-of-control individual who was, at all times, violent and unresponsive to their commands[.]”<sup>141</sup> The court concluded that witness and the video recordings “strongly counter the officers’ testimony during the height of the altercation.”<sup>142</sup> Moreover, the court asserted that “[t]he sheer number of officers available at the scene demonstrates rather strongly that there was no objectively reasonable threat to the safety of any one other than Anastasio.”<sup>143</sup> The district court rejected the defendants’ claim that they were immune from suit under the defenses of sovereign and qualified immunity.<sup>144</sup> The court also upheld the right of Anastasio’s

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<sup>134</sup> Fernanda Santos, *Tucson Border Agent Pleads Not Guilty in Fatal Shooting of Mexican Boy*, N.Y. TIMES, Oct. 9, 2015, <http://www.nytimes.com/2015/10/10/us/tucson-border-agent-pleads-not-guilty-in-fatal-shooting-of-a-mexican-boy.html>.

<sup>135</sup> *Id.*

<sup>136</sup> Curt Prendergast, *Lonnie Swartz Indictment*, ARIZONA DAILY STAR, Sept. 24, 2015, [http://tucson.com/news/lonnie-swartz-indictment/pdf\\_46eeae16-62e4-11e5-acd7-1b4c854b8914.html](http://tucson.com/news/lonnie-swartz-indictment/pdf_46eeae16-62e4-11e5-acd7-1b4c854b8914.html).

<sup>137</sup> CBP INTEGRITY ADVISORY PANEL REPORT, *supra* note 118, at ii.

<sup>138</sup> Third Amended Complaint Ex. 1.

<sup>139</sup> *Id.*

<sup>140</sup> Order Denying Motions for Summary Judgment, *Estate of Hernandez-Rojas v. United States*, No. 11-CV-522-L (S.D. Cal. Sept. 29, 2014) (Dkt. 325).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 17.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 27.

family to allege a violation of the *jus cogen* prohibition of torture as well as statutory and common law violations of his constitutional rights.<sup>145</sup>

On November 24, 2014, the defendants appealed the district court's denial of summary judgment before the Ninth Circuit Court of Appeals.<sup>146</sup> The district court subsequently stayed the trial proceedings pending the outcome of the appeal.<sup>147</sup> The district court has not established a trial date in the case and the case remains unresolved more than five years after it began.

### iii. Criminal Case

CBP agents informed San Diego Police Department ("SDPD") of the incident involving Anastasio late on the morning of May 29, 2010 and SDPD began the criminal investigation the day after the incident.<sup>148</sup> Incident reports by CBP agents and SDPD described Anastasio as a suspect and the officers as victims of battery.<sup>149</sup> Within days of the incident, media articles referred to SDPD investigators describing Anastasio as "violent"<sup>150</sup> and "combative"<sup>151</sup> and pointing to the role of "drugs or mental disorders" as contributing facts in Taser death cases.<sup>152</sup>

On the afternoon of May 29, 2010, a full day after the incident, SDPD secured the crime scene and took the first witness statements. From approximately 2:20 p.m. until 9:00 p.m. on May 29<sup>th</sup>, criminal investigators interviewed at least twenty-one law enforcement agents regarding the incident.<sup>153</sup> Most interviews of law enforcement lasted less than fifteen minutes. SDPD did not interview all of the agents involved in the incident, including the agents who struck Anastasio with their batons or erased images taken by civilian eyewitnesses of the incident, until several days later.<sup>154</sup>

On June 9, 2010, a civilian eyewitness, Humberto Navarette Mendoza, posted videos of agents beating and tasing Anastasio with an audio recording of Anastasio's pleas for help to YouTube.<sup>155</sup> Prior to the public release of these videos, SDPD had not taken a witness statement from any civilian eyewitness although local press had previously reported eyewitness accounts of CBP agents beating Anastasio.<sup>156</sup> SDPD detectives subsequently interviewed Humberto Navarette and at least two

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<sup>145</sup> Order Denying Motion for Reconsideration at 4-5, *Estate of Hernandez-Rojas v. United States*, No. 11-CV-522-L (S.D. Cal. Jul. 24, 2014) (Dkt. 324).

<sup>146</sup> Notice of Appeal, *Estate of Hernandez-Rojas v. United States*, No. 11-CV-522-L (S.D. Cal. Nov. 24, 2014) (Dkt. 328).

<sup>147</sup> Order Granting Defendants' Ex Parte Motion to Suspend Scheduling Order, *Estate of Hernandez-Rojas v. United States*, No. 11-CV-522-L (S.D. Cal. Mar. 20, 2015) (Dkt. 369).

<sup>148</sup> Border Patrol Briefing (May 29, 2010) (Ex. 30) at 30.

<sup>149</sup> US CBP Memorandum re Incident at Whiskey 2 (May 28, 2010) (Ex. 31) at 31; San Diego Regional Crime Incident Report (June 1, 2010) (Ex. 33).

<sup>150</sup> Kristina Davis, *Man Who Was Shot with Taser at Border Dies*, UNION-TRIBUNE (June 1, 2010), <http://www.sandiegouniontribune.com/news/2010/jun/01/man-who-was-shot-with-taser-at-border-dies/>.

<sup>151</sup> *Mexican Detainee Death Ruled A Homicide*, CNN (June 2, 2010), <http://www.cnn.com/2010/US/06/02/california.detainee.death/>

<sup>152</sup> Davis, *supra* note 150.

<sup>153</sup> *See generally*, San Diego Police Department Police Investigation (Feb. 13, 2013) (Ex. 43)

<sup>154</sup> San Diego Police Department, Witness Statement of Ernest Kalnas (June 8, 2010) (Ex. 42) [hereinafter Kalnas Witness Statement]; San Diego Police Department, Witness Statement of Harinzo Narainingsingh (June 1, 2010) [hereinafter Narainingsingh Witness Statement] (Ex. 52); San Diego Police Department, Witness Statement of Ramon DeJesus (Jun. 1, 2010) (Ex. 41) [hereinafter DeJesus Witness Statement]; San Diego Police Department, Witness Statement of Andre T. Piligrino (June 1, 2010) (Ex. 32)

<sup>155</sup> San Diego Police Department, Addendum Report (June 9, 2010) [hereinafter SDPD Addendum Report] (Ex. 44) at 1-3.

<sup>156</sup> Mariana Martinez, *A Death at the Border: Anastasio Rojas Beaten and Tasered by Customs Officer*, LA PRENSA SAN DIEGO (June 4, 2010), <http://laprensa-sandiego.org/featured/a-death-at-the-border/>.

additional civilian (non-security) eye witnesses who were with Navarette when he filmed the incident. Shortly after July 9, 2010, SDPD referred the case to the United States Attorney's Office in San Diego.

Immediately after Anastasio's death, his family members, through a representative, contacted the Civil Rights Division of the Department of Justice (DOJ). DOJ officials refused to provide Anastasio's family any information about the investigation or comment on their role. The family members, through a representative, contacted DOJ several additional times during 2010 and 2011 to no avail.

On April 20, 2012, the Public Broadcasting System released an eyewitness video of CBP agents surrounding and beating Anastasio. A witness, Ashley Young, used her cell phone to take the footage, but concealed her phone when she saw CBP agents seize witnesses' cameras and phones the day of the incident. After PBS released the video, members of the U.S. Congress wrote a letter to the Department of Homeland Security to express concern regarding "a troubling lack of training and accountability within the Department" and Border Patrol attempts to cover up the incident and "obfuscate" their use of force.<sup>157</sup>

On May 9, 2012, two years after the incident, family members traveled to Washington DC to meet with investigators for the first time. Around this time, DOJ opened a criminal investigation into Anastasio's death.<sup>158</sup> In June 2012, the DOJ subpoenaed Ashley Young to appear before a federal grand jury in Washington DC.<sup>159</sup> DOJ has not released information about the grand jury investigation.

On November 6, 2015, more than five years after the incident, DOJ announced its decision to close the investigation in into the death of Anastasio Hernández Rojas. According to the press release, prosecutors reviewed "hundreds of pages of evidence generated by San Diego Police Department investigators" and "initiated an independent federal investigation into the incident" which included "federal law enforcement witness accounts, Mexican law enforcement witness accounts, civilian witness accounts, medical personnel accounts, medical records, autopsy reports, official use of force training materials and forensic evidence." The press release described the incident as follows:

The evidence developed during the investigation indicated that when Hernández-Rojas' handcuffs were removed at the San Ysidro Port of Entry, Hernández-Rojas began grappling with the two U.S. Border Patrol (USBP) agents and then resisted their efforts to restrain him. Two Immigration and Customs Enforcement (ICE) agents, as well as another USBP agent, joined the struggle and struck Hernández-Rojas several times with their asp batons. The agents again secured Hernández-Rojas in handcuffs, but he continued to struggle and kick at the agents. The agents called for backup and a transport vehicle to take Hernández-Rojas for processing since he was no longer eligible for voluntary return due to the struggle. As agents attempted to place Hernández-Rojas in the transport van to take him back to the station, he again physically resisted and attempted to kick the agents. A number of Customs and Border Protection (CBP)

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<sup>157</sup> Congress of the United States, Letter from the U.S. Congress to Secretary Napolitano of the Department of Homeland Security (May 10, 2012), <https://serrano.house.gov/sites/serrano.house.gov/files/DHSletter.pdf>. [hereinafter U.S. Congress' Letter to DHS Secretary Napolitano].

<sup>158</sup> Declaration of Richard Tolles in Support of Motion for Stay (July 24, 2012) (Ex. 34) at 2.

<sup>159</sup> Elliot Spagat, *Grand Jury Probes Illegal Immigrant's Death at Border*, ASSOCIATED PRESS (July 11, 2012), <http://www.azcentral.com/news/articles/20120711grand-jury-probes-stun-gun-mexico-border-death.html>.

officers responded to the scene, one of whom shocked Hernández-Rojas with a taser. Hernández-Rojas stopped resisting and the agents restrained his legs. Shortly thereafter, Hernández-Rojas' breathing slowed and he became unresponsive. The CBP officers administered CPR until medical personnel arrived at the scene. Hernández-Rojas was pronounced dead two days later after being removed from life support.<sup>160</sup>

According to the prosecutors, the federal government could not disprove “the agents’ claim that they used reasonable force in an attempt to subdue and restrain a combative detainee . . . .”<sup>161</sup> Prosecutors concluded that “the federal agents’ restraint and deployment of the [T]aser against Hernández-Rojas when he was non-compliant and physically assaultive was not unlawful and, based on the evidence gathered relating to the federal agents’ use of force training, the federal agents’ action were not done without due caution and circumspection.”<sup>162</sup> Additionally, the press release erroneously stated that the medical examiner stated that “Hernández-Rojas would not have died had there not been methamphetamine intoxication.”<sup>163</sup>

The statement by federal prosecutors, the first public statement about the incident from DOJ, shocked and dismayed Anastasio’s family members.

### III. ADMISSIBILITY

#### A. The Commission Has Jurisdiction to Consider this Petition

The Petition is admissible in its entirety under the Rules of Procedure of the Inter-American Commission on Human Rights (“Rules of Procedure”). The Commission is competent *ratione personae* to consider this Petition. Pursuant to Article 23 of the Rules of Procedure, each of the Petitioners is a natural person who was subject to the jurisdiction of the United States and whose rights were protected under the American Declaration when the violations occurred.<sup>164</sup>

The Commission has jurisdiction *ratione materiae* to consider Petitioners’ allegations that the United States violated Articles I, II, XVIII, XXV, and XXVI of the American Declaration. The Commission has consistently held that the American Declaration constitutes a source of binding international obligations for the United States.<sup>165</sup>

The Commission has jurisdiction *ratione temporis* to examine this Petition. The United States has violated Petitioners’ rights and denied Petitioners an effective remedy for the harms that they have

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<sup>160</sup> *Federal Officials Close the Investigation into the Death of Anastasio Hernandez-Rojas*, U.S. DEPARTMENT OF JUSTICE (Nov. 6, 2015) [hereinafter *Federal Officials Close Investigation*], <https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-anastasio-hernandez-rojas>.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> Inter-Am. Comm. H.R. R. P. 23.

<sup>165</sup> Organization of American States Charter [hereinafter OAS Charter], Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 48, entered into force Dec. 13, 1951 [ratified by the United States, June 15, 1951]; amended by Protocol of Buenos Aires, 721 U.N.T.S. 324, O.A.S. Treaty Series, No. 1-A, entered into force Feb. 27, 1970; amended by Protocol of Cartagena, O.A.S. Treaty Series, No. 66, 25 I.L.M. 527, entered into force Nov. 16, 1988; amended by Protocol of Washington, 1-E Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add. 3 (SEPF), 33 I.L.M. 1005, entered into force Sept. 25, 1997; amended by Protocol of Managua, 1-F Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add.4 (SEPF), 33 I.L.M. 1009, entered into force Jan. 29, 1996. *See also* Roach v. United States, Case 9647, Inter-Am. Comm’n H.R., Report No. 3/87, OEA/Ser.L/V/II.71, doc. 9 rev. 1, ¶ 46 (1987); Smith v. United States, Petition 8-03, Inter-Am. Comm’n H.R., Report No. 56/06, OEA/Ser.L/VII.127, doc. 4 rev. 1, ¶¶ 32-33 (2006).

suffered. The United States failure to provide Petitioners access to an effective remedy is an on-going violation of their rights.

#### B. The Petitioners Have Exhausted Domestic Remedies

The Inter-American Commission requires petitioners to exhaust all domestic remedies which are “available in practice . . . and would be adequate and effective in providing a remedy for the alleged violation.”<sup>166</sup> The Commission does not require a petitioner to exhaust every domestic remedy, only those remedies that are available, adequate, and effective.<sup>167</sup>

Where the State has the power to independently prosecute violations of rights protected under the American Declaration and the violations were committed by state agents,<sup>168</sup> admissibility should hinge on the State’s actions to rectify the violation, rather than petitioners’ pursuit of civil remedies.<sup>169</sup> In cases involving extrajudicial killings, petitioners must only exhaust criminal remedies.<sup>170</sup> In *Michael Gayle v. Jamaica*, for example, the Commission required the family members of a mentally disabled individual killed by police to exhaust criminal, but not civil remedies.<sup>171</sup>

On November 6, 2015, more than five years after the Anastasio’s death, prosecutors issued a decision not to pursue federal criminal civil rights or other charges and closed the criminal investigation.<sup>172</sup> According to the prosecutors, the federal government could not disprove “the agents’ claim that that they used reasonable force in an attempt to subdue and restrain a combative detainee . . . .”<sup>173</sup> The Petitioners have exhausted domestic remedies.

#### C. The Petition Has Been Submitted Within Six Months

The Rules of Procedure require Petitioners to file a complaint with the Commission within six months of notification of a final decision that exhausts domestic remedies.<sup>174</sup> Petitioners were notified of prosecutors’ decision to close the criminal investigation on November 6, 2015. The Petitioners have filed this Petition within six months of receiving notification of the decision to close the criminal investigation.

#### D. There Are No Proceedings Pending Before Any Other International Tribunal

In accordance with Article 33 of the Rules of Procedure, Petitioners confirm that none of the issues in this Petition are the subject matter of proceedings before any other international tribunal; nor

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<sup>166</sup> Jessica Gonzales et al. v. United States, Petition 1490-05, Inter-Am. Comm’n H.R., Report No. 52/07 OEA/Ser.L./V/II.128, doc. 19 ¶ 42 (2007); JO M. PASQUALUCCI, THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 92 (2d ed. 2013).

<sup>167</sup> Jessica Gonzales et al. v. United States, Report No. 52/07, *supra* note 166, ¶ 42.

<sup>168</sup> *Id.* at ¶ 56 (observing that the State was allegedly a “principle actor in the underlying human rights violation of a criminal nature”).

<sup>169</sup> Undocumented migrant, legal resident, and U.S. citizen victims of anti-immigration vigilantes v. United States, Petition 478-05, Inter-Am. Comm’n H.R., Report No. 78/08 ¶ 55, 57 (2009). *See also* Christina Daniel Dominguez Domenichetti v. Argentina, Petition 11.819, Inter-Am. Comm’n H.R., Report No. 51/03 ¶ 46 (2003).

<sup>170</sup> Christina Daniel Dominguez Domenichetti v. Argentina, Report No. 51/03, *supra* note 169, ¶ 46.

<sup>171</sup> Gayle v. Jamaica, Petition 191-02, Inter-Am. Comm’n H.R., Report No. 8/03 ¶ 41 (2003).

<sup>172</sup> *Federal Officials Close Investigation*, *supra* note 160.

<sup>173</sup> *Id.*

<sup>174</sup> Inter-Am. Comm. H.R. R. P. 32(1).

have they been previously examined and settled by the Commission or another international tribunal.<sup>175</sup>

#### IV. LEGAL ARGUMENT

##### A. The Inter-American Commission Should Interpret the American Declaration in Light of Established Human Rights Law and Standards

The Inter-American Commission has consistently referred to developing standards of human rights law articulated in national, regional and international bodies to interpret the nature and scope of obligations established under the American Declaration.<sup>176</sup> In the *Villareal* case, the Commission noted that:

in interpreting and applying the American Declaration, it is necessary to consider its provisions in the context of developments in the field of international human rights law since the Declaration was first composed and with due regard to other relevant rules of international law applicable to member states against which the complaints of violations of the Declaration are properly lodged. Developments in the corpus of international human rights law relevant in interpreting and applying the American Declaration may in turn be drawn from the provisions of other prevailing international and regional human rights instruments.<sup>177</sup>

The Commission has described the American Convention on Human Rights (“American Convention”) as a direct descendent of the American Declaration. In several cases, the Commission has noted that the American Convention “may be considered to represent an authoritative expression of the fundamental principles set forth in the American Declaration.”<sup>178</sup> Thus, the Commission has repeatedly referred to jurisprudence developed in the context of the American Convention to guide its interpretation of analogous provisions of the American Declaration. The Commission has also referred to the authoritative interpretations by United Nations treaty bodies, United Nations Special

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<sup>175</sup> Inter-Am. Comm. H.R. R. P. 33.

<sup>176</sup> Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (Ser. A) No. 10, ¶ 37 (July 14, 1989) (establishing that “to determine the legal status of the American Declaration it is appropriate to look to the Inter-American System today in light of the evolution it has undergone since the adoption of the Declaration, rather than to examine the normative value and significance which that instrument was believed to have had in 1948.”).

<sup>177</sup> Ramón Martínez Villareal v. United States, Case 11.753, Inter-Am. Comm’n H.R., Report No. 52/02, doc. 5 rev.1 at 821 ¶ 60 (2002) (citing Juan Raúl Garza v. United States, Case 12.243, Inter-Am. Comm’n H.R., Report No. 52/01, OEA/Ser.L/V/II.111, doc. 20 rev. at 1255 ¶¶ 88-89 (2000)). See also Maya Indigenous Community of the Toledo District v. Belize, Case 12.053, Inter-Am. Comm’n H.R., Report No. 40/04, OEA/Ser.L/V/II.122, 5 rev. 1 at 727 ¶¶ 86-88 (2004); Mary and Carrie Dann v. United States, Case 11.140, Inter-Am. Comm’n H.R., Report No. 75/02, doc 5 rev. 1 at 860, ¶¶ 96-97 (2002).

<sup>178</sup> Solidarity Statehood Comm. v. United States, Case 11.204, Inter-Am. Comm’n H.R., Report No. 98/03, OEA/Ser./L/V/II.114, doc. 70 rev. 1 ¶ 87 n.79 (2003) (citing Garza v. United States, Report No. 52/01, *supra* note 177, ¶¶ 88-89). See also Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.106, doc. 40 rev. ¶ 38 (2000).

Rapporteurs, and international and regional courts, such as the European Court of Human Rights to inform its understanding of the protections established by the American Declaration.<sup>179</sup>

## B. The United States Tortured Anastasio Hernández Rojas

While in the custody of U.S. border agents, Anastasio Hernández Rojas, an unarmed civilian, was kicked, punched, struck with batons, hogtied, electrocuted several times with a Taser gun, and placed into positions that limited his ability to breathe. Border agents inflicted this mistreatment intentionally to punish Anastasio. The actions of federal agents caused Anastasio immense suffering and resulted in grave, ultimately fatal, injuries. The federal investigation of Anastasio's homicide did not investigate the crime of torture. The acts and omissions of state agents amount to torture and violate Anastasio's rights under the American Declaration.

