

ELUSIVE JUSTICE

**PURSUING LEGAL REDRESS IN THE
UNITED STATES AND MEXICO FOR
KILLINGS BY U.S. BORDER AGENTS**

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SUMMARY OF FINDINGS

Since the 1990's, U.S. Customs and Border Protection (CBP) agents have killed at least forty Mexican and U.S. nationals along the U.S.-Mexico border. Many of these deaths prompted lawsuits that alleged CBP agents had unlawfully used deadly force. This working paper identifies the legal [remedies](#) available to the relatives of victims in the United States and Mexico and examines the likelihood of successful claims.

Key findings include the following:

U.S. Federal Civil Claims: Victims' relatives commonly bring federal [tort](#) actions for money [damages](#) under the Alien Tort Statute, the *Bivens* decision, and the Federal Tort Claims Act. Federal civil lawsuits have met with mixed success. U.S. courts have dismissed most civil claims involving victims killed in Mexico for lack of [jurisdiction](#). Civil suits for killings committed in the United States have fared slightly better and some settled out of court. To date, no known civil [plaintiff](#) has won a trial.

U.S. State Civil Claims: In theory, victims' relatives may also sue under state tort law for wrongful death, assault, battery, negligence, intentional infliction of emotional distress, or negligent infliction of emotional distress. These legal actions are rarely filed or successful because Congress enacted legislation, the Westfall Act, which in most circumstances requires courts to convert state law tort claims brought against a U.S. officer into a federal tort claim. The Westfall Act bars plaintiffs from bringing state claims if their federal tort claims are dismissed.

U.S. Federal Criminal Prosecutions: Federal prosecutors may bring criminal charges against CBP agents for homicide, assault, torture, and civil rights violations for border killings. Torture prosecutions are also possible if the crime was committed outside the United States. CBP agents rarely face federal criminal prosecution for using deadly

force. The Department of Justice has closed nearly every homicide investigation without pursuing charges.

Criminal Prosecutions by State Courts: State prosecutors may also bring criminal charges against CBP agents for homicide, assault, and other crimes. There have been only a handful of state prosecutions for border killings against U.S. border agents during the one hundred year history of U.S. border patrol.

Civil Claims in Mexico: Victims' families may sue CBP agents for killings in Mexico. Mexican civil law however requires the [defendant](#) to be present in Mexico for a lawsuit to proceed and limits [tort](#) recovery to injuries suffered in Mexico and the amount of [damages](#).

Criminal Prosecutions in Mexico: Under certain circumstances, Mexican courts have the authority to initiate criminal investigations for killings of Mexican nationals committed by CBP agents in Mexico or the United States. Indeed, Mexican authorities are investigating a handful of cases. Mexican criminal law authorizes victims' relatives to initiate criminal investigations by filing a criminal complaint, to act as private prosecutors, and to intervene in criminal proceedings by submitting evidence and questioning witnesses. Prosecutions in Mexico are possible only if the United States extradites the accused, which is unlikely.

GLOSSARY OF TERMS

Cause of Action: The legal basis for enforcing a right, i.e. the reason why someone is able to sue someone else.

Choice-of-law: The determination of which laws—state, federal, or foreign—should be applied to the case.

Civil Action: A lawsuit brought to enforce the rights of private parties. The purpose of a civil action is to determine if one party is at fault for another party's injuries and to obtain monetary compensation for damages.

Color of Law: Persons acting under the “color of law” are acting in an official or governmental capacity. For example, a police officer is acting under the “color of law” when issuing a speeding ticket.

Common Law: Also known as judge-made law or case law.

Criminal Action: A lawsuit brought by the government against an individual for an offense that may result in fines and/or imprisonment. In the United States, the decision to bring a criminal case rests with the prosecutor, not the victim.

Damages: Money awarded by the court as compensation for harm is referred to as damages. There are two types of damages: compensatory damages and punitive damages. Compensatory damages are intended to compensate for a loss or injury. Punitive damages are intended to punish and deter bad behavior.

Declaratory Relief: A decision by a court that articulates the parties' rights but does not award damages or order any action.

Defendant: The individual against whom a civil or criminal action is filed.

Discovery: The fact-finding process that takes place after a lawsuit is filed. The parties exchange information to prepare for settlement or trial.

Dismissal: An order or judgment to throw out a legal claim.

Extraterritorial Jurisdiction: The legal authority of a court to decide a case that involves conduct that occurs outside its normal boundaries. For example, U.S. court would exercise extraterritorial jurisdiction to decide a case involving a killing that occurred in Mexico.

Forum non-conveniens: The concept that a court may change where a law suit takes place because where it was filed is inconvenient for the defendant.