### i. The American Declaration prohibits torture and other cruel, inhuman, and degrading treatment (Articles I, XXV, and XXVI)

Articles I, XXV, and XXVI of the American Declaration collectively guarantee the right to humane treatment and prohibit torture and other cruel, inhuman or degrading treatment.<sup>180</sup> Article I ensures “life, liberty, and the security of [the] person.”<sup>181</sup> The Commission has interpreted the right to personal security to include the right to humane treatment and has held that “[a]n essential aspect of the right to personal security is the absolute prohibition of torture.”<sup>182</sup> Article XXV prohibits the deprivation of individual liberty without due process of law and expressly protects the right of every individual to “humane treatment” while in custody.<sup>183</sup> Article XXVI prohibits “cruel, infamous, or unusual punishment.”<sup>184</sup> Moreover, Article 5 of the American Convention, the analog to Article I of the American Declaration, explicitly guarantees the right of “[e]very person . . . to have his physical, mental, and moral integrity respected. . . . No one shall be subjected to torture or cruel, inhuman, or degrading treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.”<sup>185</sup>

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<sup>179</sup> See e.g. Felix Rocha Diaz v. United States, Case 12.833, Inter-Am. Comm'n H.R., Report No. 11/15, OEA/Ser.L/V/II.154 doc. 5 ¶54 (2015); Wayne Smith, Hugo Armendariz, et al. v. United States, Case 12.562, Inter-Am. Comm'n H.R., Report No. 81/10 ¶¶ 48-58 (2010).

<sup>180</sup> Organization of American States, American Declaration of the Rights and Duties of Man arts. I, XXV, XXVI, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992) [hereinafter American Declaration]. See INTER-AM. COMM'N H.R., REPORT ON TERRORISM AND HUMAN RIGHTS ¶ 149 (2002) [hereinafter REPORT ON TERRORISM AND HUMAN RIGHTS].

<sup>181</sup> American Declaration, *supra* note 180, at art. I.

<sup>182</sup> REPORT ON TERRORISM AND HUMAN RIGHTS, *supra* note 180, ¶ 155.

<sup>183</sup> American Declaration, *supra* note 180, at art. XXV.

<sup>184</sup> *Id.* at art. XXVI.

<sup>185</sup> Organization of American States, American Convention on Human Rights art. 5, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention]. See also REPORT ON TERRORISM AND HUMAN RIGHTS, *supra* note 180, ¶ 155 (noting that Article I of the American Declaration contains a prohibition against torture and inhuman treatment similar to that of the American Convention).

ii. The prohibition against torture is *jus cogens*

International instruments, including universal and regional human rights treaties, prohibit torture and other cruel, inhuman or degrading treatment.<sup>186</sup> For example, the International Covenant on Civil and Political Rights (“ICCPR”), ratified by 167 countries, including the United States, provides that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>187</sup> Similarly, the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”), ratified by 150 countries, including the United States, forbids torture and cruel, inhuman or degrading treatment.<sup>188</sup>

The Inter-American system considers the prohibition of torture and other forms of inhuman treatment customary international law.<sup>189</sup> Under international law, the prohibition of torture is a non-derogable, *jus cogens* norm.<sup>190</sup> The Inter-American Convention to Prevent and Punish Torture (“Inter-American Torture Convention”) recognizes the special vulnerability of detainees, providing that “[n]either the dangerous character of the detainee or prisoner, nor the lack of security of the prison establishment or penitentiary shall justify torture.”<sup>191</sup> In accordance with these international obligations, the United States is not only prohibited from perpetrating torture, but also has a positive obligation to prevent, investigate, and punish acts of torture.<sup>192</sup>

The United States has recognized the *jus cogens* status of the prohibition against torture and inhuman treatment in this case. In response to the officers’ motion to dismiss the civil lawsuit filed by Anastasio’s family, a federal judge held that “a *jus cogens* norm of international law is binding on all states, including the state of California” and that “the prohibition against torture is a *jus cogens* norm of international law.”<sup>193</sup> The district court cited to a 1992 opinion by the United States Court of Appeals for the Ninth Circuit, the U.S. federal court with appellate jurisdiction over the district court, which stated “it would be unthinkable to conclude other than that acts of official torture violate

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<sup>186</sup> See e.g., Inter-American Convention to Prevent and Punish Torture at 83, Feb. 28, 1987, OEA/Ser.L.V/II.82 doc.6 rev.1 (1992) [hereinafter Inter-American Torture Convention]; United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, 1465 U.N.T.S. 85 [hereinafter U.N. Convention against Torture]; International Covenant on Civil and Political Rights art. 7, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Universal Declaration of Human Rights art. 5, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter Universal Declaration].

<sup>187</sup> ICCPR, *supra* note 186, at art. 7; See also, Universal Declaration, *supra* note 186, at art. 5 (providing, identically to the ICCPR, that, “No one shall be subject to torture or to cruel, inhuman, or degrading treatment or punishment”).

<sup>188</sup> U.N. Convention against Torture, *supra* note 186.

<sup>189</sup> Peter Cash v. Bahamas, Case 12.231, Inter-Am. Comm’n H.R., Report No. 12/14, OEA/Ser.L/V/II.150, doc. 16, ¶ 102 (2014) (citing REPORT ON TERRORISM AND HUMAN RIGHTS, *supra* note 180, ¶ 155, and explaining that the “prohibition of torture is a peremptory norm of international law creating obligations erga omnes”); see also Prince Pinder v. Bahamas, Case 12.513, Inter-Am. Comm’n H.R. Report No. 79/07, OEA/Ser.L/V/II.130, doc. 22 rev. 1, ¶ 27 (2007) (citing Case of Caesar v. Trinidad and Tobago, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 123, ¶ 70 (Mar. 11, 2005)).

<sup>190</sup> Peter Cash v. Bahamas, Report No. 12/14, *supra* note 189, ¶ 102; see also U.N. Convention against Torture, *supra* note 186 (“No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture.”).

<sup>191</sup> Inter-American Torture Convention, *supra* note 186, at art. 5.

<sup>192</sup> *Id.*; see also U.N. Convention against Torture, *supra* note 186, at art. 2(1) (“Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”); U.N. Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, HRI/GEN/1/Rev.1 at 30, ¶ 2 (Mar. 10, 1992) [hereinafter *General Comment No. 20*] (“It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.”).

<sup>193</sup> Order Granting In Part and Denying In Part Defendant’s Motion to Dismiss and/or to Strike Portions of the Third Amended Complaint at 7-8, Estate of Hernandez-Rojas v. United States, No. 11-CV-522-L (S.D. Cal. Sept. 24, 2013) (Dkt. 279).



customary international law. And while not all customary international law carries with it the force of a *ius cogens* norm, the prohibition against official torture has attained that status.”<sup>194</sup>

iii. The United States’ mistreatment of Anastasio Hernández Rojas constitutes torture

The Commission, interpreting the Declaration, has defined torture in accordance with Article 2 of the Inter-American Torture Convention. The Commission has held that in order for an act to constitute torture (1) it must produce physical and mental pain and suffering in a person; (2) it must be committed with a purpose (such as personal punishment or intimidation) or intentionally (i.e. to produce a certain result in the victim); and (3) it must be committed by a public official or by a private person acting at the instigation of the former.<sup>195</sup> This definition is similar to other established torture definitions, including the CAT, to which the United States is a party.<sup>196</sup>

The Commission has held that the distinction between torture and other cruel, inhuman or degrading treatment hinges on the “the intensity of the suffering inflicted.”<sup>197</sup> To determine the severity of the victim’s suffering, the Commission looks to the circumstances of each case, including “the duration of the treatment, its physical and mental effects, and, in some cases, the sex, age, and health of the victim.”<sup>198</sup> The cumulative or combined effect of distinct acts of mistreatment may increase the severity of individual suffering. The Inter-American Court of Human Rights (“Inter-American Court”) has referred to the cumulative effects of detention conditions in assessing violations of the right to humane treatment.<sup>199</sup> Similarly, the European Court of Human Rights (“European Court”) also has considered the cumulative effects of multiple acts of mistreatment and the duration of the mistreatment to conclude that the victim had been tortured.<sup>200</sup>

For decades, international treaty bodies have expressed concern about law enforcement’s excessive use of force in the United States.<sup>201</sup> International experts have condemned exactly the type

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<sup>194</sup> *Id.*

<sup>195</sup> Peter Cash v. Bahamas, Report No. 12/14, *supra* note 189, ¶¶ 44, 101, 104 (“acknowledg[ing] that The Bahamas is not a signatory to either the American Convention of Human Rights or the Inter-American Torture Convention. “but nonetheless deciding that the country had violated the Declaration’s implied torture prohibition under Articles I, XXV, and XXVI when police officers assaulted Cash post-arrest ‘for the purpose of extracting a confession’”).

<sup>196</sup> U.N. Convention against Torture, *supra* note 186, at art. 1 (“[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”).

<sup>197</sup> REPORT ON TERRORISM AND HUMAN RIGHTS, *supra* note 180, ¶ 158 (citing Luis Lizardo Cabrera v. Dominican Republic, Case 10.832, Inter-Am. Comm’n H.R., Report No. 35/96, OEA/Ser.L/V/II.95 Doc. 7 rev. at 821 at ¶ 80 (1997); Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) ¶¶ 162-63 (1979)).

<sup>198</sup> Lysias Fleury v. Republic of Haiti, Case 12.459, Inter-Am. Comm’n H.R., ¶ 58 (2009), <http://www.cidh.org/demandas/12.459%20Lysias%20Fleury%20Haiti%205ago09%20ENG.pdf> (citing Luis Lizardo Cabrera v. Dominican Republic, Report No. 35/96, *supra* note 197, at 821 ¶ 78 (1997)).

<sup>199</sup> Case of Montero-Aranguren et al. (Detention Center of Catia) v. Venezuela, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct.H.R. (ser. C) No. 150, ¶ 97 (July 5, 2006). See also Lori Berenson Mejia v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct.H.R. (ser. C) No. 119, ¶ 101 (Nov. 25, 2004).

<sup>200</sup> Selmouni v. France, 25803/94, Council of Europe: European Court of Human Rights, ¶105 (July 28, 1999).

<sup>201</sup> U.N. Human Rights Committee, *Concluding Observations: United States of America*, A/50/40, ¶ 282 (Oct. 3, 1995) (expressing

of force used against Anastasio. In 1997, the United Nations Special Rapporteur on Torture warned that the United States law enforcement use of restraints caused “positional asphyxia” and “had resulted in a substantial number of injuries and deaths in police custody in the country.”<sup>202</sup> In November 2007, the United Nations Committee Against Torture (“Committee Against Torture”) warned that Taser X26 weapons “provoke extreme pain” and “constitute[] a form of torture.”<sup>203</sup> In 2014, the Committee Against Torture again called on the United States to carefully review and restrict its use of electroshock devices.<sup>204</sup> In 2014, the United Nations Human Rights Committee also expressed “concern[] about the still high number of fatal shootings by certain police forces, [...] including the deadly use of tasers, [...] and use of lethal force by Customs and Border Protection (CBP) officers at the United States-Mexico border.”<sup>205</sup>

1. The federal agents who tortured Anastasio Hernández Rojas acted in their official capacity

The state agents who tortured Anastasio were acting in their official capacity. From its earliest cases, the Inter-American System has held states “responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law.”<sup>206</sup> At least one dozen agents, including officers and their supervisors from multiple federal agencies, directly acted, assisted, or tolerated acts of torture against Anastasio.

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“concern[] at the reportedly large number of persons killed, wounded or subjected to ill-treatment by members of the police force in the purported discharge of their duties”); U.N. Human Rights Committee, *Concluding Observations: United States of America*, CCPR/C/USA/CO/4, ¶ 11 (Apr. 23, 2014) [hereinafter *April 2014 Concluding Observations: United States of America*] (“concerned about the still high number of fatal shootings by certain police forces, [...] including the deadly use of tasers, which has a disparate impact on African Americans, and use of lethal force by Customs and Border Protection (CBP) officers at the United States-Mexico border”); *Zeid urges restraint, and determined effort to root out institutionalized discrimination in wake of U.S. Ferguson verdict*, OHCHR (Nov. 25, 2014), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15342&LangID=E> (statement by the U.N. High Commissioner for Human Rights, Zeid Ra’ad Al Hussein noting that, in the United States, “there is a deep and festering lack of confidence in the fairness of the justice and law enforcement systems”); Committee against Torture, *Concluding Observations of the Committee Against Torture: United States of America*, CAT/C/USA/CO/3-5, ¶ 26 (Dec. 19, 2014) [hereinafter *Concluding Observations of the Committee Against Torture: United States of America*] (“concerned about the numerous reports of police brutality and excessive use of force by law enforcement officials, in particular against persons belonging to certain racial and ethnic groups, immigrants and LGBTI individuals [...] and] about racial profiling by police and immigration offices and the growing militarization of policing activities”).

<sup>202</sup> Nigel S. Rodley (Special Rapporteur on Torture and cruel, inhuman or degrading treatment or punishment), *Summary of communications transmitted to Governments and replies received*, ¶ 786, U.N. Doc. E/CN.4/1996/35/Add.1 (Jan. 16, 1996) (noting “that a police practice of placing suspects face down in restraints, usually while hogtied, had resulted in a substantial number of injuries and deaths in police custody in the country. Such practices, exercised in a number of jurisdictions, were said to restrict respiratory movement and occasionally to lead to death from “positional asphyxia”. The risk of death was said to be exacerbated when the restrained person was in an agitated state or under the influence of drugs.”).

<sup>203</sup> Press Release, Committee against Torture, Committee against Torture Concludes Thirty-Ninth Session (Nov. 23, 2007).

<sup>204</sup> *Concluding Observations of the Committee Against Torture: United States of America*, *supra* note 201, ¶ 27.

<sup>205</sup> *April 2014 Concluding Observations: United States of America*, *supra* note 201, ¶ 11.

<sup>206</sup> *Velasquez-Rodriguez v. Honduras*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 170 (July 29, 1988); *See also*, 42nd Police District, Parque Sao Lucas, Sao Paulo v. Brazil, Case 10.301, Inter-Am. Comm’n H.R., Report No. 40/03, OEA/Ser.L/V/II.118, doc. 5 rev. 2 ¶¶ 1, 36, 41 (2003) (citing to this language from *Velasquez-Rodriguez*, the Commission referred to Brazilian prison guards as “state agents” and reasoned that Brazil was “responsible” for “the acts or omissions” of these agents, even though they acted outside official training when they ordered approximately fifty people into a small isolation cell and released tear gas – causing the deaths by asphyxiation of eighteen detainees).

The perpetrators included officers of CBP and Immigration and Customs Enforcement (“ICE”).<sup>207</sup> In the context of civil litigation, the United States affirmed that these agents had acted in their official capacity.<sup>208</sup>

2. The federal agents inflicted severe physical and mental pain and suffering on Anastasio Hernández Rojas

Federal agents subjected Anastasio to specific acts of torture and abuse. Federal agents kicked, punched, dragged, electrocuted, and restricted Anastasio’s breathing although he posed no imminent threat to the agents’ lives or safety. During the incident, Anastasio was in federal custody and at times handcuffed and hogtied in a secure area where there was no chance to escape. In combination these acts caused Anastasio severe suffering manifested in his cries for help and extensive injuries.

The Commission considers the severity of the victims’ physical injuries to assess allegations of torture.<sup>209</sup> The infliction of mental and emotional suffering, even without physical abuse, is also sufficient to constitute torture.<sup>210</sup> Moreover, the Court has held that “any use of force that is not strictly necessary to ensure proper behavior [by] the detainee constitutes an assault on the dignity of the person in violation of Article 5 of the American Convention.”<sup>211</sup> Both Commission and Court presume the veracity of torture claims in cases of extrajudicial killings where state agents detain the victim and there exists evidence of severe mistreatment.<sup>212</sup> Once the victim is under the absolute control of state officials, the State bears the burden of proving that the victim was not subject to fatal, prohibited mistreatment while in its custody.<sup>213</sup>

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<sup>207</sup> The civil case, captioned *Estate of Anastasio Hernandez-Rojas, et al. v. United States, et al.*, names twelve federal officers: Jerry Vales (Customs and Border Protection Agent 7663); Gabriel Ducoing (Border Patrol Agent V325); Philip Krasielwicz (Border Patrol Agent V315); Andre Piligrino (Immigration Enforcement Agent 2054); Harinzo Naraineisigh (Immigration Enforcement Agent 7G2186); Derrick Llewellyn (Border Patrol Agent L (DOB 11/4/1969)); Alan Boutwell (Customs and Border Protection Agent B (DOB 7/8/1969)); Kurt Sauer (Customs and Border Protection Officer S (DOB 10/27/1971)); Ishmael Finn (Border Patrol Supervisor V61); Guillermo Avila (Border Patrol Supervisor I199); Edward Caliri (Border Patrol Supervisor I68); and Ramon De Jesus (Customs and Border Protection Supervisor CAQ03175). Plaintiffs’ Response in Opposition to all Defendants’ Motions for Summary Judgment at 1, *Estate of Anastasio Hernandez Rojas v. United States*, No. 3:11-cv-00522-L-DHB (S.D. Cal. Sept. 11, 2013).

<sup>208</sup> Defendant United States’ Notice of Motion to Dismiss (May 31, 2013) (Ex. 35) at 3-4 (admitting that the individuals were “federal officials” and arguing that the only appropriate action would be against the “federal employees acting within the course and scope of their employment”).

<sup>209</sup> *Lysias Fleury v. Republic of Haiti*, *supra* note 198, ¶¶ 58-60 (2009); *see also Daniel and Kornel Vaux v. Bahamas*, Case 12.504, Inter-Am. Comm’n H.R., Report No. 81/07, OEA/Ser.L/V/II.130 Doc. 22, rev. 1 ¶ 52 (2007).

<sup>210</sup> *Urrutia v. Guatemala*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 103, ¶ 93 (Nov. 27, 2003) (stating that “according to the circumstances of each particular case, some acts of aggression inflicted on a person may be classified as mental torture, particularly acts that have been prepared and carried out deliberately against the victim to eliminate his mental resistance and force him to accuse himself of or confess to certain criminal conducts. . .”).

<sup>211</sup> REPORT ON TERRORISM AND HUMAN RIGHTS, *supra* note 180, ¶ 158.

<sup>212</sup> *Juan Humberto Sánchez v. Honduras*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 99, ¶¶ 99-100 (June 7, 2003); Case of the “Street Children (Villagrán-Morales et al.) v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63 ¶¶ 157-60, 166, 168 (Nov. 19, 1999); *Remigio Domingo Morales et al. v. Guatemala*, Cases 10.626, 10.627, 11.198(A), 10.799, 10.751, 10.901, Report No. 59/01, Inter-Am. Comm’n H.R., Annual Report 2000, OEA/Ser.L/V/II.111, doc. 20 rev. ¶¶ 133-35 (2000); *Bulacio v. Argentina*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 100 ¶¶ 250-52 (Sept. 18, 2003).

<sup>213</sup> *Juan Humberto Sánchez v. Honduras*, Preliminary Objections, Merits, Reparations and Costs, *supra* note 212, ¶¶ 99-100; *Villagrán-Morales et al. v. Guatemala*, Merits, *supra* note 212, ¶¶ 157-60, 166, 168; *Remigio Domingo Morales et al. v. Guatemala*, Report No. 59/01, *supra* note 212, ¶¶ 133-35; *Bulacio v. Argentina*, Merits, Reparations and Costs, *supra* note 212, ¶¶ 250-52.

The Inter-American Commission has held that many of the abuses to which Anastasio was subjected constitute torture, including the beating,<sup>214</sup> the denial of medical treatment,<sup>215</sup> and the infliction of corporal punishment.<sup>216</sup> International human rights bodies have also concluded that use of the X-26 Taser<sup>217</sup> and dangerous positional restraints<sup>218</sup> amount to torture.

Anastasio experienced severe mental and physical pain and suffering. Over the course of several hours, federal agents subjected Anastasio to acts of unjustified violence while he was in federal custody. A few minutes after entering the processing center, an agent pushed Anastasio against a wall and kicked his ankles several times after he unwittingly failed to comply with the agent's order.<sup>219</sup> The agent responded to Anastasio's complaints about physical pain and requests for medical attention by ridiculing him, handcuffing him, and forcing him to limp into the processing center.<sup>220</sup>

Once at Whiskey 2, a secure and restricted area, federal agents escalated their violent assault on Anastasio. Two ICE officers used steel batons to beat Anastasio's abdomen and chest,<sup>221</sup> in violation of CBP use of force policy and federal law enforcement training courses.<sup>222</sup> Soon thereafter, five federal agents forced Anastasio to the ground, quickly handcuffed him, and each pressed on his back – smashing him facedown onto the pavement with at least a half-ton of pressure, “compressing [his] organs, and [] compressing the rib cage, in particular the diaphragm.”<sup>223</sup> Agents continued to beat Anastasio for the next twenty minutes, despite his pleas for mercy.<sup>224</sup>

Although Anastasio was immobilized and non-combative, agents continued to escalate the use of force.<sup>225</sup> One witness observed two officers holding Anastasio, one with a knee on his back, and one with a knee on his neck, while other agents kicked Anastasio and punched him in the ribs.<sup>226</sup> Onlookers nearby yelled at the officers to stop using “excessive force” on the defenseless father of five.<sup>227</sup>

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<sup>214</sup> See, e.g. *Peter Cash v. Bahamas*, Report No. 12/14, *supra* note 189, ¶¶ 44, 104; *Daniel and Kornel Vaux v. Bahamas*, Report No. 81/07, *supra* note 209, ¶¶ 58-52.

<sup>215</sup> *Michael Gayle v. Jamaica*, Case 12.418, Inter-Am. Comm'n H.R., Report No. 92/05, OEA/Ser.L/V/II.124, doc. 5, ¶ 60 (2005).

<sup>216</sup> *Prince Pinder v. Bahamas*, Case 12.513, Report No. 79/07, *supra* note 189, ¶ 26.

<sup>217</sup> Committee against Torture Concludes Thirty-Ninth Session, *supra* note 203.

<sup>218</sup> *Rodley*, *supra* note 202 (noting “that a police practice of placing suspects face down in restraints, usually while hogtied, had resulted in a substantial number of injuries and deaths in police custody in the country. Such practices, exercised in a number of jurisdictions, were said to restrict respiratory movement and occasionally to lead to death from ‘positional asphyxia’. The risk of death was said to be exacerbated when the restrained person was in an agitated state or under the influence of drugs.”).

<sup>219</sup> Interview of Hernandez Ex. 7 at 16. See *Chula Vista Camera Video* (May 28, 2010) (Ex. 8); *Chula Vista Camera Video with Outline of Ducoing* (May 28, 2010) (Ex. 9).

<sup>220</sup> *Id.* 15-16; Third Amended Complaint Ex. 1 at 7.

<sup>221</sup> Deposition of Wagner Ex. 18 at 13:10-11; Transcript of Videotaped Deposition of Marvin Pietruszka (Mar. 21, 2013) [hereinafter Deposition of Pietruszka] (Ex. 36) at 76:1-18.

<sup>222</sup> The CBP Use of Force Policy prohibits “intentional strikes with the baton to the head, the neck, the face, the groin, the solar plexus, the kidneys or the spinal column.” U.S. CUSTOMS AND BORDER PROTECTION, OFFICE OF TRAINING AND DEVELOPMENT, HB 4500-01C, USE OF FORCE POLICY, GUIDELINES AND PROCEDURES HANDBOOK 28 (2014) [hereinafter USE OF FORCE POLICY, GUIDELINES AND PROCEDURES HANDBOOK], <https://www.cbp.gov/sites/default/files/documents/UseofForcePolicyHandbook.pdf>; Deposition of Piligrino Ex. 20 at 58:18-20, 73:1-23.

<sup>223</sup> Deposition of Wagner Ex. 18 at 226:20-22, 227:6-13.

<sup>224</sup> Plaintiff's Response in Opposition to All Defendants' Motions for Summary Judgment Ex. 10 at 146; Transcript of Navarrete's Videos Ex. 21.

<sup>225</sup> Young's Videos Ex. 17.

<sup>226</sup> Deposition of Gonzalez-Gomez Ex. 13 at 66:4-9; 74:8-20.

<sup>227</sup> Transcript of Navarrete's Videos Ex. 21.

Ignoring the pleas of on-lookers, an agent activated the Taser X-26 against Anastasio at least four separate times,<sup>228</sup> out of which at least two successfully deployed.<sup>229</sup> For the final shock, the agent set the Taser X26 to “drive stun” mode, and applied the twelve-second shock directly to Anastasio’s chest.<sup>230</sup> Each successful shock from a Taser X26 is meant to deliver 1200 volts of electrical charge, instantly paralyze the subject’s muscles, cause him to become disoriented and unbalanced, increase his heart rate, and stress the cardiovascular system.<sup>231</sup> The shocks also had the capacity to cause lactic acidosis, or a change in blood pH, that were “[strong] enough to knock a man down”; this pH change is painful and life threatening.<sup>232</sup>

According to CBP use of force policy, agents may use a Taser, only when the agent “reasonably believes [that the subject’s resistance] may result in injury to themselves or to another person.”<sup>233</sup> This same policy requires that an agent deploy only one “standard cycle” shock, lasting five seconds, and prohibits CBP agents from administering more than three Taser shocks total.<sup>234</sup> Moreover, the use of force policy requires that any subject exposed to a Taser “shall, as soon as practicable, be seen by an Emergency Medical Technician or other trained medical professional.”<sup>235</sup> In 2014, the Committee Against Torture, “appalled” at the number of reported deaths in the United States attributable to law enforcement use of Tasers, urged the United States “to provide more stringent instructions to law enforcement personnel entitled to use electric discharge weapons, and to strictly monitor and supervise their use through mandatory reporting and review of each use.”<sup>236</sup>

After the final administration of the Taser, officers again pressed Anastasio facedown on the pavement and restricted his ability to breathe.<sup>237</sup> One witness testified that while agents hog-tied Anastasio, “he was motionless; “[his] eyes went two thirds of the way open, and some saliva was coming out of his mouth.”<sup>238</sup> The chief medical examiner of San Diego County ruled Anastasio’s death a homicide brought on by: the variety of restraints, the number of persons who beat him, and the fact that Anastasio was prone and Tasered.<sup>239</sup> Another autopsy report corroborated these findings, indicating that but for the repeated blows inflicted by the agents, Anastasio would be alive.<sup>240</sup> According to autopsy reports, Anastasio sustained multiple and serious injuries during the incident,

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<sup>228</sup> Plaintiff’s Response in Opposition to All Defendants’ Motions for Summary Judgment Ex. 10 at 8.

<sup>229</sup> Deposition of Wagner Ex. 18 at 13:10-11.

<sup>230</sup> Deposition of Avila Ex. 19 at 40:1-25. Unlike other settings on the X26 Taser, which primarily aim to forcefully immobilize the victim, the “drive stun” mode does not incapacitate. Instead, the sole purpose of use in “drive stun” mode is to cause localized pain, or as ensure “pain compliance,” as law enforcement refer to it. Thompson & Berman, *supra* note 59.

<sup>231</sup> Plaintiff’s Response in Opposition to All Defendants’ Motions for Summary Judgment Ex. 10 at 60, 121; Deposition of Pietruszka Ex. 36 at 99:20-100:1.

<sup>232</sup> Deposition of Wagner Ex. 18 at 187:11-22.

<sup>233</sup> USE OF FORCE POLICY, GUIDELINES AND PROCEDURES HANDBOOK, *supra* note 222.

<sup>234</sup> *Id.* at 29.

<sup>235</sup> *Id.*

<sup>236</sup> *Concluding Observations of the Committee Against Torture: United States of America*, *supra* note 201, ¶ 27.

<sup>237</sup> Plaintiffs’ Response in Opposition to All Defendants’ Motions for Summary Judgment at 9, Estate of Anastasio Hernandez Rojas et al. v. United States et al., No. 3:11-cv-00522-L-DHB (Sept. 11, 2013); Deposition of Boutwell Ex. 23 at 81:24-87:25.

<sup>238</sup> Plaintiff’s Response in Opposition to All Defendants’ Motions for Summary Judgment Ex. 10 at 67.

<sup>239</sup> County Autopsy Report Ex. 25 at 3; Deposition of Wagner Ex. 18 at 13:10-11 - 227:14-16.

<sup>240</sup> Deposition of Pietruszka Ex. 36 at 69:4-12, 231:11-233:18.

including five fractured ribs.<sup>241</sup> Anastasio's injuries are irrefutable evidence that he endured severe pain and suffering as a result of the agents' acts.

### 3. Federal agents intentionally tortured Anastasio Hernández Rojas

The Commission defines torture to require the intentional imposition of pain and suffering for the “purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose.”<sup>242</sup> The Inter-American system uses an expansive approach to the purposive element of the definition of torture.<sup>243</sup> For example, the Commission has noted that intentionally “produc[ing] a certain result in the victim” satisfies the purpose element of torture.<sup>244</sup> The Inter-American Court has held that any act that has been “planned and inflicted deliberately upon the victim to wear down his psychological resistance . . . or to subject him to other types of punishment, in addition to imprisonment itself” can amount to physical and physiological torture.<sup>245</sup>

The Commission has noted that “[n]either the dangerous character of the detainee or prisoner, nor the lack of security of the prison establishment or penitentiary shall justify torture.”<sup>246</sup> Indeed, the Commission has held that an aggressive beating by state agents of a person in custody as a preventative measure or in order to inflict punishment constitutes torture under the American Declaration.<sup>247</sup> The Commission has specifically held that corporal punishment is presumptively torture because it “in and of itself is incompatible with international and national guarantees against torture and other inhumane treatment.”<sup>248</sup> Similarly, the U.N. Human Rights Committee has concluded that the prohibition against torture “should be extended to corporal punishment, ‘including excessive chastisement ordered as punishment for a crime, or as an educative or disciplinary measure.’”<sup>249</sup>

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<sup>241</sup> Expert Autopsy Ex. 27 at 3.

<sup>242</sup> Inter-American Torture Convention, *supra* note 186, at art. 2.

<sup>243</sup> *C.f.* U.N. Convention against Torture, *supra* note 186, at art. 1 (“[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”).

<sup>244</sup> Peter Cash v. Bahamas, Report No. 12/14, *supra* note 189, ¶ 101 (defining torture to “be committed with a purpose (*inter alia* personal punishment or intimidation) or intentionally (i.e. to produce a certain result in the victim)[...]”).

<sup>245</sup> Tibi v. Ecuador, Inter- Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 114 ¶146 (Sept. 7, 2004).

<sup>246</sup> Inter-American Torture Convention, *supra* note 186, at art. 5; *See* Tibi v. Ecuador, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 129, ¶ 145 (June 24, 2005) (stating that “[t]he Inter-American Convention against Torture [...] is part of the inter-American corpus iuris that this Court must resort to in establishing the content and scope of the general provision contained in Article 5(2) of the American Convention [and therefore, in interpreting the Declaration’s similar prohibition against torture].”).

<sup>247</sup> *See, e.g.* Lysias Fleury v. Republic of Haiti, *supra* note 198; Prince Pinder v. Bahamas, Report No. 79/07, *supra* note 189.

<sup>248</sup> Prince Pinder v. Bahamas, Report No. 79/07, *supra* note 189, ¶ 26 (citing Case of Caesar v. Trinidad and Tobago, Merits, Reparations, and Costs, *supra* note 189, ¶ 70, which notes that the Bahamas is party only to the Declaration and the infliction of corporal punishment “constitutes a form of torture and, therefore is a violation per se of the right of any person submitted to such punishment to have his physical, mental and moral integrity respected, as provided in Article 5(1)[20] and 5 (2)[21] of the (American) Convention”).

<sup>249</sup> *General Comment No. 20*, *supra* note 192, at 30, ¶ 5.

Federal agents intentionally beat and Tased Anastasio, subjecting him to mistreatment that resulted in pain and suffering. According to agents' testimony, Anastasio did not behave like a "typical alien,"<sup>250</sup> but talked loudly, looked directly at the agents, and formally complained about his treatment.<sup>251</sup> The Border Patrol supervisor who ordered agents to remove Anastasio from the United States described Anastasio as "vocal and argumentative,"<sup>252</sup> and one Border Patrol agent described Anastasio as "problematic."<sup>253</sup> Agent testimony indicates that Anastasio was beaten and denied medical care to punish him. Indeed, Anastasio had created a "problem" for the agents by complaining about mistreatment, requesting medical attention, asking to use the phone, and insisting that he be treated with dignity.

iv. The United States has failed to investigate and punish those responsible for torturing Anastasio Hernández Rojas

Under international law, the United States has a positive obligation to prevent, investigate, and punish acts of torture within its borders.<sup>254</sup> Current U.S. federal law does not criminalize torture committed within the United States,<sup>255</sup> and thus the federal investigation of Anastasio's homicide did not include the crime of torture.<sup>256</sup> State or federal authorities failed to investigate the torture of Anastasio Hernández Rojas. The United States has failed to uphold its international obligations to investigate and punish those federal agents who tortured Anastasio.<sup>257</sup>

C. Agents of the United States Killed Anastasio Hernández Rojas In Violation of His Right to Life and Liberty

i. The American Declaration Prohibits the arbitrary deprivation of liberty and life (Articles I and XXV)

While it is a maxim of international law that state security forces hold a monopoly over the means of violence and the use of force in society,<sup>258</sup> international law also limits when law

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<sup>250</sup> Declaration of Galvan Ex. 4 at ¶ 6.

<sup>251</sup> *Id.* ¶ 6-7.

<sup>252</sup> Transcript of Videotaped Deposition of Ishmael P. Finn (Jan. 10, 2013) (Ex. 37) at 76:11-17.

<sup>253</sup> San Diego Police Department, Interview with Robinson Ramirez (May 29, 2010) (Ex. 38) at 4.

<sup>254</sup> U.N. Convention against Torture, *supra* note 186, at art. 2(1) ("Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."); *General Comment No. 20, supra* note 192, at 30, ¶ 2 ("It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.").

<sup>255</sup> The State Department has stated that legislation specifically criminalizing torture was unnecessary because "existing criminal law was determined to be adequate to fulfil [sic] the Convention's [i.e., the CAT's] prohibitory obligations, and in deference to the federal-state relationship." Committee against Torture, *Consideration of Reports Submitted by State Parties Under Article 19 of the Convention*, CAT/C/28/Add.5 (U.S.) at 13, ¶ 48 (Feb. 9, 2000).

<sup>256</sup> The state of California criminalizes torture under Penal Code Section 206-206.1. California Penal Code § 206-206.1.

<sup>257</sup> Bacre Waly Ndiaye (Special Rapporteur on extrajudicial, summary or arbitrary executions), *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Submitted Pursuant to Commission Resolution 1997/61, Mission to the United States of America*, E/CN.4/1998/68/Add.3 ¶ 108 (Jan. 22, 1998).

<sup>258</sup> Max Weber first characterized the monopoly of the legitimate use of physical force as the defining feature of the modern state in his

enforcement can lawfully use force. In carrying out their function as the legitimate bearers of arms, law enforcement is required under international standards to hold sacred the value of human life and to uphold the human rights of all persons, including the rights to life, security, and personal integrity.<sup>259</sup> Under international standards, law enforcement may *only* use force “when strictly necessary and to the extent required for the performance of their duty.”<sup>260</sup> The ultimate use of force – lethal force – may only be employed “when strictly unavoidable to protect life.”<sup>261</sup>

Every major human rights treaty protects the right to life and prohibits the arbitrary deprivation of life.<sup>262</sup> Inter-American human rights instruments provide that “every person has the right to have his life respected,” and that “no one shall be arbitrarily deprived of his life.”<sup>263</sup> The Inter-American Commission (“Commission”) describes the right to life as “the supreme right of the human being, respect for which the enjoyment of all other rights depends.”<sup>264</sup> According to the Commission, the right to life “undoubtedly [has] attained the status of customary international law.”<sup>265</sup>

Article I of the Declaration protects the rights of life, liberty and personal security: “Every human being has the right to life, liberty and the security of his person.”<sup>266</sup> Article XXV of the Declaration protects persons from arbitrary arrest and guarantees the right of persons in state custody to humane treatment: “No person may be deprived of his liberty except . . . according to the procedures established by pre-existing law . . . Every individual who has been deprived of his liberty . . . has the right to humane treatment during the time he is in custody.”<sup>267</sup> The Commission has “interpreted Article I of the Declaration as containing a prohibition similar to that under the American Convention.”<sup>268</sup> Therefore, in interpreting the right to life, the Inter-American Commission has looked to the American Convention on Human Rights, specifically Articles 4 (Right to Life) and 5 (Right to Humane Treatment).<sup>269</sup>

The Inter-American Commission has consistently discussed the application of right to life protections in the context of the use of force by state agents.<sup>270</sup> According to Inter-American standards, the use of force by state security forces “must be grounded on the existence of exceptional

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1919 essay, *Politics as a Vocation*.

<sup>259</sup> Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 112 (1990) [hereinafter Basic Principles on the Use of Force and Firearms by Law Enforcement Officials].

<sup>260</sup> Code of Conduct for Law Enforcement Officials, G.A. res. 34/169, annex, 34 U.N. GAOR Supp. (No. 46) at 186, U.N. Doc. A/34/46 (1979).

<sup>261</sup> Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, *supra* note 259.

<sup>262</sup> *See e.g.*, African Charter on Human and Peoples’ Rights art. 4, June 27, 1981, OAU Doc. CAB/LEG/67/3/rev.5, reprinted at (1982) 21 I.L.M. 58; American Convention, *supra* note 185, at art. 4; ICCPR, *supra* note 186, at art. 6; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, 1950, 213 U.N.T.S. 222, 232 entered into force Sept. 8, 1953.

<sup>263</sup> Restrictions to the Death Penalty (American Convention arts. 4(2) and 4(4)), Advisory Opinion OC-3/83, Inter-Am. Ct. H.R. (Ser. A) No. 3, ¶ 53 (Sept. 8, 1983).

<sup>264</sup> Jessica Lenahan (Gonzales) et al. v. United States, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, ¶ 112 (2011); Gary T. Graham (Shaka Sankofa) v. United States, Case 11.193, Inter-Am. Comm’n H.R., Report 97/03, ¶ 26 (2003); Michael Domingues v. United States, Case 12.285, Inter-Am. Comm’n H.R. Report 62/02, ¶ 38 (2002). *See also* REPORT ON TERRORISM AND HUMAN RIGHTS, *supra* note 180, ¶ 81.

<sup>265</sup> Jessica Lenahan (Gonzales) et al. v. United States, Report No. 80/11, *supra* note 264, ¶ 112.

<sup>266</sup> American Declaration, *supra* note 180, at art. XXV.

<sup>267</sup> *Id.* *See also* Franz Britton v. Guyana, Case 12.264, Inter-Am. Comm’n H.R., Report No. 1/06, OEA/Ser.L/V/II.127 Doc. 4 rev. 1 ¶ 31 (2007).

<sup>268</sup> REPORT ON TERRORISM AND HUMAN RIGHTS, *supra* note 180, ¶ 155.

<sup>269</sup> American Convention, *supra* note 185, at arts. 4, 5, 22.

<sup>270</sup> *See, e.g.*, Sanchez v. Colombia, Case 12.009, Inter-Am. Comm’n H.R., Report No. 38/08, ¶¶ 54–59 (2008).



circumstances”<sup>271</sup> in which the use of such force is “strictly unavoidable to protect [law enforcement] or other persons from imminent threat of death or serious injury...”<sup>272</sup> The U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (“U.N. Principles on Use of Force”) specify the circumstances justifying the use of force to include “self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient.”<sup>273</sup> Absent the existence of exceptional circumstances, excessive force or disproportionate force by law enforcement that results in deprivation of life constitutes an arbitrary deprivation of life.<sup>274</sup>

In *Carandiru v. Brazil*, the Commission held that the use of lethal force against unarmed prisoners during a prison riot did not amount to self-defense,<sup>275</sup> and found that the police had used lethal force in “absolute disregard for the life of the inmates, demonstrating a retaliatory and punitive attitude, wholly at variance with the guarantees that the police should offer.”<sup>276</sup> The Commission concluded that the killing of unarmed inmates was a “deliberate and systematic infringement[] of their rights to life and integrity in violation of Articles 4(1) and 5 of the Convention.”<sup>277</sup> Similarly, the Inter-American Court has found the killing of unarmed and undocumented migrants by immigration authorities during a pursuit constituted an arbitrary deprivation of life. The Court reasoned that the unarmed migrant did not represent any threat notwithstanding that they had illegally crossed the border.<sup>278</sup>

The Inter-American Commission and Court have examined the use of force by state agents at three distinct moments to determine whether the force used was excessive: preventive actions taken before the incident, actions accompanying the incident, and actions subsequent to the incident.<sup>279</sup> A failure to comply with international law regarding the use of force in any of these three moments constitutes a violation of the state obligation to guarantee rights to life and personal integrity codified in Articles I and XXV of the Declaration.<sup>280</sup>

Preventive actions concern the planning and regulation of the potential use of force in a state operation.<sup>281</sup> Both the Commission and the Court have referred to the U.N. Principles on Use of Force to identify domestic policies and preventive actions that international law requires States to

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<sup>271</sup> Press Release, *IACHR condemns the recent death of Mexican national by U.S. Border Patrol Agents*, INTER-AM. COMM’N H.R., July 24, 2012, [http://www.oas.org/en/iachr/media\\_center/PReleases/2012/093.asp](http://www.oas.org/en/iachr/media_center/PReleases/2012/093.asp).

<sup>272</sup> REPORT ON TERRORISM AND HUMAN RIGHTS, *supra* note 180, ¶ 87 (citing Basic Principles on the Use of Force and Firearms by Law Enforcement Officials).

<sup>273</sup> Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, *supra* note 259, at 112, ¶ 9. *See also, e.g.*, *Carandiru v. Brazil*, Case 11.291, Inter-Am. Comm’n H.R., Report No. 34/00, ¶¶ 63, 88 (2000).

<sup>274</sup> REPORT ON TERRORISM AND HUMAN RIGHTS, *supra* note 180, ¶ 92.

<sup>275</sup> *Carandiru v. Brazil*, Report No. 34/00, *supra* note 273, ¶ 88.

<sup>276</sup> *Id.* ¶ 63.