Injunctive Relief: A court order that requires a party to perform or stop a specific behavior.

Jurisdiction: The authority of a court to hear and decide a case.

Plaintiff: The individual who files a civil action.

Qualified and Absolute Immunity: The concept that public officials cannot be sued for certain conduct.

Redress: To provide relief to make a wrong right.

Remedy: The way a court rights a wrong. A court may prohibit or permit certain acts, require payment of money, or tell parties what their rights and responsibilities are.

Tort: An area of law that provides relief to persons who have suffered harm from wrongful acts committed by others.

Sovereign Immunity: A legal doctrine that prohibits suits against the U.S. government without its consent.

Standing: The ability of a party to bring a lawsuit in court based upon his or her stake in the outcome. A plaintiff must have standing to sue.

Statute of Limitations: The time period established by law during which someone can be sued.

Venue: The appropriate location for a trial according to the law and court rules.

INTRODUCTION

Since the 1990's, U.S. Customs and Border Protection (CBP) agents have killed at least forty persons along the U.S.-Mexico border.¹ These cases of deadly force involve three scenarios:

- (1) foreign nationals killed in Mexico by CBP agents (e.g. 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, U.S. citizens killed while in moving vehicles, and Mexican nationals who died after they were beaten, shot with Taser guns, or repeatedly pepper sprayed by CBP agents. Allegations of the unlawful use of deadly force by CBP agents have prompted criminal investigations, civil suits, and condemnation by the Mexican government.

Efforts by the victims' relatives to seek [redress](#) through the U.S. legal system however have been largely unsuccessful. U.S. prosecutors routinely decline to prosecute these cases and U.S. courts frequently dismiss civil lawsuits brought by victims' relatives and in some cases have concluded that "the agent's actions constituted a reasonable use of force or would constitute an act of self-defense."² Not a single known [plaintiff](#) in a wrongful death case against a CBP agent has won a favorable judgment by a judge or jury although a few cases have settled out of court.³ In the one case with a trial judgment, the judge found the CBP agent acted in self-defense.⁴

¹ See Appendix. This number does not include killings by CBP agents that occurred near the Canadian border or

² See e.g., *Federal Officers Close Investigation into the Death of Sergio Hernandez-Guereca*, FEDERAL BUREAU OF INVESTIGATION (Apr. 27, 2012), <https://www.fbi.gov/elpaso/press-releases/2012/federal-officers-close-investigation-into-the-death-of-sergio-hernandez-guereca>.

³ See Appendix.

⁴ See Opinion & Order, *Mendez v. Poitevent*, No. 2:13-cv-00065-AM-VRG, (W.D. Tex. Sept. 30, 2014), ECF No. 68.

This working paper identifies the legal avenues of justice available to victims' relatives by mapping the legal remedies that exist in both the United States and Mexico. The families have a broad spectrum of needs and priorities: access to information about the circumstances of the killing and the identities of those responsible; accountability through a criminal investigation and prosecution of the perpetrators; economic compensation for the harms suffered; and policy reforms to prevent future killings. Legal actions provide an opportunity to achieve some of these goals.

This is not a how-to-guide for litigation. Nor does this paper discuss the formidable practical barriers to justice. Litigation is expensive, time-consuming, emotionally taxing, and in some of these cases, exposes victims' relatives to risks. Instead, the goal of this working paper is to describe the available avenues of [redress](#) and examine the likelihood of success in a way that is accessible to advocates, activists, victims of border abuses, and their relatives.

In providing an overview of available legal remedies, the paper has three main goals. First, it seeks to support efforts by advocates and activists to counsel victims' relatives. Multiple legal strategies are available to victims' relatives in U.S. and Mexican courts to hold CBP agents, their supervisors, and the U.S. government accountable for border killings although there are significant limitations to each legal avenue. The information presented in this paper will help advocates identify the legal strategy that best advances the priorities, interests, and needs of specific victims and their relatives. Second, this paper aims to prepare activists and advocates to participate in discussions about legal options with lawyers and prosecutors. Lastly, the paper will help identify where the gaps in accountability exist and legislative action is needed. However well-conceived, no legal strategy can overcome the limitations imposed by the law. For example, the doctrine of [sovereign immunity](#) makes it impossible to sue the U.S. government under most circumstances.

The paper uses civil and criminal court records; legal scholarship; and reports by government agencies, media, and advocacy groups to provide an up-to-date and comprehensive legal analysis of available remedies. Drawing on this analysis, the paper suggests the probability for success taking into account the nationality of the victim and the location of injury among other factors. We provide a glossary of legal terms and whenever possible avoid legal jargon to improve accessibility.

A. U.S. CUSTOMS AND BORDER PROTECTION

CBP is the largest law enforcement agency in the United States with over 60,000 employees.⁵ Since September 11, 2001, Congress has bolstered border security by more than doubling CBP's budget and expanding the agency's access to surveillance equipment, weaponry, and technology.⁶ Twenty thousand CBP agents monitor U.S. borders and enforce U.S. immigration laws.⁷ They have the authority to apprehend individuals they suspect of violating immigration law within 100 miles of the border. The killings described by this paper occurred in diverse settings—at ports of entry, in the suburbs of major cities like San Diego, in remote rural areas, and in Mexico.

A number of victims of lethal use of force by CBP agents have not been identified.⁸ 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

⁵ *Careers*, CUSTOMS & BORDER PATROL, <http://www.cbp.gov/careers> (last visited Aug. 10, 2015).

⁶ Congress increased CBP's budget from \$5.9 billion in FY 2004 to \$13 billion in FY 2015. LAURA W. MURPHY & GEORGEANNA M. USOVA, ACLU, WRITTEN STATEMENT OF THE AMERICAN CIVIL LIBERTIES UNION FOR A HEARING ON THE BUDGET OF U.S. CUSTOMS AND BORDER PROTECTION SUBMITTED TO THE HOMELAND SECURITY SUBCOMMITTEE OF THE HOUSE OF APPROPRIATIONS COMMITTEE (Apr. 2, 2014), https://www.aclu.org/sites/default/files/assets/aclu_statement_for_cbp_budget_hearing_house_appropriations_homeland_security_subcommittee_4_2_14_final.pdf.

⁷ The majority of the remaining 40,000 CBP officers screen passengers and cargo at ports of entry.

⁸ Since 2013, CBP agents killed at least four unidentified individuals. *Border Patrol Abuse Since 2010*, S. BORDER COMMUNITIES COAL., <http://soboco.org/border-patrol-brutality-since-2010/> (last visited Aug. 10, 2015).

requested.”⁹ It does not appear that CBP requires its agents to take specific steps to identify victims.¹⁰

Under CBP policy, “deadly force may only be used if an agent has a reasonable belief, based on the totality of the circumstances, that the subject of such force poses an imminent danger of death or serious physical injury to the agent or another person.”¹¹

Most of the border killings involve two kinds of scenarios: a CBP agent kills an individual who allegedly threw a rock or a CBP agent kills an occupant of a moving vehicle.¹² After several high-profile killings of U.S. citizens and minors, advocates and victims’ relatives drew national and international attention to the excessive use of lethal force by CBP agents. Advocacy led to policy reforms, including changes to the agency’s use of legal force policy against rock throwers and moving vehicles.¹³ Victims’ relatives have been frustrated by the lack of progress made to hold CBP agents accountable for the killings.

B. ACCESS TO JUSTICE: AN OVERVIEW

Victims of border abuses struggle to access justice in U.S. courts.¹⁴ Federal civil claims offer the possibility of monetary compensation and access to information about the incident. However, civil [redress](#) in U.S. courts is largely unavailable to the relatives of victims killed in Mexico because courts have ruled that Mexican nationals killed in

⁹ U.S. Customs & Border Protection, Use of Force Policy, Guidelines & Procedures Handbook 17 (2014), <http://www.cbp.gov/sites/default/files/documents/UseofForcePolicyHandbook.pdf>.

¹⁰ CBP practice is most likely to inform local police of deaths resulting from use of force.

¹¹ Memorandum from Michael J. Fisher, Chief of U.S. Border Patrol, on Use of Safe Tactics and Techniques, 1 (Mar. 7, 2014) [hereinafter Fisher Memo], <http://www.cbp.gov/sites/default/files/documents/Use%20of%20Safe%20Tactics%20and%20Techniques.pdf>. Since 2010, CBP agents responded to rock throwing incidents with lethal force 43 times, resulting in 10 deaths. *Id.*

¹² POLICE EXECUTIVE RESEARCH FORUM, U.S. CUSTOMS & BORDER PROTECTION – USE OF FORCE REVIEW: CASES AND POLICIES (2013), <http://www.cbp.gov/sites/default/files/documents/PERFReport.pdf>.

¹³ In 2014, CBP changed its use of lethal force policy by limiting the use of lethal force in a number of circumstances including against rock throwers and moving vehicles. Sarah Wheaton, *Border Patrol Instructed to Show Restraint*, N.Y. TIMES (Mar. 8, 2014), <http://www.nytimes.com/2014/03/08/us/border-patrol-instructed-to-show-restraint.html>.