<sup>277</sup> *Id.* ¶ 88.

<sup>278</sup> *Case of Nadege Dorzema et al. v. Dominican Republic, Merits, Reparations, and Costs*, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 251, ¶ 96 (Oct. 24, 2012).

<sup>279</sup> *Id.* ¶ 78.

<sup>280</sup> *See, e.g., id.* ¶ 81.

<sup>281</sup> *Hinojosa v. Ecuador*, Case 11.442, Inter-Am. Comm’n. H.R., Report No. XX/14, ¶ 178 (2014).

implement.<sup>282</sup> First, state agents must have adequate training in use of force policies so that they “have the elements of judgment necessary” when deciding whether or not to use force in certain circumstances.<sup>283</sup> Beyond proper policies and training, meeting their obligation under preventive actions requires state agents to have appropriate non-lethal and protective equipment to allow them to restrict as much as possible their use of lethal weapons that can cause injury or death.<sup>284</sup> In *Dorzema v. Dominican Republic*, the Court found that the State failure to provide training and instruction to law enforcement officers on the lawful use of force constituted a breach of the State’s obligation to implement proper preventive measures.<sup>285</sup>

Additionally, the Inter-American case law identifies the state obligation to enact a regulatory framework on the use of force by law enforcement.<sup>286</sup> A regulatory framework must not only exist, but it must provide adequate guidance to law enforcement. In *Montero Aranguen*, the Court found that Venezuela failed to provide its agents “the minimum specifications it should have included” in use of force policies.<sup>287</sup> The Court has also recognized that a regulatory framework is not an effective preventative measure unless law enforcement also receives training that is consistent with “the principles and provisions on protection of human rights and the limits to which the use of weapons by law enforcement officers is subject.”<sup>288</sup>

The second discrete moment that must be analyzed when examining state use of force includes actions accompanying any use of force.<sup>289</sup> All force used is examined under the principles of legality, necessity, and proportionality.<sup>290</sup> Legality requires that domestic law establishes the exceptional circumstances in which force is lawful and define the purpose for which the use of force is legitimate (e.g. legal). The legality standard also requires state agents to interpret use of force laws restrictively, in light of the other two principles taken into consideration in use of force cases.<sup>291</sup> The principle of absolute necessity requires that all other means of control must have been exhausted and failed, meaning that absolutely no “other means are available to protect the life and safety of the person or situation that [the use of force] is sought to protect.”<sup>292</sup> Finally, proportionality requires that “the level of force used must be in keeping with the level of resistance offered . . . agents must apply the criteria of differentiated and progressive use of force, determining the degree of cooperation, resistance or

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<sup>282</sup> *Detention Center of Catia v. Venezuela*, Preliminary Objection, Merits, Reparations, and Costs, *supra* note 199, ¶ 75; *Nadege Dorzema et al. v. Dominican Republic*, Merits, Reparations, and Costs, *supra* note 278, ¶ 79.

<sup>283</sup> *Detention Center of Catia v. Venezuela*, Preliminary Objection, Merits, Reparations, and Costs, *supra* note 199, ¶ 78; *see also* *Case of McCann et al. v. United Kingdom*, 324 Eur. Ct. H.R. (ser. A) ¶ 151 (1995); *Case of Kakoulli v. Turkey*, App. No. 38595/97, Eur. Ct. H.R. ¶¶ 109, 110 (2005).

<sup>284</sup> *Nadege Dorzema et al. v. Dominican Republic*, Merits, Reparations, and Costs, *supra* note 278, ¶ 80.

<sup>285</sup> *Id.* ¶¶ 79–92.

<sup>286</sup> *Hinojosa v. Ecuador*, Report No. XX/14, *supra* note 281, ¶ 193.

<sup>287</sup> *Detention Center of Catia v. Venezuela*, Preliminary Objection, Merits, Reparations, and Costs, *supra* note 199, ¶ 76.

<sup>288</sup> *Id.* ¶ 77.

<sup>289</sup> *Nadege Dorzema et al. v. Dominican Republic*, Merits, Reparations, and Costs, *supra* note 278, ¶¶ 82–83.

<sup>290</sup> *Id.* ¶¶ 82–83.

<sup>291</sup> *Case of the Barrios Family v. Venezuela*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 237, ¶ 49 (Nov. 24, 2011). The principle of legality is also discussed in *Dorzema*. *See* *Nadege Dorzema et al. v. Dominican Republic*, Merits, Reparations, and Costs, *supra* note 278, ¶ 100.

<sup>292</sup> *Nadege Dorzema et al. v. Dominican Republic*, Merits, Reparations, and Costs, *supra* note 278, ¶ 85(ii); *see also* *Case of the Barrios Family v. Venezuela*, Merits, Reparations and Costs, *supra* note 291, ¶ 49.

violence of the subject against whom the intervention is intended and, on this basis, employ negotiating tactics, control or use of force, as required.”<sup>293</sup>

In *Dorzema*, the Court found that state agents had violated all three principles of legality, absolute necessity, and proportionality. First, the Court established that there was not regulatory framework that governed the use of force at a checkpoint.<sup>294</sup> Referring to the attempt by unarmed migrants to flee from law enforcement, the Court reasoned that “even when abstaining from the use of force would have allowed the individuals that were the subject of the State’s action to escape, the agents should not have used lethal force against people who did not represent a threat or a real or imminent danger to the agents or third parties . . . this event did not constitute a situation of absolute necessity.”<sup>295</sup> Moreover, the Court has held that “the use of lethal force by state agents against individuals who no longer represent a threat, such as individuals under custody of the authorities, would amount to an extrajudicial execution.”<sup>296</sup>

Finally, States have an obligation to provide assistance and medical aid to persons injured due to use of force and promptly investigate the legality of use of force. The Inter-American Court has stated that “[t]he general prohibition to arbitrarily deprive someone of his life, which state officials must observe, would be ineffective without proceedings to verify the legality of the lethal use of force.”<sup>297</sup> The state obligation to conduct a rigorous, impartial and effective investigation is particularly important in cases involving extrajudicial killings by state agents.<sup>298</sup>

## ii. The United States Used Arbitrary and Excessive Force to Deprive Anastasio Hernández Rojas of His Right to Liberty and Life

### 1. The United States failed to prevent the excessive use of force

The use of force policy in effect at the time of Anastasio’s killing was inadequate and ineffective. CBP policy did not provide specific guidance on the use of Tasers, address the risk of serious injury or death inherent to the multiple applications of Taser shocks, or even require that personnel are trained on the use of Tasers. As a result, CBP failed to implement preventative measures that would have prevented Anastasio’s death. Indeed, in the absence of adequate training and guidance, the decision to use force was left to agent discretion.

The CBP Use of Force Policy Handbook in effect at the time of Anastasio’s death authorized the use of intermediate force, such as batons, Tasers, and hand-to-hand combat, under certain circumstances, including to protect persons from bodily harm, restrain or subdue a resisting detainee,

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<sup>293</sup> *Nadege Dorzema et al. v. Dominican Republic, Merits, Reparations, and Costs*, *supra* note 278, ¶¶ 85(iii), 100; *see also*, *Case of the Barrios Family v. Venezuela, Merits, Reparations and Costs*, *supra* note 291, ¶ 49.

<sup>294</sup> *Nadege Dorzema et al. v. Dominican Republic, Merits, Reparations, and Costs*, *supra* note 278, ¶¶ 85(i), 100.

<sup>295</sup> *Id.* ¶ 85(ii), 100.

<sup>296</sup> *Case of Zambrano Velez et al. v. Ecuador, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C.) No. 166, ¶ 108* (July 4, 2007). In the same case, the Commission determined that, “comparing the number of soldiers who participated in the operation with the number of weapons seized, and given that no information was provided regarding acts of resistance in the course of the operation, the Commission indicated that it is not possible to demonstrate the urgency required or to justify the volume of force used.” *Id.* ¶ 76.

<sup>297</sup> *Id.* ¶ 88.

<sup>298</sup> *Id.*

or make an arrest.<sup>299</sup> According to CBP policy, the use of force must be “both reasonable and necessary.” The guidelines defined reasonableness to mean that

there are objective reasons that justify the degree of force to be used in the given situation, up to and including deadly force. The ‘reasonableness’ of a particular use of force is judged from the perspective of a reasonable officer/agent on the scene, and its calculus must embody an allowance for the fact that law enforcement officers/agents are often forced to make split-second decisions about the amount of force necessary in a particular situation. Necessary means that some force is required to carry out one's duties as a law enforcement officer/agent.<sup>300</sup>

In 2013, after Anastasio’s death, the Police Executive Research Forum, a police research and policy organization, examined all use of deadly force incidents from 2010-2012 (“PERF Report”) at the request of CBP.<sup>301</sup> The PERF Report raised a number of concerns related to the excessive use of force by CBP agents. The report recommended that the CBP limit the circumstances in which agents used deadly force by explicitly prohibiting the use of deadly force against occupants of vehicles and rock throwers.<sup>302</sup> The PERF Report described these recommendations as “significant departures from current practice” and as necessitating an implementation strategy.<sup>303</sup>

The PERF Report also recommended adding specific language to clarify the “reasonableness” standard. The report suggested that CBP policy should state:

The use of force must be objectively reasonable. The use of force is not left to the unregulated discretion of the involved officer/agent. *Use of force decisions are not driven by the officers/agent, but rather those decisions are dictated by the passive, aggressive, or deadly actions of the resistant or combative subject.* Justification for the use of force is limited to the facts actually known or reasonably perceived by the officer/agent at the moment that force is used.<sup>304</sup>

Additionally, the PERF Report makes specific recommendations about the use of electronic control devices, commonly known as Tasers. The report expressed concern that CBP did not require training on the use of Tasers and suggested several changes to CBP’s policy on the use of Tasers. CBP policy allowed the use of Tasers “as a compliance tool on a subject offering, at a minimum, active resistance.” The PERF Report recommended a higher standard that would allow Tasers “only against subjects who are exhibiting active resistance in a manner that, in the agent’s judgment, is likely to result in injuries to themselves or others. [Tasers] should not be used against a passive subject.”<sup>305</sup> The PERF also recommended that CBP policy require agents to evaluate the situation” after using the Taser for one cycle and to consider that “exposure to the [Tasers] for longer than 15 seconds (whether due to

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<sup>299</sup> U.S. Customs and Border Protection Office of Training and Development, USE OF FORCE POLICY HANDBOOK 16 (2010) [hereinafter USE OF FORCE POLICY HANDBOOK], <https://www.dhs.gov/sites/default/files/publications/cbp-use-of-force-policy.pdf>.

<sup>300</sup> *Id.* at 14. The guidelines permit “[the] use deadly force only when necessary, that is, when the officer/agent has a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury to the officer/agent or to another person.” *Id.* at 15. Deadly force was “not authorized solely to prevent the escape of a fleeing subject” unless the subject’s escape posed an “imminent threat of death or serious physical injury to the officer/agent or to another person.” *Id.*

<sup>301</sup> USE OF FORCE REVIEW, *supra* note 97, at 2.

<sup>302</sup> *Id.*

<sup>303</sup> *Id.* at 3.

<sup>304</sup> *Id.* at 10.

<sup>305</sup> *Id.* at 18.

multiple applications or continuous cycling) may increase the risk of death or serious injury.”<sup>306</sup> The PERF Report noted that the implementation of these recommendations would bring the CBP into compliance with best practices.<sup>307</sup>

While the CBP Use of Force Handbook covered, in general terms, the use of force, it was too vague to provide a sound basis for these officers to make an informed decision as to their use of force. Additionally, the officers lacked the institutional support and training to ensure that they were physically and mentally equipped to make that decision.

## 2. Federal agents applied illegal, unnecessary, and disproportional force against Anastasio Hernández Rojas

The lawful or legal use of force has a legitimate purpose.<sup>308</sup> There was no clear, non-retributive goal for using force against Anastasio. He was unarmed, in state custody, and handcuffed and hog-tied during much of the incident. He did not pose an imminent threat of death or serious injury to the agents. He had however garnered the disdain of agents by advocating for his rights and respect for his person. There was no non-frivolous legal justification for the use of force against him.

State agents further violated the principle of necessity. This principle requires that “force be used . . . in exceptional cases, where all other control methods must have been exhausted and failed.”<sup>309</sup> Any state contention that the use of force against Anastasio was necessary fails the threshold question of, “necessary to achieve what?” The escalation of the use of force to the point where he was beaten, hog-tied, and Tasered until he suffered heart failure and death were never necessary to “control” him.<sup>310</sup> The increasing use of force is counterintuitive. The initial kick crippled him. As the beatings increased in severity, Anastasio’s physical mobility accordingly decreased to the point where he was tied hand to foot. The continued use of force against an unarmed, injured, and immobilized person has no justification of necessity.

Finally, the United States violated the principle of proportionality. Proportionality requires that “the level of force used must be in keeping with the level of resistance offered.” Injured and unarmed, Anastasio posed no threat that the CBP could construe as requiring a resort to escalating force. Force only conforms to the principle of proportionality when the person against whom state agents seek to use force is imminently threatening the lives of those agents or third parties. The alleged transgression that merited the first kick to his ankle was pouring a water bottle into a trash can. The progression of violence against him that culminated in his death was similarly baseless and retaliatory, and grossly lacking in the proportionality required under Inter-American jurisprudence.

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<sup>306</sup> *Id.* at 19.

<sup>307</sup> *Id.*

<sup>308</sup> *Case of the Barrios Family v. Venezuela, Merits, Reparations and Costs, supra* note 291, ¶ 49; *Nadege Dorzema et al. v. Dominican Republic, Merits, Reparations, and Costs, supra* note 278, ¶ 100.

<sup>309</sup> *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, supra* note 259.

<sup>310</sup> *See Young’s Videos Ex. 17. See also Navarette’s Videos Ex 22.*

3. The United States failed to appropriately or effectively respond to the unlawful use of force

The United States has failed to effectively investigate Anastasio's death and hold those responsible accountable. Petitioners are unaware of any disciplinary investigation or action taken against any of the agents involved. To their knowledge, all of the agents involved remain on active duty. On November 6, 2015, more than five years after Anastasio's death, federal authorities released the decision not to pursue criminal charges against the agents responsible for Anastasio's death after an inadequate, delayed criminal investigation that lacked independence and impartiality.

D. The United States Violated the Right to Life of Anastasio Hernández Rojas by Failing to Uphold its Duty to Investigate, Prosecute, and Provide Full Reparations

i. The American Declaration requires an effective investigation and prosecution of extrajudicial killings (Articles I and XVIII)

Article I of the American Declaration guarantees the right to life.<sup>311</sup> The Commission has found that "it is well-established in the jurisprudence of the inter-American system that there is an inherent connection between the State's obligation to respect and ensure human rights, [and] to provide effective judicial protection for those rights...."<sup>312</sup> With regard to the violation of the right to life, Article XVIII provides family members of the victim the right to an investigation, prosecution, and full reparations.<sup>313</sup> The general obligation to guarantee rights "is particularly important in cases of the use of lethal force."<sup>314</sup> In cases involving extrajudicial killings by state agents, there is a heightened duty to investigate, prosecute, and punish.<sup>315</sup> To this end, the Commission has held that "if a person was detained in good health conditions and subsequently died, the State has the obligation to provide a satisfactory and convincing explanation of what happened."<sup>316</sup>

ii. The United States failed to effectively investigate the extrajudicial killing of Anastasio Hernández Rojas

Article I and XVIII of the American Declaration obligate the State to conduct a thorough, impartial, and prompt investigation<sup>317</sup> "such that any failure to produce sufficient evidence to lay criminal charges was not the product of mechanical implementation of certain procedural formalities

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<sup>311</sup> American Declaration, *supra* note 180, at art. I.

<sup>312</sup> Michael Gayle v. Jamaica, Report No. 92/05, *supra* note 215, ¶ 81.

<sup>313</sup> See Jessica Lenahan (Gonzales) et al. v. United States, Report No. 80/11, *supra* note 264, ¶ 172, 195.

<sup>314</sup> Case of Zambrano Vélez et al. v. Ecuador, Merits, Reparations and Costs, *supra* note 296, ¶ 88.

<sup>315</sup> "In cases of extra-legal executions, it is essential for the States to effectively investigate deprivation of the right to life and to punish all those responsible, especially when State agents are involved, as not doing so would create, within the environment of impunity, conditions for this type of facts to occur again, which is contrary to the duty to respect and ensure the right to life." Myrna Mack Chang v. Guatemala, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 101, ¶ 156-57 (Nov. 25, 2003) (quoting Hugh Jordan v. United Kingdom, No. 24746/94, Eur. Ct. H.R. at 156 (2001)).

<sup>316</sup> Juan Humberto Sánchez v. Honduras, Preliminary Objections, Merits, Reparations and Costs, *supra* note 212, ¶ 111.

<sup>317</sup> Jessica Lenahan (Gonzales) et al. v. United States, Report No. 80/11, *supra* note 264, ¶ 181.

without the State genuinely seeking the truth.”<sup>318</sup> A breach of the duty to investigate does not arise merely because the investigation conducted does not lead to a satisfactory result.<sup>319</sup> An investigation must be “capable of producing the result for which it was designed,” and “must be truly effective in establishing whether there has been a violation of human rights...”<sup>320</sup> The United States’ failure to preserve physical evidence and interview witnesses, to ensure the independence of investigators, and to carry out an investigation in a reasonable amount of time undermined the integrity of investigation into Anastasio’s death and predetermined the decision to close the case without pursuing criminal charges.

### 1. The United States failed to collect and preserve evidence

A thorough investigation of a suspicious death requires that the State collect and preserve evidence.<sup>321</sup> The Commission has found that a State violates the duty to investigate by failing to exercise due control over the scene, properly collect physical evidence, or thoroughly examine the evidence collected.<sup>322</sup> Investigative authorities should act immediately to collect and preserve evidence.<sup>323</sup> In this case, federal agents acted immediately to prevent the collection of evidence by dispersing witnesses and destroying physical evidence.

After administering the fifth and final shock, the CBP agent who Tased Anastasio realized that members of the public were “recording video and taking photos from the pedestrian bridge” overlooking Whiskey 2.<sup>324</sup> The agent radioed to the other officers on the scene and called for an agent “to go over there and apprehend [the witnesses], stop them from getting those photos.”<sup>325</sup> Agents “cleared” the pedestrian bridge of witnesses and told onlookers to “keep walking.”<sup>326</sup> The agents did not request the eye-witnesses’ contact information. By dispersing eye-witnesses without documenting their contact information, federal agents prevented the collection of inculpatory evidence and violated minimum international standards for a thorough investigation established by the Commission.<sup>327</sup>

Federal agents also seized witnesses’ cellphones and deleted audio, video, and photographic evidence.<sup>328</sup> According to agent testimony, CBP policy requires the agents to turn over devices seized from civilians to a designated CBP employee.<sup>329</sup> The designated employee should decide to return the images to the owner or delete them from the device for security reasons.<sup>330</sup> Before deleting the images, the designee should preserve the images by downloading them to an internal system.<sup>331</sup> Agents did not

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<sup>318</sup> Moreover, the Commission stated that a State “may not rely upon procedures or standards prescribed under its domestic law as a justification for a failure to conduct an investigation that complies with its international obligations.” *Michael Gayle v. Jamaica*, Report No. 92/05, *supra* note 215, ¶ 83.

<sup>319</sup> *Id.*

<sup>320</sup> *Velasquez-Rodriguez v. Honduras*, Merits, Judgement, Inter-Am. Ct. H.R. (Ser. C) No. 4, ¶ 63 (July 29, 1988).

<sup>321</sup> *Michael Gayle v. Jamaica*, Report No. 92/05, *supra* note 215, ¶ 86.

<sup>322</sup> *Jessica Lenahan (Gonzales) et al. v. United States*, Report No. 80/11, *supra* note 264, ¶ 183.

<sup>323</sup> *Anzualdo Castro v. Peru*, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 202, ¶ 135 (September 29, 2009).

<sup>324</sup> San Diego Police Department, Interview of Jerry Vales (May 29, 2010) (Ex. 38) at 8.

<sup>325</sup> *Id.*

<sup>326</sup> *Id.* See also Young’s Videos Ex. 17 at 00:10.

<sup>327</sup> *Michael Gayle v. Jamaica*, Report No. 92/05, *supra* note 215, ¶ 90.

<sup>328</sup> Plaintiff’s Response in Opposition to All Defendants’ Motions for Summary Judgment Ex. 10 at 53.

<sup>329</sup> DeJesus Witness Statement Ex. 41 at 3-4.

<sup>330</sup> *Id.* at 4.