¹⁴ CBP rarely takes action on complaints filed by victims. According to a recent report, the CBP did not take any action on ninety-seven percent of the complaints of abuse filed between 2009-2012. Daniel E. Martinez, Guillermo Cantor & Walter A. Ewing, Am. Immigr. Council, No Action Taken – Lack of CBP Accountability in Responding to Complaints of Abuse (2014), http://www.americanimmigrationcouncil.org/sites/default/files/No%20Action%20Taken_Final.pdf.

Mexico are not protected by U.S. law.¹⁵ Victims of abuses committed in the United States also face procedural hurdles and formidable legal defenses. A small number of cases have overcome these hurdles¹⁶ and even obtained monetary settlements,¹⁷ while several other cases have been dismissed.¹⁸ Several civil cases are on-going.¹⁹ State law **tort** claims, including wrongful death, assault, battery, negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress, may be available in certain circumstances.

Redress through the U.S. criminal justice system is even less likely for different reasons. State and federal prosecutors have the authority to bring criminal charges against CBP agents, but have rarely exercised that discretion. Federal authorities have closed nearly every criminal investigation involving a killing by CBP agents without pursuing criminal

¹⁵ See *Hernandez v. United States*, No. 11-50792, 2015 WL 1881566 (5th Cir. 2015) (Mexican teenager fatally shot in Mexico). Compare *Rodriguez v. Swartz*, No. 4:14-cv-02251-RCC (D. Ariz. July 9, 2015) (App. 153a) (Mexican teenager fatally shot in Mexico).

¹⁶ See e.g. *Rodriguez v. Swartz*, No. 4:14-cv-02251-RCC (D. Ariz. July 9, 2015) (Mexican teenager fatally shot in Mexico); *Estate of Anastasio Hernandez-Rojas v. United States*, No. 3:11-cv-522-L-DHB, 2014 WL 4829459 (S.D. Cal. Sept. 29, 2014) (Mexican national beaten to death by at least a dozen CBP agents in California); *Guerrero v. United States*, No. 4:12-cv-00370-JAS, 2015 WL 569875 (D. Ariz. Feb. 11, 2015) (U.S. citizen fatally shot in Arizona); *Perez v. United States*, No. 3:13-cv-1417-WQH-BGS, 2015 WL 2061959 (S.D. Cal. May 1, 2015). See also cases involving 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).

¹⁷ *Sanchez Adorno v. United States*, No. 8:10-cv-00250-JVS-RNB (Mar. 2 2010) (reporting that family members of Tomas Sanchez Orzuna, who died in 2008 after being pepper sprayed by CBP agents, settled a civil lawsuit for \$15,000); *Rodriguez v. United States*, 37 Trials Digest 13th 2, 2010 WL 3454114 (S.D. Cal.) (Verdict and Settlement Summary) (reporting that the family of Guillermo Rodriguez Martinez who was fatally shot in the back by border 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, 4:18 PM), 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 border agent Nicholas Corbett in 2007, reached a settlement in a civil lawsuit for \$850,000 with 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 border 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).

¹⁸ *Hernandez v. United States*, No. 11-50792, 2015 WL 1881566 (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).

¹⁹ *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).

charges.²⁰ A handful of CBP agents have been criminally prosecuted in Arizona, California, New Mexico, and Texas for abuses along the border although these state prosecutions rarely result in convictions.²¹ U.S. prosecutors are also reluctant to prosecute crimes involving killings committed in Mexico by CBP agents.

Legal [redress](#) for relatives is available in Mexico in some circumstances. Victims' relatives can sue CBP agents for killings that occurred in Mexico under Mexican civil law if the [defendant](#) is present in the country. Under Mexican law, the Mexican criminal justice system should investigate killings in Mexico or the United States if the victim is a Mexican national, the defendant is present in Mexico, and U.S. prosecutors decline to prosecute the case.²² Mexican criminal law offers some advantages to victims: victims can initiate criminal investigations, gain access to information about the investigation, and intervene in criminal proceedings. Criminal investigations in Mexico may also bolster activists' calls for greater transparency and criminal prosecutions in the United States.