<sup>331</sup> *Id.* at 3-4.

follow this policy on the night of Anastasio’s death.<sup>332</sup> Instead, they confronted witnesses,<sup>333</sup> seized their cameras and cellphones,<sup>334</sup> and immediately destroyed images of the incident.<sup>335</sup>

The United States also failed to properly collect and preserve video evidence from camera equipment at the San Ysidro Port of Entry. Seven law enforcement cameras were positioned in or near Whiskey 2 where CBP agents beat and tortured Anastasio.<sup>336</sup> The San Diego Police Department investigation noted that there were “several cameras that could potentially capture surveillance footage of the incident that occurred.”<sup>337</sup> CBP is responsible for maintaining this video equipment.<sup>338</sup> However, SDPD did not receive a copy of surveillance footage until almost two weeks after Anastasio’s death.<sup>339</sup> There is no record of the chain of custody for the surveillance tapes during that time. Furthermore, none of the footage turned over to SDPD captured the incident at Whiskey 2. The two pole cameras located in the Whiskey 2 area just southwest of the pedestrian bridge were inoperable.<sup>340</sup> The five additional cameras positioned in the area also failed to capture the incident, according to CBP agentes.<sup>341</sup> Despite seven cameras positioned in or near Whiskey 2, CBP failed to collect any video evidence of the incident.

Lastly, the criminal investigation conducted by SDPD focused on the version of law enforcement officials rather than independent and impartial accounts. SDPD largely ignored civilian witnesses. It appears that SDPD detectives interviewed only three civilian eye witnesses during their investigation although law enforcement agents testified that dozens witnessed the incident from the pedestrian bridge.

The United States has failed uphold its duty to “genuinely seek[] the truth.”<sup>342</sup> Instead, CBP agents acted to prevent the collection and preservation eyewitness testimony and physical evidence.<sup>343</sup> These actions occurred at a crucial stage of investigation and ultimately led to the federal prosecutors’ decision to close criminal investigation into Anastasio’s death without pursuing criminal charges.

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<sup>332</sup> DeJesus Witness Statement Ex. 41 at 5.

<sup>333</sup> *Id.* at 3. *See also* Kalnas Witness Statement Ex. 42 at 2.

<sup>334</sup> DeJesus Witness Statement Ex. 41 at 3.

<sup>335</sup> Kalnas Witness Statement Ex. 42 at 2.

<sup>336</sup> There were two “dummy” cameras that were inoperable and five functional cameras in or near the Whiskey 2 area, yet there was no surveillance footage of the incident. SDPD Addendum Report Ex. 44 at 1-2.

<sup>337</sup> *Id.*

<sup>338</sup> *Id.* at 1.

<sup>339</sup> *Id.* at 2.

<sup>340</sup> *Id.* at 1.

<sup>341</sup> *Id.* at 2.

<sup>342</sup> Michael Gayle v. Jamaica, Report No. 92/05, *supra* note 215, ¶ 83.

<sup>343</sup> Plaintiff’s Response in Opposition to All Defendants’ Motions for Summary Judgment Ex. 10 at 53.



2. The United States failed to conduct an independent and impartial investigation

- a. Under the American Declaration, criminal investigations of extrajudicial killings must be impartial and independent in law and fact

International law requires an impartial investigation of an extrajudicial killing.<sup>344</sup> In *Montero-Aranguren*, the Court stressed that the state investigators should have “de jure and de facto independence”.<sup>345</sup> In cases of extrajudicial killings, impartiality requires “not only institutional independence, but actual independence.”<sup>346</sup>

An impartial investigation must ensure that the investigative authority is not connected to any party that could be the subject of the investigation.<sup>347</sup> The Commission has noted that a “lack of autonomy... can undermine confidence in and the credibility of the authority charged with investigating crimes objectively.”<sup>348</sup> In *Michael Gayle*, the Inter-American Commission found that the state investigation lacked impartiality because the agents who investigated the killing were part of the same institution responsible for the killing.<sup>349</sup>

In assessing the impartiality of the investigation, the Inter-American Commission presumes a lack of impartiality when the violations involve an extrajudicial killing, the failure to properly collect and preserve evidence, and there exists a pattern of similar abuses.<sup>350</sup> The Commission has cited to the United Nations Principles and Manual on Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (“Protocol of Minnesota”)<sup>351</sup> which sets forth several factors giving rise to a presumption of “government complicity, partiality or insufficient expertise on the part of those conducting the investigation.”<sup>352</sup> Among those factors, a lack of impartiality should be presumed when “the victim was last seen alive in police custody,” “where the physical or testimonial evidence essential to the investigation becomes unavailable,” or where there is “a pattern of abuse.”<sup>353</sup>

The Commission considers the independence of a criminal investigation of an extrajudicial killing “in the broader context of the problem of impunity for police killings.”<sup>354</sup> In *Michael Gayle*, the Commission identified a “pattern” in which “a disproportionately large number of killings [were]

<sup>344</sup> Jessica Lenahan (Gonzales) et al. v. United States, Report No. 80/11, *supra* note 264, ¶ 181.

<sup>345</sup> *Detention Center of Catia v. Venezuela*, Preliminary Objection, Merits, Reparations, and Costs, *supra* note 199, ¶ 81.

<sup>346</sup> *Id.*

<sup>347</sup> INTER-AM. COMM’N H.R., GUARANTEES FOR THE INDEPENDENCE OF JUSTICE OPERATORS ¶ 39 OEA/Ser.L/V/II, Doc. 44 (2013), <https://www.oas.org/es/cidh/defensores/docs/pdf/Justice-Operators-2013.pdf>

<sup>348</sup> *Id.* ¶ 38.

<sup>349</sup> *Michael Gayle v. Jamaica*, Report No. 92/05, *supra* note 215, ¶ 92-94.

<sup>350</sup> *Id.* ¶ 93.

<sup>351</sup> *See, e.g.*, INTER-AM. COMM’N H.R., STATEMENT ON THE DUTY OF THE HAITIAN STATE TO INVESTIGATE THE GROSS VIOLATIONS OF HUMAN RIGHTS COMMITTED DURING THE REGIME OF JEAN-CLAUDE DUVALIER ¶ 32 (2011).

<sup>352</sup> Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, E.S.C. Res. 1989/65, U.N. Doc. E/1989/89 (1989) [hereinafter Principles on the Effective Prevention and Investigation]; *see also U.N. Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, U.N. Doc. E/ST/CSDHA/.12 (1991) [hereinafter *U.N. Manual on the Effective Prevention and Investigation*].

<sup>353</sup> *U.N. Manual on the Effective Prevention and Investigation*, *supra* note 352.

<sup>354</sup> *Michael Gayle v. Jamaica*, Report No. 92/05, *supra* note 215, ¶ 93.

associated with the State's security forces, but where very few prosecutions [were] undertaken in relation to those killings."<sup>355</sup> In the context of a pattern of impunity for extrajudicial killings, the Commission determined that the State "faces a particularly high burden in establishing that its investigations of police killings in specific cases have been... impartial."<sup>356</sup>

b. The criminal investigation of Anastasio Hernández Rojas's death lacked independence and impartiality

There is a pervasive and systemic pattern of impunity for extrajudicial killings by law enforcement officers in the United States. The United States does not compile data related to law enforcement on-duty killings nor are law enforcement agencies required to report such data.<sup>357</sup> The United States also does not keep comprehensive data regarding prosecutions of law enforcement officers for on-duty killings.<sup>358</sup> As a result, it is unclear, how many persons are killed by law enforcement each year and whether authorities prosecute the officers. Based available data, one recent report concluded that charges were brought in only two percent of on-duty killings committed by law enforcement between 2005 and 2011.<sup>359</sup> During the same time period, the FBI reported prosecutors brought murder or manslaughter charges in 41 out of the 2,718 on-duty killings.<sup>360</sup> In 2015, law enforcement committed at least 1,134 on-duty killings.<sup>361</sup> As of January 1, 2016, only eighteen officers had been charged with a crime in connection with these killings.<sup>362</sup>

The pattern of impunity is even starker for extrajudicial killings by CBP agents. Since 2010, on-duty CBP agents have killed at least 46 people at the southern U.S. border by use of force or coercion.<sup>363</sup> Not a single one of these agents has been convicted of a crime.<sup>364</sup> Only one agent has been indicted. CBP agent Lonnie Swartz was indicted for the second degree murder of a sixteen-year-old

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<sup>355</sup> *Id.*

<sup>356</sup> *Id.* ¶ 88.

<sup>357</sup> Rani Molla, *Why the Data on Justifiable Homicide Just Won't Do*, WALL STREET JOURNAL (Sept. 2, 2014), <http://blogs.wsj.com/numbers/why-the-data-on-justifiable-homicide-just-wont-do-1725/>; Reuben Fischer-Baum, *Nobody Knows How Many Americans the Police Kill Each Year*, FIVETHIRTYEIGHT (Aug. 19, 2014), <http://fivethirtyeight.com/features/how-many-americans-the-police-kill-each-year/>.

<sup>358</sup> Josh Voorhees, *Darren Wilson is Not an Outlier*, Slate (Dec. 2, 2014), [http://www.slate.com/articles/news\\_and\\_politics/politics/2014/12/darren\\_wilson\\_no\\_true\\_bill\\_why\\_cops\\_are\\_almost\\_never\\_indicted\\_for\\_shooting.html](http://www.slate.com/articles/news_and_politics/politics/2014/12/darren_wilson_no_true_bill_why_cops_are_almost_never_indicted_for_shooting.html).

<sup>359</sup> According to statistics compiled from city, university/college, county, state, tribal, and federal law enforcement, law enforcement officers committed an average of almost 400 extrajudicial killings in the United States per year. Zusha Elinson & Joe Palazzolo, *Police Rarely Criminally Charged for On Duty Shootings*, WALL STREET JOURNAL (Nov. 24, 2014), <http://www.wsj.com/articles/police-rarely-criminally-charged-for-on-duty-shootings-1416874955>.

<sup>360</sup> *Id.* A more recent study of law enforcement killings found that from 2005-2015, only 54 police officers were charged for fatally shooting someone while on duty. Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASHINGTON POST (Apr. 11, 2015), <http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/>

<sup>361</sup> Jon Swaine, Oliver Laughland, Jamiles Lartey & Ciara McCarthy, *Young Black Men Killed by U.S. Police at Highest Rate in Year of 1,134 Deaths*, GUARDIAN (Dec. 31, 2015), <http://www.theguardian.com/us-news/2015/dec/31/the-counted-police-killings-2015-young-black-men>.

<sup>362</sup> *Id.*

<sup>363</sup> Christian Ramirez, *Time for CBP to Hold Its Agents Accountable*, HILL (Mar. 11 2006), <http://thehill.com/blogs/congress-blog/civil-rights/272561-time-for-cbp-to-hold-its-agents-accountable#.VuNlu685SP4.twitter>

<sup>364</sup> Rob O'Dell & Daniel González, *Border Patrol Agent Pleads Not Guilty in Mexican Teen's 2012 Killing*, ARIZONA REPUBLIC (Oct. 10, 2015), <http://www.azcentral.com/story/news/local/arizona/breaking/2015/10/09/arizona-border-patrol-agent-mexican-teen-killing-court-plea/73552962/>.

Mexican minor who the agent shot multiple times through the border fence as the teenager walked home in Mexico.<sup>365</sup>

The systematic failure of state investigations to find probable cause to charge U.S. law enforcement officers responsible for extrajudicial killings demonstrates a “pattern” of impunity. In light of this pattern, the United States faces a high burden to establish that its investigation of Anastasio’s death was impartial.<sup>366</sup> The United States cannot meet that burden because actions by CBP agents thwarted the effectiveness of the criminal investigation at an early and crucial stage. Before a formal investigation could even begin, CBP agents had control of the crime scene in violation of international standards.<sup>367</sup> Agents interfered with eye witness accounts, dispersed witnesses without recording their contact information, destroyed physical evidence, and violated CBP policy intended to safeguard the integrity of an investigation.<sup>368</sup> These agents compromised the impartiality and independence of the investigation and undermined the ability of investigators to produce sufficient evidence to lay criminal charges.<sup>369</sup>

### 3. The United States failed to conduct a prompt criminal investigation

#### a. The American Declaration requires a prompt investigation of extrajudicial killings

Under Article XVIII of the American Declaration, a criminal investigation of an extrajudicial killing must be prompt in order to be effective.<sup>370</sup> A prompt investigation is necessary to “protect the interests of the victims, preserve the evidence, and safeguard the rights of anyone considered a suspect in the context of the investigation.”<sup>371</sup> The State should initiate the investigation immediately after the killing<sup>372</sup> and complete the investigation without undue delay.<sup>373</sup>

According to Inter-American case law, investigators should promptly interview witnesses to protect the accuracy of their statements and safety.<sup>374</sup> A delay in the investigation will undermine “the timely preservation and gathering of evidence and the identification of eyewitnesses.”<sup>375</sup> The

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<sup>365</sup> *Id.*

<sup>366</sup> Michael Gayle v. Jamaica, Report No. 92/05, *supra* note 215, ¶ 88.

<sup>367</sup> *Id.* ¶ 92-94 (finding a violation because the state entities responsible for the death also investigated the killing).

<sup>368</sup> Plaintiff’s Response in Opposition to All Defendants’ Motions for Summary Judgment Ex. 10 at 53.

<sup>369</sup> Michael Gayle v. Jamaica, Report No. 92/05, *supra* note 215, ¶ 83.

<sup>370</sup> The Commission has clearly set forth the standard for these investigations, noting that they must be “serious, prompt, thorough, and impartial.” Jessica Lenahan (Gonzales) et al. v. United States, Report No. 80/11, *supra* note 264, ¶ 181; *see also* Case of the Barrios Family v. Venezuela, Merits, Reparations and Costs, *supra* note 291, ¶ 176.

<sup>371</sup> Case of the Santo Domingo Massacre v. Colombia, Case 12.416, Inter-Am. Comm’n H.R., Report No. 31/55, ¶ 153 (2011). The Commission has interpreted Article XVIII in light of Articles 8 and 25 of the American Convention on Human Rights. *See, e.g.*, Jessica Lenahan (Gonzales) et al. v. United States, Report No. 80/11, *supra* note 264, ¶ 172.

<sup>372</sup> *See, e.g.*, Ximenes-Lopez v. Brazil, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 149 ¶ 163 (July 4, 2006); Michael Gayle v. Jamaica, Report No. 92/05, *supra* note 215, ¶ 89.

<sup>373</sup> *See, e.g.*, Ximenes-Lopez v. Brazil, Merits, Reparations and Costs, *supra* note 372, ¶ 203.

<sup>374</sup> Monseñor Oscar Arnulfo Romero and Galdamez v. El Salvador, Case 11.481, Inter-Am. Comm. H.R., Report 37/00, ¶ 91, 116 (1999). *See also* Michael Gayle v. Jamaica, Report No. 92/05, *supra* note 215, ¶ 89; and Ximenes-Lopez v. Brazil, Merits, Reparations and Costs, *supra* note 372, ¶ 163; Case of the Barrios Family v. Venezuela, Merits, Reparations and Costs, *supra* note 291, ¶ 234.

<sup>375</sup> Ximenes-Lopez v. Brazil, Merits, Reparations and Costs, *supra* note 372, ¶ 188; *see also* Case of the Barrios Family v. Venezuela, Merits, Reparations and Costs, *supra* note 291, ¶ 234 (finding that Venezuela had failed to effectively investigate the deaths of several members of the Barrios family, thereby violating their family’s right to judicial protection, in part because “there was [a] failure to

Commission has found that the failure to interview officers involved in a killing until more than one week after the incident “jeopardized the reliability of any accounts given by officers concerning pertinent events” and “exacerbated the possibility that the officers would refuse to implicate one another.”<sup>376</sup> Similarly, in *Monseñor Oscar Arnulfo Romero and Galdamez v. El Salvador*, the Commission condemned the “delay and deficiency” of an investigation when a key witness was not called to testify until two years and eight months after the killing.<sup>377</sup>

Inter-American law also requires authorities to complete the investigation without undue delay.<sup>378</sup> To assess whether a delay is justified, the Commission and Court consider the complexity of the matter, the procedural activities carried out by the interested party, and the conduct of judicial authorities.<sup>379</sup> The Court has found a violation of the promptness standard when an investigation involved “long periods of procedural inactivity” that were not justified.<sup>380</sup> Additionally, the Court has held that authorities undermined the continuity and diligence of the investigation by forwarding the case file to multiple judicial authorities.<sup>381</sup> In *Ximenes-Lopez v. Brazil*, the Court found that the State violated the family members’ right to judicial protection because criminal proceedings had not yet concluded six years after the extrajudicial killing.<sup>382</sup>

b. The criminal investigation of the extrajudicial killing of Anastasio Hernández was unjustifiably delayed

The criminal investigation of Anastasio Hernández Rojas’s death fell short of Inter-American standards for a prompt investigation. The United States failed to immediately interview key witnesses of the killing and conducted an investigation riddled with delay.

SDPD, which had jurisdiction to investigate Anastasio’s killing, did not arrive at or take control of the crime scene until the day after the incident.<sup>383</sup> During the crucial hours following the killing, CBP, the agency responsible for Anastasio’s death, had control of the crime scene.<sup>384</sup> Additionally, SDPD detectives did not interview state agents involved in the incident until the late afternoon of the day after the incident.<sup>385</sup> For example, SDPD detectives interviewed Agent Jerry Vales, who Tased

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immediately photograph the sites of the incidents, the evidence found, the bodies of the deceased victims, and the property affected” and because there were no forensic inspections at the onset of the investigations).

<sup>376</sup> Michael Gayle v. Jamaica, Report No. 92/05, *supra* note 215, ¶ 91; *see also* Case of the Barrios Family v. Venezuela, Merits, Reparations and Costs, *supra* note 291, ¶ 234 (noting the inadequacy of the investigation of an extrajudicial killing when “all the police officials involved and previously identified were not summoned to testify immediately, and neither were possible witness or the next of kin of the victims.”).

<sup>377</sup> *Monseñor Oscar Arnulfo Romero and Galdamez v. El Salvador*, Report 37/00, *supra* note 374, ¶ 116.

<sup>378</sup> *See, e.g.*, *Ximenes-Lopez v. Brazil*, Merits, Reparations and Costs, *supra* note 372, ¶ 203.

<sup>379</sup> *Vargas-Areco v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 155, ¶ 102 (Sept. 26, 2006).

<sup>380</sup> *Case of the Moiwana Community v. Suriname*, Preliminary Exceptions, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 124, ¶ 182 (June 15, 2005).

<sup>381</sup> *Case of the Barrios Family v. Venezuela*, Merits, Reparations and Costs, *supra* note 291, ¶ 186.

<sup>382</sup> *Ximenes-Lopez v. Brazil*, Merits, Reparations and Costs, *supra* note 372, ¶ 203.

<sup>383</sup> According to dispatch records, SDPD detectives arrived at Whiskey 2 at 12:49PM on May 29, 2010. San Diego Police Department, Dispatch Communications, May 29, 2010 (Ex. 45) at 5.

<sup>384</sup> *Id.* at 5 (detailing a conversation that took place on May 29, 2010 at 12:49PM in which one officer asks if he should “tape off” the area in which the incident took place, and the other responds, “You can’t really tape it off. There’s no [inaudible] evidence or crime scene at this point.”).

<sup>385</sup> *See generally* The SDPD did not interview Agent Philip Krasielwicz or Agent Gabriel Ducoing, who interacted with Anastasio from the moment of his arrival at the Chula Vista processing facility until the final Taser, the afternoon after Anastasio was killed. *See*

Anastasio, the evening of May 29, 2010.<sup>386</sup> Detectives conducted a walkthrough—a reenactment of the events at Whiskey 2—more than twenty-four hours after the incident. The agents’ statements to detectives provided few details about the force used against Anastasio, but made bizarre and contradictory allegations about the victim’s conduct.<sup>387</sup>

The criminal investigation of Anastasio Hernández Rojas’s death involved long periods of inactivity and unjustified delays. In part, the delay resulted from the involvement of different authorities in the criminal investigation.<sup>388</sup> Initially, SDPD investigated the homicide and referred the investigation to the U.S. Attorney’s Office in San Diego, but by July 2010, the case was referred to the Civil Rights Division of the U.S. Department of Justice (“DOJ”).

Federal authorities did not empanel a federal grand jury to investigate the killing until two years after the incident.<sup>389</sup> U.S. law requires that a federal grand jury issue indictments for federal felonies.<sup>390</sup> The federal grand jury investigating Anastasio’s death did not begin to hear witness testimony until the summer of 2012, more than two years after the killing. The Inter-American Commission has stressed that “witness testimony should [be] taken without delay so that the eyewitnesses could accurately recall the details of what they saw, and be kept from being subjected to threats or any type of undue pressure.”<sup>391</sup> The Commission has found failure to interview witness for more than two years after an incident a violation of international standards.<sup>392</sup>

Federal prosecutors did not conduct the federal grand jury investigation in a prompt manner. Under federal law, a federal prosecutor convenes a federal grand jury for a maximum of eighteen months and is only permitted to continue the investigation beyond this period with a court-granted extension of six months.<sup>393</sup> The federal grand jury investigation of Anastasio’s killing appears to have spanned several years. The DOJ did not publicly release its decision not to prosecute until November 2015—more than five years after Anastasio’s death and more than three years after convening a federal grand jury.<sup>394</sup> For most federal offenses, including federal assault, U.S. federal prosecutors have a five-years statute of limitations to charge the defendant.<sup>395</sup> Federal authorities did not conclude the federal criminal investigation in time to bring federal assault charges against the agents. The investigators

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Witness Statement of Gabriel Ducoing (May 29, 2010) (Ex. 50); Witness Statement of Philip Krasielwicz (May 29, 2010) (Ex. 47).

<sup>386</sup> San Diego Police Department, Investigator’s Report Witness of Jerry Vales, (May 29, 2010) (Ex. 38) at 96.

<sup>387</sup> See e.g. Witness Statement of Gabriel Ducoing (May 29, 2010) (Ex. 50) at 4 (claiming that “[Anastasio] also said in Spanish that we were trying poisoning him and he had snakes on him.”) See also Plaintiff’s Response in Opposition to All Defendants’ Motions for Summary Judgment Ex. 10 at 73-90 (discussing that agents’ self-serving testimony is contradicted by video and audio evidence).

<sup>388</sup> See *Case of the Barrios Family v. Venezuela, Merits, Reparations and Costs*, *supra* note 291, ¶ 186.

<sup>389</sup> Defendants’ Notice of Motion for Stay of Discovery Pending Conclusion of Grand Jury Proceedings (Aug. 1, 2012) (Ex. 48).

<sup>390</sup> Fed. R. Crim. P. 6. A grand jury determines whether there is probable cause to believe a suspect committed a crime, and not the guilt or innocence of the suspect. In the federal context, sixteen to twenty-three citizens, chosen at random from the pool of registered voters living in the judicial district where the jury convenes, make a probable cause determination to indict a suspect on criminal charges.

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, HANDBOOK FOR GRAND JURORS 2-3,

[http://www.ndd.uscourts.gov/jury/jury\\_handbook\\_grand\\_jurors.pdf](http://www.ndd.uscourts.gov/jury/jury_handbook_grand_jurors.pdf). A single grand jury may only convene for a maximum of eighteen months. However, the court may grant an extension of six months if it is in the public interest to do so. FED. R. CRIM. P. 6(g).

<sup>391</sup> See *Monseñor Oscar Arnulfo Romero and Galdamez v. El Salvador*, Report 37/00, *supra* note 374, ¶ 91.

<sup>392</sup> See *id.* ¶ 116.

<sup>393</sup> Fed. R. Crim. P. 6(g).

<sup>394</sup> *Federal Officials Close Investigation*, *supra* note 160.

<sup>395</sup> Charles Doyle, Congressional Research Service, *Statutes of Limitation in Federal Criminal Cases: An Overview 19-29* (2012), <https://www.fas.org/sgp/crs/misc/RL31253.pdf> (prepared for members and committees of Congress).

failure to promptly interviews witnesses and long periods of inactivity not only delayed justice, but ultimately thwarted justice, in violation of the American Declaration.<sup>396</sup>

iii. The United States failed to diligently prosecute the perpetrators of the torture and death of Anastasio Hernández Rojas

1. The duty to prosecute prohibits the State from failing to pursue criminal charges as result of an inadequate investigation

International law requires the State to prosecute and punish those responsible for serious human rights violations.<sup>397</sup> The State is obliged to “remove all factual and legal obstacles” that prevent the prosecution and punishment of those responsible for serious human rights violations.<sup>398</sup> In cases of extrajudicial killing and forced disappearances, the duty to prosecute has led the Court to revoke amnesty laws and other barriers to prosecution.<sup>399</sup> The Court has found that obstacles that prevent “the investigation of the facts and the identification, prosecution, and possible punishment” of those responsible violate the duty to prosecute.<sup>400</sup>

The failure to prosecute as the result of an inadequate investigation violates the duty to prosecute. The mere fact that a prosecutor decides not to pursue criminal charges “does not, in and of itself, lead to the conclusion that a state has failed in its obligation to... prosecute.”<sup>401</sup> However, in *Michael Gayle*, the Commission found that the State violated the duty to prosecute because the “failure to pursue criminal charges... stemmed in large part from the inadequacies in the investigation from its outset...”<sup>402</sup> Similarly, the United States erected a barrier to prosecution of those responsible for Anastasio’s death by conducting an inadequate investigation.

2. The United States failure to prosecute those responsible for Anastasio Hernández Rojas’s death is the direct result of an inadequate investigation

In late 2015, federal prosecutors announced that the evidence was “insufficient” to pursue federal criminal charges against those responsible for Anastasio’s death.<sup>403</sup> The lack of evidence is the direct result of actions and omissions by CBP agents and criminal investigators. CBP agents destroyed physical evidence and failed to collect surveillance video footage.<sup>404</sup> Furthermore, CBP agents

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<sup>396</sup> See *Ximenes-Lopez v. Brazil*, Merits, Reparations and Costs, *supra* note 372, ¶ 199.

<sup>397</sup> *Gomes-Lund v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 219, ¶ 137 (Nov. 24, 2010).

<sup>398</sup> *Id.*

<sup>399</sup> *Almonacid Arellano et al. v. Chile*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 154, ¶ 111 (Sept. 26, 2006); *Gomes-Lund v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, *supra* note 397, ¶ 149.

<sup>400</sup> *Gomes-Lund v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, *supra* note 397, ¶ 172.

<sup>401</sup> *Michael Gayle v. Jamaica*, Report No. 92/05, *supra* note 215, ¶ 98-99.

<sup>402</sup> *Id.* ¶ 91.

<sup>403</sup> *Federal Officials Close Investigation*, *supra* note 160.

<sup>404</sup> Plaintiff’s Response in Opposition to All Defendants’ Motions for Summary Judgment Ex. 10 at 53. See also SDPD Addendum Report Ex. 44 at 1-2.

interfered with eye witness accounts and failed to document witness contact information.<sup>405</sup> Criminal investigators did not arrive to the crime scene until the day after the incident and failed to interview witnesses in a timely manner. The inadequate investigation prompted members of the United States Congress to condemn “efforts by the agents to minimize the incident” which “suggest[ed] a troubling lack of training and accountability within the Department.”<sup>406</sup> Congress persons concluded that “there did not appear to be an effort...to fully investigate the incidents.”<sup>407</sup>

The decision by federal prosecutors to close the investigation appears to rely heavily on the version of events given by CBP and other state agents. These accounts were contradictory, inconsistent, and omitted details about agent misconduct clearly visible in witness videos.<sup>408</sup> Video evidence, for example, shows Anastasio lying in handcuffs in a fetal position on the ground while CBP Agent Vales stands above him with the Taser screaming “stop resisting.”<sup>409</sup>

Actions and omissions by state agents rendered the criminal investigation inadequate and created an obstacle to the prosecution and punishment of those responsible for killing Anastasio. Federal prosecutors then relied on this inadequate investigation to reach a preordained conclusion. The United States has violated the duty to prosecute a serious violation of human rights.

#### iv. The United States Failed to Uphold the Family Members’ Right to Truth

##### 1. The American Declaration guarantees the family the right to access information

The right to truth is enshrined in several international instruments.<sup>410</sup> The Inter-American Commission has found that the right to judicial protection includes a right to access information related to the investigation.<sup>411</sup> The Commission has interpreted Article XXVI of the American Declaration in light of American Convention to protect the right to access information as “a crucial component of a victim’s

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<sup>405</sup> DeJesus Witness Statement Ex. 41 at 5.

<sup>406</sup> U.S. Congress’ Letter to DHS Secretary Napolitano, *supra* note 157.

<sup>407</sup> *Id.*

<sup>408</sup> Compare San Diego Police Department, Witness Statement of Guillermo Avila (July 6, 2010) (Ex. 49), and San Diego Police Department, Witness Statement of Gabriel Ducoing Ex. 50, with San Diego Police Department, Witness Statement of Philip Krasielwicz Ex. 47. See also Plaintiff’s Response in Opposition to All Defendants’ Motions for Summary Judgment Ex. 10 at 73-90 (discussing that agents’ self-serving testimony is contradicted by video and audio evidence).

<sup>409</sup> Young’s Videos (Ex. 17).

<sup>410</sup> See, e.g., REPORT OF THE OFFICE OF THE HIGH COMMISSIONER OF THE UNITED NATIONS FOR HUMAN RIGHTS, STUDY ON THE RIGHT TO THE TRUTH, U.N. Doc. E/CN.4/2006/91 (Jan. 9, 2006); United Nations General Assembly, BASIC PRINCIPLES AND GUIDELINES ON THE RIGHT TO A REMEDY AND REPARATION FOR VICTIMS OF GROSS VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW AND SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW, ¶ 24 (Mar. 21, 2006). The family’s right to truth is recognized by the Geneva Conventions which establish the right to know the fate of one’s relatives and the obligation of parties to armed conflict to search for missing persons. Additional Protocol I, Geneva Conventions, Art. 32 (Aug. 12, 1959). The International Committee of the Red Cross has concluded that the right to truth constitutes customary international law and requires that “each party to the conflict must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate.” Rule 117 in International Committee of the Red Cross, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I, Rules 421 (2005). The right to truth has extended beyond its initial roots in international humanitarian law to protect the rights of family members of victims of serious human rights violations. Principles on the Effective Prevention and Investigation, *supra* note 352, Principle 16.

<sup>411</sup> Jessica Lenahan (Gonzales) et al. v. United States, Report No. 80/11, *supra* note 264, ¶ 193.

adequate access to judicial remedies.”<sup>412</sup> The right to access information includes the obligation of the State to investigate the circumstances of the victim’s death and inform the family members of the victim “of all happenings related to a serious human rights violation. . . .”<sup>413</sup>

The Inter-American Commission and Court have held that victims’ family members have a right “to know the full, complete, and public truth as to the events that transpired, their specific circumstances, and who participated in them.”<sup>414</sup> Authorities must provide family members with descriptions of events, names of witnesses who testified, the scope of the inquiry, the methods used to evaluate evidence, and recommendations.<sup>415</sup> The State has an obligation to reveal the findings of the investigation within a reasonable period of time.<sup>416</sup> In *Lenahan*, the Commission found that the United States had violated the family’s rights to judicial protection by failing to inform them of the results of the criminal investigation.<sup>417</sup>

## 2. The United States violated the family members’ right to information

The United States violated Anastasio’s family members’ right to access information about the investigation of his death. Although family members requested information throughout the course of the entire investigation, the United States did not contact the family or explain the status of the investigation. Family members were not provided with any information about the criminal investigation until the day before federal prosecutors announced their decision to close the criminal investigation.

Indeed, the United States actively sought to withhold information about the case. For example, the United States requested and obtained a protective order to withhold the names of the CBP agents involved in the killing from the public.<sup>418</sup> The family members were informed of the identities of the agents more than three years after Anastasio was killed and only after they filed a civil wrongful death suit and requested that a judge lift the protective order.<sup>419</sup>

Very little information about the grand jury investigation has been conveyed to the family or made public. DOJ has consistently declined to comment on the status of the investigation. Federal law requires grand jury proceedings to remain secret.<sup>420</sup> While proceedings must be recorded, grand jurors and prosecutors may not divulge any “matter occurring before the grand jury.”<sup>421</sup> Proceedings must

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<sup>412</sup> *Id.*

<sup>413</sup> *Id.* ¶¶ 193, 195.

<sup>414</sup> *Monseñor Oscar Arnulfo Romero and Galdamez v. El Salvador*, Report 37/00, *supra* note 374, ¶ 671; *Case of the Moiwana Community v. Suriname*, Preliminary Objection, Merits, Reparations and Costs, *supra* note 380, ¶ 147 (The Court in *Moiwana Community* explained that “victims of rights violations and their family members have a right to know the truth regarding those violations—that is, to be informed about the relevant facts and responsible parties.”).

<sup>415</sup> *Vargas-Areco v. Paraguay*, Merits, Reparations and Costs, *supra* note 379, ¶ 102.

<sup>416</sup> *Id.* ¶ 102.

<sup>417</sup> *Jessica Lenahan (Gonzales) et al. v. United States*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, ¶ 195-96 (2011).

<sup>418</sup> AMERICAN CIVIL LIBERTIES UNION, UNITED STATES’ COMPLIANCE WITH THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, SHADOW REPORT TO THE FOURTH PERIODIC REPORT TO THE UNITED STATES 11 (2013) [hereinafter REPORT ON U.S. COMPLIANCE WITH ICCPR].

<sup>419</sup> *Id.*

<sup>420</sup> FED. R. CRIM. P. 6(e).

<sup>421</sup> Except as ordered by a court, the prosecutor must retain control and keep secret any recordings, notes, and transcripts from a grand jury proceeding. Fed. R. Crim. P. 6(e).



remain confidential, even after the grand jury concludes, “to the extent and as long as necessary.”<sup>422</sup> While a court can release grand jury records, it must balance the government’s interest in secrecy with the public’s interest in disclosure<sup>423</sup> and federal norms block the disclosure of the vast majority of grand jury investigations.<sup>424</sup>

On November 6, 2015, federal prosecutors informed family members that they had decided not to bring charges against CBP agents for lack of evidence. This was the first time—more than five years after Anastasio was killed—that officials provided the family members with information about the criminal investigation.<sup>425</sup> Federal prosecutors informed the family of the results of their investigation, but did not provide a full or accurate description of events or details regarding the evidence or investigative process in accordance with the family’s right to information.<sup>426</sup> Specifically, the prosecutors did not provide information about what evidence they had or lacked to support the separate possible charges, including assault, civil rights violations, and murder. With regard to the possible assault charge, the prosecutors did not inform the family that the statute of limitations had passed and, when asked by the family directly on November 6, 2015, did not answer to why they could not have brought this lesser charge. The State has failed to fulfill its obligation under the right to truth within a reasonable period of time.<sup>427</sup>

v. The United States Violated Family Members’ Right to Participate in the Investigation

1. The American Declaration provides the right to participate

The Inter-American Commission should interpret Article XXVI of the American Declaration, which protects the right to an “impartial and public hearing,” in light of established Inter-American case law and human rights standards.<sup>428</sup> The Inter-American Court has interpreted the analogous provision of the American Convention (Article 8) to afford family members the right to participate in criminal proceedings.<sup>429</sup> The Court has held that States have an obligation to ensure the rights of a victim’s relatives to participate in all stages of the proceedings “so that they can make proposals, receive information, provide evidence, formulate arguments and . . . assert their interests and rights.”<sup>430</sup> Similarly, the Minnesota Protocol notes that the families of the deceased “shall be informed of, and

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<sup>422</sup> *Id.*

<sup>423</sup> FED. R. CRIM. P. 6(e)(3)(C)(i)(I); *United States v. Aisenberg*, 358 F.3d 1327 (11th Cir. 2004).

<sup>424</sup> Jonathan Blitzer, *The Case to Release the Garner Grand Jury Records*, NEW YORKER (Mar. 10, 2015), <http://www.newyorker.com/news/news-desk/the-case-to-release-the-garner-grand-jury-records>.

<sup>425</sup> *Federal Officials Close Investigation*, *supra* note 160.

<sup>426</sup> *See* Principles on the Effective Prevention and Investigation, *supra* note 352, Principle 17. Indeed, federal prosecutors released inaccurate and contested information about the incident. The press release by the Department of Justice alleges that Anastasio was high on methamphetamines with no conclusive evidence. *Compare Federal Officials Close Investigation*, *supra* note 160, with Transcript of Videotaped Deposition of Ian McIntyre (Oct. 12, 2012) [hereinafter Deposition McIntyre] (Ex. 53) at 11, 15-16 (highlighting that, for example, the toxicology report is not consistent with hospital records and the blood was drawn after Anastasio had been issued phenylephrine, a medication used to stimulate the heart, but there was no phenylephrine in the blood analysis).

<sup>427</sup> Jessica Lenahan (Gonzales) et al. v. United States, Report No. 80/11, *supra* note 264, ¶ 17.

<sup>428</sup> American Declaration, *supra* note 180, at art. XXVI.

<sup>429</sup> *See, e.g.*, Case of the Barrios Family v. Venezuela, Merits, Reparations and Costs, *supra* note 291, ¶ 178.

<sup>430</sup> Case of Gonzales Medina and Family v. Dominican Republic, Preliminary Exception, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 240, ¶ 251 (Feb. 27, 2012).

have access to any hearing as well as to all information relevant to the investigation, and shall be entitled to present other evidence.”<sup>431</sup>The aim of these participatory rights is to provide ample possibility for families “to seek clarification of the facts and the punishment of those responsible, and to obtain due reparation.”<sup>432</sup>

U.S. law also provides the relatives of homicide victims with the right to participate in criminal proceedings.<sup>433</sup> Under federal law, federal prosecutors must make reasonable efforts to notify crime victims of their rights—including the rights to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding; the right to confer with the attorney for the government in the case; the right to proceedings free from unreasonable delay; and the right to be treated with fairness and with respect for the victim's dignity and privacy—and to afford those rights as early in the criminal justice process as is feasible and appropriate.<sup>434</sup>

## 2. The United States violated the family members’ right to participate

The United States failed to notify or inform Anastasio’s family members of their rights under federal or state law and disregarded their repeated attempts to participate in or have input into the criminal investigation. Indeed, the United States sought to withhold information about the case from the family by successfully requesting a protective order to keep secret the names of the CBP agents involved in the incident.<sup>435</sup> Federal authorities also consistently declined to comment on the status of the investigation.

Additionally, victims and their relatives have no right to participate in federal grand jury proceedings. In the U.S. grand jury system, the prosecutor has autonomy to determine which witnesses testify and what evidence is presented.<sup>436</sup> The family members were not heard by the federal grand jury. Moreover, federal investigators have not fully explained the decision to close the criminal investigation, revealed the names of the witnesses who testified before the grand jury, or revealed the methods used to evaluate evidence. In sum, Anastasio’s family members had no meaningful

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<sup>431</sup> Principles on the Effective Prevention and Investigation, *supra* note 352, Principle 16.

<sup>432</sup> Case of the Barrios Family v. Venezuela, Merits, Reparations and Costs, *supra* note 291, ¶ 178; *see also* Case of Baldeón-García v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 147, ¶ 93 (Apr. 6, 2006) (affirming the “right of the victims of human rights violations or their families to be heard during investigation and court proceedings as well as to actively participate in such proceedings.”); Case of Pueblo Bello Massacre v. Colombia, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 140, ¶ 144 (Jan. 31, 2006) (“[D]uring the investigation procedure and the judicial proceedings, the victims of the human rights violations, or their next of kin, should have extensive opportunities to participate and be heard, both in the clarification of the facts and the punishment of those responsible, and in seeking fair compensation.”). *See also* Ximenes-Lopez v. Brazil, Merits, Reparations and Costs, *supra* note 372, ¶ 193; Case of the Pueblo Bello Massacre v. Colombia, Interpretation of the Judgment of Merits, Reparations and Costs, Inter-Am. Ct. H.R. (Ser. C) No. 159, ¶ 144 (Nov. 25, 2006) (“[D]uring the investigation procedure and the judicial proceedings, the victims of human rights violations, or their next of kin, should have extensive opportunities to participate and be heard, both in the clarification of the facts and the punishment of those responsible, and in seeking fair compensation.”); Case of Vera Vera et al. v. Ecuador, Preliminary Exception, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 226, ¶ 85 (May 19, 2011).

<sup>433</sup> *See* California Constitution, Article I, section 28(b) (“Marsy’s Law”); 18 U.S.C. § 3771 (2004). Federal courts also have held that crime victims are entitled to rights, even if the prosecutor has not filed charges or identified a suspect. *In re Dean*, 527 F.3d 391, 394 (5th Cir. 2008); *Doe v. United States*, 817 F.Supp.2d 1337 (S.D. Fla. 2011).

<sup>434</sup> 18 U.S.C. § 3771 (2004).

<sup>435</sup> REPORT ON U.S. COMPLIANCE WITH ICCPR, *supra* note 418

<sup>436</sup> Berkeley Law, *Background on Grand Juries and Federal Civil Rights Suits 2*, <https://www.law.berkeley.edu/files/grand-jury-faq-BerkeleyLaw-12-14.pdf>.

opportunity to participate in the criminal investigation in violation of their rights under the American Declaration.

vi. The United States Failed to Provide Full Reparations

1. The American Declaration provides the right to reparations

The violation of the American Declaration gives rise to a duty to provide the victim with full reparations.<sup>437</sup> It is well-established jurisprudence that “[t]he reparation of the damage caused by the infringement of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which consists of the return to the state of affairs prior to the infringement.”<sup>438</sup> In cases of serious violations of human rights, such as extrajudicial killings, where it is impossible to restore victims to their original situation, States must implement a range of measures. This includes “monetary compensation and public actions or works the effect of which, among others, [are] to acknowledge the victim’s dignity and to avoid new violations.”<sup>439</sup> Preventative measures often require any legal and policy reforms necessary to ensure that violations of the nature committed are not repeated.<sup>440</sup> In acknowledgement of the victims’ dignity, the Commission has also required States to issue a public apology.<sup>441</sup>

2. The United States violated the family members’ right to reparations

The United States has failed to provide reparations for the violations committed against Anastasio and his family. Although the extrajudicial killing of Anastasio stripped the family of their main source of economic support and has caused them significant economic hardship, the United States has failed to provide them with economic compensation. Nor has the United States issued a public apology or publicly taken responsibility for the violations of Anastasio’s and his family’s human rights. Rather, the United States has cast aspersions on Anastasio’s character by alleging the victim was combative and high on methamphetamine at the time of his death, despite the lack of conclusive evidence.<sup>442</sup> According to the clinical pathologist who conducted the official autopsy after Anastasio’s death, the use of Tasers undeniably contributed to Anastasio’s death.<sup>443</sup> The United States has utterly failed to uphold its duty to acknowledge the dignity of Anastasio and his family.

Furthermore, Anastasio’s family has been provided no guarantee of non-repetition. CBP agents have killed forty-six persons at the U.S.-Mexico border since Anastasio’s death.<sup>444</sup> CBP has failed to implement changes to its use of force policy, including the use of Tasers, which would prevent these

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<sup>437</sup> Jessica Lenahan (Gonzales) et al. v. United States, Report No. 80/11, *supra* note 264, ¶ 172.

<sup>438</sup> Detention Center of Catia v. Venezuela, Preliminary Objection, Merits, Reparations, and Costs, *supra* note 199, ¶ 117.

<sup>439</sup> *Id.* at ¶¶ 118, 130.

<sup>440</sup> Michael Gayle v. Jamaica, Report No. 92/05, *supra* note 215, ¶ 114.

<sup>441</sup> *Id.*

<sup>442</sup> *Federal Officials Close Investigation*, *supra* note 160.

<sup>443</sup> Deposition of Wagner Ex. 18 at 210:13-20.

<sup>444</sup> Ramirez, *supra* note 363.

deaths.<sup>445</sup> Moreover, the vast majority of incidents of abuse and excessive force remain shrouded in absolute impunity.<sup>446</sup>

E. The United States Violated the Right of Anastasio Hernández Rojas’s Family Members to Personal Integrity

i. The American Declaration protects the right to personal integrity (Articles I & XXVI)

Under Article I of the American Declaration, the State has an obligation to protect individuals’ personal integrity.<sup>447</sup> In *Victims of the Tugboat “13 de Marzo” v. Cuba*, the Commission held that the emotional and psychological distress inflicted by “the loss of loved ones, the trauma caused by the incident, [and] . . . the knowledge that they did not receive justice” violated the right of personal integrity of the victims’ relatives.<sup>448</sup> The Inter-American Court has found that actions or omission by a State to investigate an extrajudicial killing implicate the right to personal integrity of the victim’s family members protected by the analogous provision of the American Convention (Article 5).<sup>449</sup> The Court has presumed that serious violations of human rights harm the mental and moral integrity of the immediate family of the victims, including mothers and fathers, sons and daughters, and permanent companions.<sup>450</sup>

Moreover, the Inter-American Court has presumed a violation of the family members’ personal integrity in cases of extrajudicial executions.<sup>451</sup> The Court has affirmed that “the mere loss of a loved one as a result of the arbitrary use of force by security agents, in a permanent context of threat and vulnerability, followed also by the failure to elucidate the facts and their impunity, are elements that allow the violation of the right to integrity of the immediate family of the deceased to be inferred.”<sup>452</sup> The Court has recognized that the lack of effective investigations “exacerbate[] [the family members’] the feelings of frustration, helplessness, and anxiety.”<sup>453</sup>

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<sup>445</sup> See generally USE OF FORCE REVIEW, *supra* note 97.

<sup>446</sup> Bob Ortega & Rob O’Dell, *Deadly Border Agent Incidents Cloaked in Silence*, REPUBLIC (Mar. 28, 2014), <http://www.azcentral.com/story/news/arizona/2014/03/28/arizona-border-force-deadly-incidents/7013023/>.

<sup>447</sup> See Carmelo Soria Espinoza v. Chile, Case 11.725, Inter-Am. Comm’n H.R., Report 133/99, ¶ 118 (1999); *Victims of the Tugboat “13 de Marzo” v. Cuba*, Inter-Am. Comm’n H.R., Report 47/96 ¶ 69 (1996).

<sup>448</sup> *Victims of the Tugboat “13 de Marzo” v. Cuba*, Report 47/96, *supra* note 447, ¶ 103.

<sup>449</sup> See, e.g., *Case of the Pueblo Bello Massacre v. Colombia*, Interpretation of the Judgment of Merits, Reparations and Costs, *supra* note 432, ¶ 154.

<sup>450</sup> *Case of the Barrios Family v. Venezuela*, Merits, Reparations and Costs, *supra* note 291, ¶ 302 (noting that for other next of kin, the Court does not presume harm to their personal integrity but rather must evaluate “whether particularly close ties existed between them and the victims in the case that would enable them to prove an impairment of their personal integrity and, accordingly, a violation of Article 5 of the Convention.”); *Case of Gutiérrez and Family v. Argentina*, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (Ser. C) No. 271, ¶ 139 (Nov. 25, 2013).

<sup>451</sup> *Case of Gutiérrez and Family v. Argentina*, Merits, Reparations and Costs, *supra* note 450, ¶ 139.

<sup>452</sup> *Case of the Barrios Family v. Venezuela*, Merits, Reparations and Costs, *supra* note 291, ¶ 295.

<sup>453</sup> *Id.* ¶ 310.

ii. The United States violated the family members' right to personal integrity

The actions and omission of the United States have exacerbated the emotional and psychological distress suffered by Anastasio's family members.<sup>454</sup> Anastasio and his family shared a tight-knit bond: he was close with his eight siblings, his parents, his partner, and his five children.<sup>455</sup> Anastasio was the primary source of economic support for his wife and children.<sup>456</sup> Anastasio's death not only deprived his family of his love and affection, but also plunged his immediate family into an economic crisis from which they have never recovered.

His surviving family members have suffered extreme hardship in coping with Anastasio's death. The brutality of his death devastated his partner and children. The last memory that Anastasio's children have of their father is of his severely beaten face and body on life support.<sup>457</sup> Anastasio's son, Daniel, visited a psychologist for five months after his father's death and continues to feel despondent, Anastasio's daughter, Daniela, rarely socializes,<sup>458</sup> and Fabian, who was eleven when his father died, was prescribed antidepressants.<sup>459</sup>

The family has relentlessly sought justice for Anastasio. They brought civil litigation against the agents responsible for Anastasio's death and the U.S. government.<sup>460</sup> They made multiple attempts to provide input into the criminal investigation. They have also made numerous media appearances and participated in countless protests and campaigns. Despite these efforts, federal prosecutors closed the federal criminal investigation and used that opportunity to disparage Anastasio's character. Federal prosecutors alleged that Anastasio was high on methamphetamines without clear evidence of drug use.<sup>461</sup> The press release was the only public statement made by the federal government regarding the incident since Anastasio's death. The United States actions and omissions have further exacerbated the family members feelings of frustration, helplessness, and anxiety.<sup>462</sup>

Anastasio's death, the loss of the family's primary economic provider, the particularly gruesome way in which Anastasio was killed, the impunity enjoyed by those who killed him, and the State's attempt to destroy Anastasio's character amount to violations of Anastasio's family members' rights to personal integrity.

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<sup>454</sup> See *Victims of the Tugboat "13 de Marzo" v. Cuba*, Report 47/96, *supra* note 447, ¶ 69; *Case of the Barrios Family v. Venezuela*, *supra* note 291, ¶ 295.

<sup>455</sup> Joint Motion for Leave to File Third Amended Complaint (Mar. 13, 2012) (Ex. 54) at 6.

<sup>456</sup> *Id.* at 5.

<sup>457</sup> Plaintiff's Response in Opposition to All Defendants' Motions for Summary Judgment Ex. 10 at 23.

<sup>458</sup> Deposition I of Maria Puga Ex. 26 at 150:7 – 150:13.

<sup>459</sup> Deposition II of Maria Puga Ex. 28 at 248:14 - 249:1.

<sup>460</sup> See Third Amended Complaint Ex. 1.

<sup>461</sup> *Federal Officials Close Investigation*, *supra* note 160. Although blood tests revealed the presence of methamphetamine metabolite in Anastasio's blood, various legal substances contain or can produce the methamphetamine metabolite, including phenylephrine, Tylenol, caffeine, codeine, and ibuprofen. Transcript of Videotaped Deposition of Cameron Campbell (Jan. 17, 2013) (Ex. 55) at 71-73. Moreover, there are reasons to question the reliability of the toxicology report. Anastasio's blood was drawn after Anastasio had been issued phenylephrine, a medication used to stimulate the heart, but there was no phenylephrine in the blood analysis. Deposition of Ian McIntyre Ex. 53 at 11, 15-16.

<sup>462</sup> *Case of the Barrios Family v. Venezuela*, Merits, Reparations and Costs, *supra* note 291, ¶ 310.

F. The United States Violated Anastasio Hernández Rojas’s Right to Equality before the Law and the Prohibition against Discrimination

i. The American Declaration prohibits discriminatory intent and effect (Articles I & II)

The Inter-American Commission describes the right to equal protection before the law and the prohibition against discrimination as a “fundamental principle of the Inter-American system of human rights.”<sup>463</sup> Under Article II of the American Declaration, “[a]ll persons are equal before the law and have the rights and duties established in th[e] Declaration, without distinction as to race. . . or any other factor.”<sup>464</sup> The Inter-American Court recognizes the prohibition of discrimination as *jus cogens* and binding on the Member States of the Organization of American States.<sup>465</sup>

The American Declaration prohibits both *de jure*<sup>466</sup> and *de facto*<sup>467</sup> discrimination. This prohibition extends to policies and practice that are deliberately discriminatory in nature, but also those that have a discriminatory effect.<sup>468</sup> The Inter-American Court similarly defines discrimination as any measure adopted by a State that intentionally disadvantages an individual or group or that has a disparate impact on such a group.<sup>469</sup> Other human rights treaties reflect a similar understanding of the right to equality before the law and non-discrimination.<sup>470</sup> The Convention on the Elimination of All Forms of Racial Discrimination (“CERD”), ratified by 177 countries, including the United States, defines discrimination as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”<sup>471</sup> The Human Rights Committee has interpreted the International Covenant on Civil and Political Rights (“ICCPR”) ratified by 168 countries, including the United States, to prohibit both *de jure* and *de facto* discrimination.<sup>472</sup>

The legal definition of discrimination in the United States is much narrower than the definition codified in international law. The U.S. Supreme Court has interpreted the U.S. Constitution to prohibit intentional discrimination against a protected class.<sup>473</sup> The Supreme Court requires a showing of

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<sup>463</sup> Jessica Lenahan (Gonzales) et al. v. United States, Report No. 80/11, *supra* note 264, ¶ 107.

<sup>464</sup> American Declaration, *supra* note 180, at art. II.

<sup>465</sup> See e.g., Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (Ser. A) No. 18, ¶ 101 (Sept. 17, 2003).

<sup>466</sup> See Oscar Elías Bicet et al. v. Cuba, Case 12.476, Inter-Am. Comm’n H.R., Report No. 67/06, ¶¶ 228–31 (2006).

<sup>467</sup> See Maya Indigenous Communities of the Toledo District v. Belize, Report No. 40/04, *supra* note 177, ¶ 171.

<sup>468</sup> INTER-AM. COMM’N H.R., REPORT ON IMMIGRATION IN THE UNITED STATES: DETENTION AND DUE PROCESS ¶ 95 (2010); see also Nadege Dorzema et al. v. Dominican Republic, Case 12.688, Inter-Am. Comm’n H.R., Report No. 174/10, ¶ 209 (2010), <http://www.oas.org/en/iachr/decisions/court/12688FondoEn.pdf>.

<sup>469</sup> See Case of Girls Yean and Bosico v. Dominican Republic, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am Ct. H.R. (Ser. C) No. 130, ¶ 141 (Sept. 8, 2005) (emphasis added); see also Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, *supra* note 465, ¶ 103 (“[S]tates must abstain from carrying out any action that, in any way, directly or indirectly, is aimed at creating situations of *de jure* or *de facto* discrimination.”).

<sup>470</sup> Maya Indigenous Communities of the Toledo District v. Belize, Report No. 40/04, *supra* note 177, ¶ 87 (Interpreting and applying pertinent provisions of the American Declaration in light of current developments in the field of international human rights law, as evidenced by the American Convention on Human Rights and other treaties).

<sup>471</sup> International Convention on the Elimination of All Forms of Racial Discrimination, art. 1, Mar. 7, 1966, 660 U.N.T.S. 195.

<sup>472</sup> Human Rights Committee, *General Comment No. 18 on Non-Discrimination*, ¶ 7, UN Doc. HRI/GEN/1/Rev.7 (1989).

<sup>473</sup> *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256 (1979).

discriminatory purpose, which “implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”<sup>474</sup> “[A]wareness of consequences” does not prove “discriminatory purpose” under the U.S. Constitution.<sup>475</sup> Discriminatory impact in absence of discriminatory purpose is thus not sufficient to hold a law, policy, or practice unconstitutional.<sup>476</sup>

ii. Neutral laws and policies that have a discriminatory effect constitute discrimination

Inter-American law does not prohibit all distinctions in treatment. Permissible distinctions “must be based upon objective and reasonable justification, must further a legitimate objective . . . and the means must be reasonable and proportionate to the end sought.”<sup>477</sup> The Inter-American Commission has also recognized that discrimination manifests in indirect ways.<sup>478</sup> Laws and policies that appear neutral may disparately impact a group in discriminatory manner. The Commission has established that

[i]f the effect is one of indirect discrimination, the disproportionately prejudicial effect or result that the provision has on a group has to be shown. . . . [T]o examine norms and policies for their adherence to the principle of effective equality and non-discrimination, one has to look at their discriminatory *impact* –even those whose formulation is neutral or those that apply to everyone, without exception. The emphasis must be on objective factors –including the discriminatory effect or result- in preference to the declared *intention* to discriminate.<sup>479</sup>

The Inter-American Commission has considered various factors to determine the discriminatory effect of facially neutral norms, including whether (1) the victim is part of a protected group;<sup>480</sup> (2) the protected group has been subjected to violence;<sup>481</sup> and (3) the victim and the protected group has access to effective redress.<sup>482</sup>

As a threshold question, the Commission has considered whether the victim is a member of a group regarded as deserving heightened protection. Article II of the American Declaration explicitly prohibits discrimination on the grounds of “race, sex, language, creed, or any other factor.”<sup>483</sup> Inter-American case law has also recognized children,<sup>484</sup> the mentally ill,<sup>485</sup> indigenous communities,<sup>486</sup>

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<sup>474</sup> *Id.* at 279.

<sup>475</sup> *Id.*

<sup>476</sup> *Id.* at 278.

<sup>477</sup> REPORT ON TERRORISM AND HUMAN RIGHTS, *supra* note 180, ¶ 338.

<sup>478</sup> INTER-AM. COMM’N H.R., ACCESS TO JUSTICE FOR WOMEN VICTIMS OF VIOLENCE IN THE AMERICAS ¶ 89 (2007).

<sup>479</sup> *Id.* ¶¶ 91-92.

<sup>480</sup> See Jessica Lenahan (Gonzales) et al. v. United States, Report No. 80/11, *supra* note 264, ¶ 110; see also Nadege Dorzema et al. v. Dominican Republic, Report No. 174/10, *supra* note 468, ¶ 49.

<sup>481</sup> See Nadege Dorzema et al. v. Dominican Republic, Report No. 174/10, *supra* note 468, ¶ 210.

<sup>482</sup> See Jessica Lenahan (Gonzales) et al. v. United States, Report No. 80/11, *supra* note 264, ¶ 168; see also Nadege Dorzema et al. v. Dominican Republic, Report No. 174/10, *supra* note 468, ¶ 210.

<sup>483</sup> American Declaration, *supra* note 180, at art. II.

<sup>484</sup> See, e.g., Villagrán-Morales et al. v. Guatemala, Merits, *supra* note 212, ¶¶ 195–96 (Nov. 19, 1999).

<sup>485</sup> See, e.g., Ximenes-Lopez v. Brazil, Merits, Reparations and Costs, *supra* note 372, ¶¶ 123–49.

domestic violence victims,<sup>487</sup> and undocumented migrants<sup>488</sup> as deserving of heightened protections. The Inter-American Commission has emphasized the close links between discrimination, violence, and impunity in recognizing the special vulnerability of these groups.<sup>489</sup>

In *Lenahan*, for example, the petitioner argued that systematic failure of law enforcement to effectively respond to domestic violence and the victims' lack of access to an effective remedy amounted to gender discrimination.<sup>490</sup> The Inter-American Commission considered social, cultural, and historical patterns to determine that domestic violence disproportionately impacted women, particularly low-income women of color, in the United States.<sup>491</sup> The Commission noted "State inaction towards cases of violence against women fosters an environment of impunity and promotes the repetition of violence since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts."<sup>492</sup>

In *Nadege*, the Commission argued before the Inter-American Court that state agents used excessive lethal force against a Haitian migrant with impunity in violation of the prohibition against discrimination.<sup>493</sup> The Commission urged the Court to consider the context of racism, racial discrimination, and "anti-Haitian" practices in which these acts were committed.<sup>494</sup> The Commission asserted that "the violence used by the State agents against Haitian individuals, as well as the lack of punishment of those responsible for the incidents," were part of a pattern of discrimination.<sup>495</sup> The Court found that the Dominican Republic had failed to create "preventive measures to adequately address situations relating to migratory control on the land border with Haiti and based on their situation of vulnerability."<sup>496</sup>

### iii. State-sponsored violence and impunity constitute discrimination under the American Declaration

#### 1. Undocumented migrants are a protected class under the American Declaration

Since September 11, 2001, xenophobia and racist sentiments against undocumented migrants have been on the rise in the United States. In popular and political discourse, undocumented migrants are depicted as criminals and terrorists who pose a threat to national security.<sup>497</sup> Latino migrants,

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<sup>486</sup> See, e.g., *Maya Indigenous Communities of the Toledo District v. Belize*, Report No. 40/04, *supra* note 177, ¶¶ 169–70 (finding that the State must provide special safeguards to ensure that indigenous groups can meaningfully participate in the State's legal system).

<sup>487</sup> See, e.g., *Jessica Lenahan (Gonzales) et al. v. United States*, Report No. 80/11, *supra* note 264, ¶ 162.

<sup>488</sup> See, e.g., *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, *supra* note 465, ¶ 112–13; see also *Nadege Dorzema et al. v. Dominican Republic*, Report No. 174/10, *supra* note 468, ¶ 208.

<sup>489</sup> *Nadege Dorzema et al. v. Dominican Republic*, Report No. 174/10, *supra* note 468, ¶ 204.

<sup>490</sup> *Jessica Lenahan (Gonzales) et al. v. United States*, Report No. 80/11, *supra* note 264, ¶ 105.

<sup>491</sup> *Id.* ¶ 160–61.

<sup>492</sup> *Id.* ¶ 168.

<sup>493</sup> *Nadege Dorzema et al. v. Dominican Republic*, Report No. 174/10, *supra* note 468, ¶ 210.

<sup>494</sup> *Id.* ¶ 203.

<sup>495</sup> *Id.* ¶ 204.

<sup>496</sup> *Nadege Dorzema et al. v. Dominican Republic, Merits, Reparations, and Costs*, *supra* note 278, ¶ 237.

<sup>497</sup> Special Rapporteur on Human Rights of Migrants, *Mission to the Border Between Mexico and the United States of America*, ¶ 41, E/CN.4/2003/85/Add.3 (Oct. 30, 2002) [hereinafter *Mission to the Border Between Mexico and the United States of America*] (by



Mexicans in particular, are routinely described as “illegal aliens,” unassimilable to U.S. society, and a threat to the American workforce.<sup>498</sup> Though immigrants are less likely to commit crimes than native-born Americans,<sup>499</sup> these views have become part of the U.S. cultural mainstream.<sup>500</sup>

The vulnerability of undocumented migrants to criminality, abuse, racism and has led the Inter-American system to recognize undocumented migrants as a protected group that should be afforded heightened human rights protections.<sup>501</sup> The Court has found that the “situation of vulnerability [of undocumented migrants] has an ideological dimension and occurs in a historical context that is distinct for each State and is maintained by *de jure* and *de facto* situations.”<sup>502</sup> The Commission has expressed particular concern for undocumented migrants traveling to and living in the United States.<sup>503</sup> The Commission has observed that undocumented migrants are especially vulnerable to the “danger[s] of falling victim to violations of human rights, crime, abuse and discrimination, racism and xenophobia.”<sup>504</sup>

While the Commission and Court have recognized that undocumented migrants in the United States constitute a protected class, the Inter-American system has also acknowledged the sovereign right of States to make objective and reasonable distinctions based on legal migratory status.<sup>505</sup> The Inter-American Court, however, has established that “States may not discriminate or tolerate discriminatory situations that prejudice migrants.”<sup>506</sup> In enforcing immigration laws, States must ensure “that its policies and enforcement of the law are not unjustifiably aimed at certain individuals based on their ethnic or racial features . . . .”<sup>507</sup>

## 2. The United States has systematically perpetuated violence at the border

The extra-judicial killings of undocumented migrants are part of a systemic pattern of violence with deep historical roots. The record of state and mob violence targeting Mexicans extends back to the 1800s.<sup>508</sup> According to historical analysis, Mexicans in the U.S. Southwest were perceived as “too Mexican,” and were targeted for violence for “acting ‘uppity,’ taking away jobs, making advances toward a white woman, cheating at cards, practicing ‘witchcraft,’ [] refusing to leave land that Anglos

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Gabriela Rodriguez Pizarro).

<sup>498</sup> LEO R. CHAVEZ, *THE LATINO THREAT: CONSTRUCTING IMMIGRANTS, CITIZENS, AND THE UNION* 3–4 (2008).

<sup>499</sup> WALTER A. EWING ET AL., *AMERICAN IMMIGRATION COUNCIL, THE CRIMINALIZATION OF IMMIGRATION IN THE UNITED STATES* 4 (2015).

<sup>500</sup> *Mission to the Border Between Mexico and the United States of America*, *supra* note 497, ¶ 41. *See also* Lauren Fox, *Anti-Immigrant Hate Coming from Everyday Americans*, U.S. NEWS (July 24, 2014), <http://www.usnews.com/news/articles/2014/07/24/anti-immigrant-hate-coming-from-everyday-americans>.

<sup>501</sup> *See* Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, *supra* note 465, ¶¶ 112–13; *see also* Nadege Dorzema et al. v. Dominican Republic, Report No. 174/10, *supra* note 468, ¶¶ 207–08.

<sup>502</sup> Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, *supra* note 465, ¶ 112.

<sup>503</sup> *See* INTER-AM. COMM’N H.R., *HUMAN RIGHTS OF MIGRANTS AND OTHER PERSONS IN THE CONTEXT OF HUMAN MOBILITY IN MEXICO* ¶ 80 (2013) [hereinafter *HUMAN RIGHTS OF MIGRANTS AND OTHER PERSONS IN THE CONTEXT OF HUMAN MOBILITY IN MEXICO*]; *see generally* INTER-AM. COMM’N H.R., *REFUGEES AND MIGRANTS IN THE UNITED STATES: FAMILIES AND UNACCOMPANIED CHILDREN* (2015) [hereinafter *REFUGEES AND MIGRANTS IN THE UNITED STATES*] (discussing the vulnerability of undocumented migrant children who flee violence and poverty in their countries and travel to the United States).

<sup>504</sup> *See* *HUMAN RIGHTS OF MIGRANTS AND OTHER PERSONS IN THE CONTEXT OF HUMAN MOBILITY IN MEXICO*, *supra* note 503, ¶ 80.

<sup>505</sup> Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, *supra* note 465, ¶¶ 118–19; *see also* Nadege Dorzema et al. v. Dominican Republic, Report No. 174/10, *supra* note 468, ¶ 208.

<sup>506</sup> Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, *supra* note 465, ¶ 119;

<sup>507</sup> Nadege Dorzema et al. v. Dominican Republic, Report No. 174/10, *supra* note 468, ¶ 209.

<sup>508</sup> Delgado, *supra* note 99.

coveted[,]” and speaking Spanish.<sup>509</sup> Latinos, particularly Mexican-Americans in the Southwest, were lynched in large numbers at the turn of the twentieth century.<sup>510</sup> Between 1848 and 1928, mobs murdered thousands of Mexicans.<sup>511</sup> Law enforcement, specifically the Texas Rangers, directly participated in the violence.<sup>512</sup>

The lynchings declined after the 1920s,<sup>513</sup> however, some of the perpetrators, including Texas Rangers, were recruited to join a new law enforcement agency, the U.S. Border Patrol.<sup>514</sup> Established in 1924, U.S. Border Patrol was initially used to prevent the smuggling of alcohol, but by the 1950’s had become the primary enforcement mechanism for immigration laws. In 1954, U.S. Border Patrol led the effort to deport hundreds of thousands of Mexican migrants from the United States, known as Operation Wetback. Then Attorney General Herbert Brownell, Jr., told U.S. Border Patrol officers “to shoot point-blank ‘wetbacks’ attempting to enter [the United States].”<sup>515</sup> Agents were accused of widespread abuses.<sup>516</sup> More recent efforts by U.S. Border Patrol to prevent illegal crossings, such as Operation “Hold the Line” and Operation “Gatekeeper,” have been linked to an increase in deaths of undocumented migrants.<sup>517</sup> The U.S. government has acknowledged that “increased enforcement efforts . . . ultimately resulted in the redirection of migrant flows” to more rural, remote and dangerous areas which led to “an increase in border-crossing deaths resulting from exposure to either extreme heat or cold.”<sup>518</sup>

In 2003, U.S. Border Patrol became part of U.S. Customs and Border Protection (CBP), a component of Department of Homeland Security. CBP agents are routinely accused of a range of abuses, including racial profiling, illegal stops and searches, mistreatment, and excessive use of force. The American Civil Liberties Union, for example, obtained civil rights complaints lodged against CBP agents in two Arizona counties between 2011 and 2014.

The records contain recurring examples of Border Patrol agents detaining, searching, and terrorizing individuals and entire families at interior checkpoints and in “roving patrol” vehicle stops far into the interior of the country; threatening motorists with assault rifles, electroshock weapons, and knives; destroying and confiscating personal property; and interfering with efforts to video record Border Patrol activities.<sup>519</sup>

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<sup>509</sup> *See id.*

<sup>510</sup> *Id.* at 297, 298.

<sup>511</sup> *See Carrigan & Webb, supra* note 100 (citing this number and declaring it conservative).

<sup>512</sup> *See Delgado, supra* note 99, at 297, 300.

<sup>513</sup> *See Carrigan & Webb, supra* note 100, at 411, 417; *see also* William D. Carrigan, Op-Ed., *When Americans Lynched Mexicans*, N.Y. TIMES (Feb. 20, 2015), [http://www.nytimes.com/2015/02/20/opinion/when-americans-lynched-mexicans.html?\\_r=0](http://www.nytimes.com/2015/02/20/opinion/when-americans-lynched-mexicans.html?_r=0).

<sup>514</sup> *Border Patrol History, supra* note 101.

<sup>515</sup> *Id.*

<sup>516</sup> Yanan Wang, *Donald Trump’s ‘Humane’ 1950s Model for Deportation, ‘Operation Wetback’, Was Anything But*, Washington Post, Nov. 11.2015, <https://www.washingtonpost.com/news/morning-mix/wp/2015/09/30/donald-trumps-humane-1950s-model-for-deportation-operation-wetback-was-anything-but/>.

<sup>517</sup> *Border Patrol History, supra* note 101.

<sup>518</sup> U.S. GOVERNMENT ACCOUNTABILITY OFFICE, *ILLEGAL IMMIGRATION: BORDER-CROSSING DEATHS HAVE DOUBLED SINCE 2005, BORDER PATROL’S EFFORTS TO PREVENT DEATHS HAVE NOT BEEN FULLY EVALUATED* 9 (2002). Importantly, the GAO noted that “the increase in deaths occurred despite the fact that, according to published estimates, there was not a corresponding increase in the number of illegal entries.” *Id.*

<sup>519</sup> LYALL, *supra* note 102.

A survey of 1,100 recently repatriated migrants between 2009 and 2012 confirms that CBP agents systematically engaged in the physical and verbal mistreatment of migrants.<sup>520</sup> Out of those surveyed, 11% of deportees reported some form of physical abuse.<sup>521</sup> The majority (70%) of those respondents had experienced being pushed or dragged, being placed in painful or stressful positions, or being spat upon.<sup>522</sup> One-third of the respondents who reported physical abuse said that they were hit or kicked, hit with an object, pushed against an object, or hit/thrown while already constrained.<sup>523</sup> Approximately 6% of respondents reported suffering lasting injuries and 3% reported sexual abuse while in U.S. custody.<sup>524</sup> A significant percentage of individuals reported verbal abuse, which consisted of nationalistic or racist slurs, insults related to crossing the border without authorization, or other general insults.<sup>525</sup> The Inter-American Commission also has expressed concerns over allegations of sexual, physical, and verbal abuse committed by U.S. border officials while migrant and refugee children and families are in state custody.<sup>526</sup>

Since 2010, CBP agents have killed nearly fifty Mexican and U.S. nationals along the border.<sup>527</sup> CBP policy authorizes agents to use lethal force if an agent has a “reasonable belief” that the subject poses imminent danger of death or serious physical injury to the agent or another person.<sup>528</sup> Though on its face it is neutral, the standard affords CBP agents overly broad discretion that has resulted in the disproportionate and illegal use of excessive force against undocumented migrants.

### 3. The United States has systematically failed to hold CBP agents accountable for abuses

Successful administrative, civil, or criminal actions against CBP agents are extremely rare. The abuse of migrants at the U.S.-Mexico border stems from, and is in turn promoted by, a lack of transparency, oversight, and accountability of CBP.<sup>529</sup>

One study described the process used by CBP to investigate complaints as a “rather ornamental component of CBP that carries no real weight in how the agency functions.”<sup>530</sup> There is no centralized office that reviews complaints by individuals. Individuals may submit complaints recording agent misconduct or abuse to the Department of Homeland Security (DHS) Office of Inspector General, Joint Intake Center, Office for Civil Rights and Civil Liberties and/or the CBP’s Office of Internal Affairs and individual CBP offices.<sup>531</sup> These agencies do not use uniform procedures or standards to assess the merits of the complaints. Moreover, the CBP does not track the number of use of force allegations or investigations involving CBP agents.<sup>532</sup> A 2016 report by a panel of government experts

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<sup>520</sup> BORDERING ON CRIMINAL, *supra* note 103, at 1.

<sup>521</sup> *Id.* at 4.

<sup>522</sup> *Id.*

<sup>523</sup> *Id.*

<sup>524</sup> *Id.*

<sup>525</sup> *Id.* at 5.

<sup>526</sup> REFUGEES AND MIGRANTS IN THE UNITED STATES, *supra* note 503 ¶ 6.

<sup>527</sup> O’Dell & Gonzalez, *supra* note 364.

<sup>528</sup> Memorandum on Use of Safe Tactics and Techniques, *supra* note 98.

<sup>529</sup> NO ACTION TAKEN, *supra* note 123, at 2.

<sup>530</sup> *Id.* at 3.

<sup>531</sup> *Id.* at 2–3.

<sup>532</sup> CBP USE OF FORCE TRAINING AND ACTIONS TO ADDRESS USE OF FORCE INCIDENTS, *supra* note 121, at 1 (2013).

concluded that the CBP’s “discipline system [was] broken” and “undermined the deterrence goals of discipline.”<sup>533</sup> The former chief of internal affairs for CBP has lamented the agency’s reluctance, and in some instances opposition, to efforts to hold CBP agents accountable for excessive use of force: “[internal affairs] had a mandate to hold the Border Patrol accountable but were given very few to no authorities to do that job. . . From Day 1, they aggressively resisted every effort.”<sup>534</sup>

The lack of a centralized and uniform process has created an ineffective system that fails to incentivize agents to uphold the law, refrain from abuses, or respect the rights of migrants. A 2014 study by American Immigration Council found widespread complaints of physical abuse and excessive use of force.<sup>535</sup> Of the over 800 complaints filed between 2009-2012, only one case resulted in the agent’s suspension and only two cases led to court proceedings.<sup>536</sup> No official action was taken in 97% of complaints in which a formal decision was reached.<sup>537</sup> The average amount of time taken to arrive at a decision was 122 days.<sup>538</sup> The internal investigation had not concluded after more than 1 year in almost 40% of the complaints.<sup>539</sup>

CBP’s chronic inaction promotes a culture of impunity. This culture has been almost impenetrable in cases of border killings. Although CBP agents have killed at least 46 people at the southern U.S. border by use of force or coercion,<sup>540</sup> not a single one of these agents has been convicted of a crime, and only one agent has been indicted.<sup>541</sup>

- iv. The United States has discriminatorily denied Anastasio Hernández Rojas equal protection of the law

In *Nadege*, the Commission emphasized that violence against undocumented Haitian migrants “constitute[d] a form of discrimination that greatly prevent[ed] the members of the group[] from enjoying the rights and freedoms in equal footing with all other individuals.”<sup>542</sup> Similarly, CBP’s use of excessive force against Anastasio constitutes discrimination. The violence faced by Anastasio and other undocumented migrants is the direct result of the United States’ failure to protect the lives of undocumented migrants through preventative measures, including laws and procedures that effectively regulate use of force and ensure accountability.

The use of force policy in effect at the time of Anastasio’s death was inadequate and ineffective. In practice, CBP agents have broad discretion in determining when to use force. At the time of Anastasio’s killing, for example, CBP use of force policy permitted lethal force against occupants of vehicles and rock throwers.<sup>543</sup> Additionally, CBP policy did not provide specific guidance on the use of Tasers, address the risk of serious injury or death inherent to the multiple applications of

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<sup>533</sup> CBP INTEGRITY ADVISORY PANEL REPORT, *supra* note 118, at 21.

<sup>534</sup> Mark Binelli, *10 Shots Across the Border*, N.Y. TIMES MAGAZINE, Mar. 3, 2016, <http://www.nytimes.com/2016/03/06/magazine/10-shots-across-the-border.html>.

<sup>535</sup> NO ACTION TAKEN, *supra* note 123, at 4.

<sup>536</sup> *Id.* at 8.

<sup>537</sup> *Id.*

<sup>538</sup> *Id.*

<sup>539</sup> *Id.*

<sup>540</sup> Ramirez, *supra* note 363.

<sup>541</sup> O’Dell & Gonzalez, *supra* note 364.

<sup>542</sup> *Nadege Dorzema et al. v. Dominican Republic*, Report No. 174/10, *supra* note 468, ¶ 202.

<sup>543</sup> USE OF FORCE REVIEW, *supra* note 97, at 2.

Taser shocks, or even require that personnel are trained on the use of Tasers. In the absence of adequate training and guidance, agents have routinely used disproportionate and unnecessary force against undocumented migrants.

CBP agents have used unlawful force with little risk of legal consequences. Despite a long record of abuse, no known perpetrator of a border killing has been punished since U.S. Border Patrol was first established in 1924. Impunity for Anastasio's killing is the inevitable result of an investigation that lacked independence, thoroughness, and promptness. The Commission has recognized the close connection between violence, discrimination and impunity. In *Nadege*, it noted that "the lack of due diligence that leads to impunity reproduces the violence that it intends to attack, without prejudice to the fact that it alone constitutes discrimination regarding access to justice and respect of the right to guarantees."<sup>544</sup>

Undocumented migrants are the main victims of CBP violence and impunity. Although CBP is the largest law enforcement agency in the United States, it operates with little transparency, oversight, or accountability. The United States has failed to invest the resources, establish the laws, or implement the processes to ensure that CBP agents' interactions with undocumented migrants respect migrants' basic dignity. These shortcomings expose a vulnerable group to routine abuse. The Inter-American Commission should not ignore these contextual factors but rather consider them evidence of discrimination.

## V. CONCLUSION & PETITION

The facts alleged in this Petition establish that the United States of America is responsible for the violation of the rights guaranteed under I, II, XVIII, XXV, and XXVI of the American Declaration. Petitioners respectfully request that the Inter-American Commission on Human Rights:

1. Expedite the initial processing of this Petition in accordance with Article 29(2) of the Rules of Procedure of the Inter-American Commission on Human Rights;
2. Declare this Petition admissible;
3. Investigate, with hearings and witnesses as necessary, the facts alleged in this Petition;
4. Declare that the United States of America is responsible for the violation of the Anastasio Hernández Rojas and his relatives' rights under the American Declaration, including, *inter alia*, their rights to be free from torture, to life, and to equal protection under the law guaranteed under Articles I, II, XXV, XXVI as well as their rights to truth and to a remedy protected under Articles I and XVIII;
5. Recommend such other remedies as the Commission considers adequate and effective for addressing the violations of the Petitioners' fundamental human rights, including, *inter alia*, requesting that the United States publicly acknowledge responsibility and

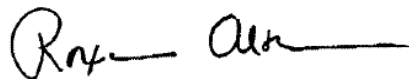
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<sup>544</sup> Nadege Dorzema et al. v. Dominican Republic, Report No. 174/10, *supra* note 468, ¶¶ 202, 210.

publicly apologize to the Petitioners' for the violation of their rights and adopt the structural, legal, and policy reforms necessary to ensure non-repetition of the violations.

Dated: March 30, 2016

Respectfully submitted,

Handwritten signature of Roxanna Altholz in black ink.

Roxanna Altholz  
Associate Director  
International Human Rights Law Clinic  
Berkeley Law

Handwritten signature of Andrea Guerrero in blue ink.

Andrea Guerrero  
Executive Director  
Alliance San Diego

## VI. EXHIBIT LIST

- Exhibit 1 Third Amended Complaint
- Exhibit 2 San Diego Regional Arrest Report
- Exhibit 3 Motion for Summary Judgment by Customs and Border Protection Officer S
- Exhibit 4 Declaration of Border Patrol Agent Jose Galvan
- Exhibit 5 Transcript of Videotaped Deposition of Philip J. Krasielwicz
- Exhibit 6 Transcript of Videotaped Deposition of Gabriel Ducoing
- Exhibit 7 Transcript of Interview of Pedro Hernandez
- Exhibit 8 Chula Vista Camera Video
- Exhibit 9 Chula Vista Camera Video with Outline of Ducoing
- Exhibit 10 Plaintiff's Response in Opposition to All Defendants' Motions for Summary Judgment
- Exhibit 11 Transcript of Sandra Cardenas SDPD Audio Interview
- Exhibit 12 Transcript of Videotaped Deposition of Ashley Young
- Exhibit 13 Transcript of Videotaped Deposition of Sergio Gonzalez-Gomez
- Exhibit 14 Transcript of Videotaped Deposition of Humberto Navarrete
- Exhibit 15 Photograph of Whiskey 2 area
- Exhibit 16 Interview of Rafael Barriga
- Exhibit 17 Videos Taken by Ashley Young
- Exhibit 18 Transcript of Deposition of Glenn N. Wagner
- Exhibit 19 Transcript of Videotaped Deposition of Guillermo Avila
- Exhibit 20 Transcript of Videotaped Deposition of Andre T. Piligrino
- Exhibit 21 Transcripts of Humberto Navarrete's Videos
- Exhibit 22 Videos Taken by Humberto Navarrete
- Exhibit 23 Transcript of Videotaped Deposition of Alan R. Boutwell
- Exhibit 24 Transcript of Videotaped Deposition of Kurt R. Sauer
- Exhibit 25 County of San Diego Autopsy Report
- Exhibit 26 Transcript of Videotaped Deposition I of Maria Puga
- Exhibit 27 Autopsy by Marvin Pietruska
- Exhibit 28 Transcript of Videotaped Deposition II of Maria Puga
- Exhibit 29 Transcript of Videotaped Deposition of Harinzo R. Narainesingh
- Exhibit 30 Border Patrol Briefing
- Exhibit 31 US CBP Memorandum re Incident at Whiskey 2
- Exhibit 32 Witness Statement of Andre T. Piligrino
- Exhibit 33 San Diego Regional Crime Incident Report
- Exhibit 34 Declaration of Richard Tolles in Support of Motion for Stay
- Exhibit 35 Defendants United States' Motion to Dismiss
- Exhibit 36 Transcript of Videotaped Deposition of Marvin Pietruszka

- Exhibit 37 Transcript of Videotaped Deposition of Ishmael P. Finn
- Exhibit 38 Interview with Robinson Ramirez
- Exhibit 39 Interview of Jerry Vales
- Exhibit 40 Transcript of Videotaped Deposition of Ramon A. DeJesus
- Exhibit 41 Witness Statement of Ramon DeJesus
- Exhibit 42 Witness Statement of Ernest Kalnas
- Exhibit 43 San Diego Police Department Police Investigation
- Exhibit 44 Addendum Report
- Exhibit 45 Dispatch Communications
- Exhibit 46 Investigator's Report of Witness Statement by Jerry Vales
- Exhibit 47 Transcript of Witness Statement of Phillip Krasielwic
- Exhibit 48 Defendants' Notice of Motion for Stay of Discovery Pending Conclusion of Grand Jury Proceedings
- Exhibit 49 Witness Statement of Guillermo Avila
- Exhibit 50 Witness Statement of Gabriel Ducoing
- Exhibit 51 Witness Statement of Philip Krasielwicz
- Exhibit 52 Witness Statement of Harinzo Narainesingh
- Exhibit 53 Transcript of Videotaped Deposition of Ian McIntyre Deposition
- Exhibit 54 Joint Motion for Leave to File Third Amended Complaint
- Exhibit 55 Transcript of Videotaped Deposition of Cameron Campbell Deposition