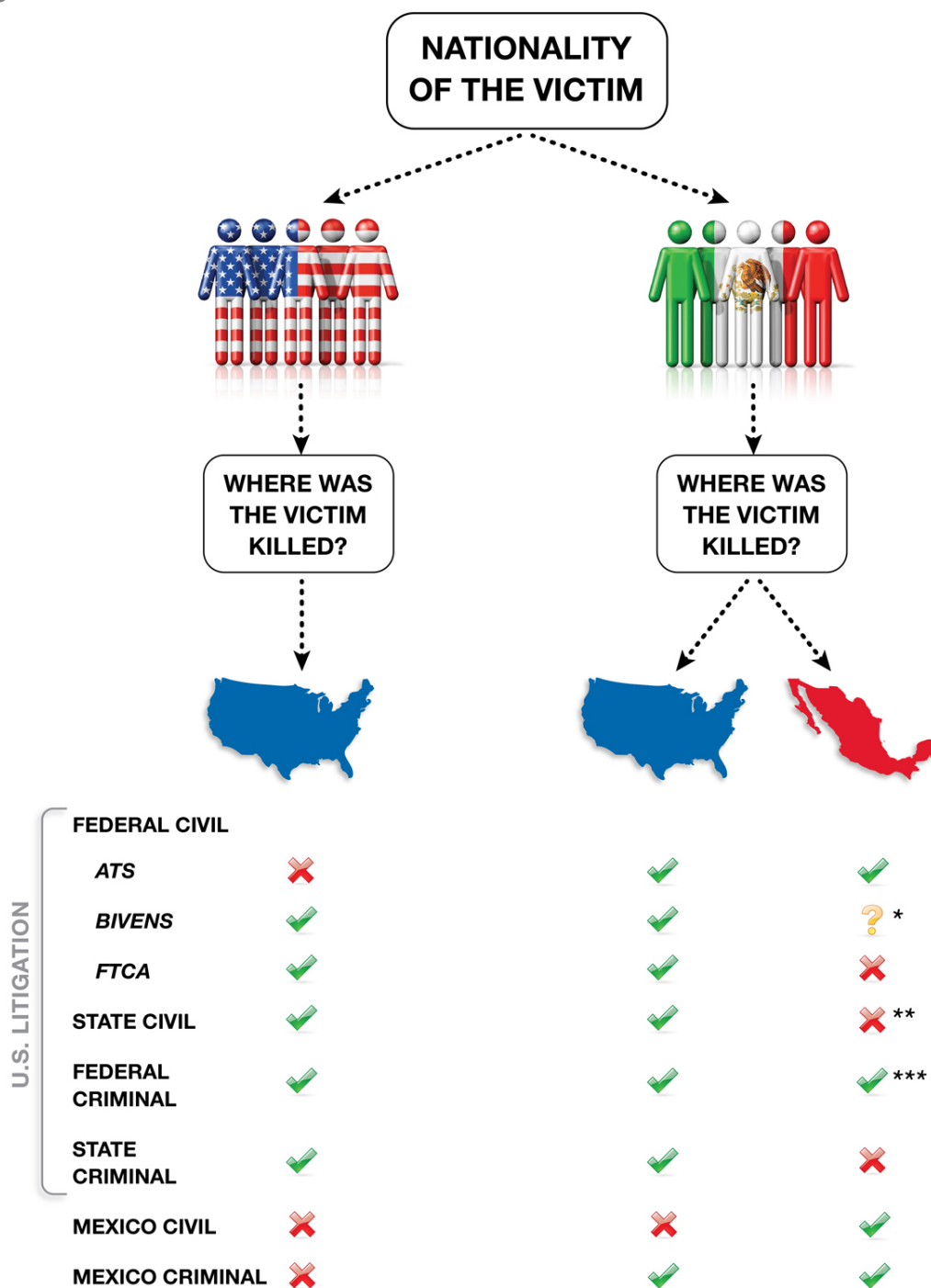
This paper maps avenues of legal [redress](#)—civil and criminal in the United States and Mexico—to examine what victims' relatives can sue for, who can sue, who can be sued, and the likely outcome of the suit. The paper proceeds in two Parts. Part I describes the legal remedies available in the United States. Part II discusses the legal remedies available in Mexico. Additionally, the appendix includes a list of border killings by CBP agents since the 1990's.

²⁰ EFE, *Activists question investigation that exonerates Border Patrol Agents*, Alliance San Diego (2015), <http://www.alliancesd.org/activists-question-investigation-that-exonerates-border-patrol-agents/>.

²¹ Human Rights Watch, *Brutality Unchecked: Human Rights Abuses Along the U.S. Border with Mexico* (1992).

²² Código Penal Federal [CPF] [Federal Criminal Code], artículo [article] 4, Diario Oficial de la Federación [DOF], 14 de Agosto de 1931, últimas reformas [last amended] DOF 12-03-2015 (Mex.).

Figure 1: Available Remedies



* U.S. courts are divided on whether Mexican nationals killed in Mexico by CBP agents were protected by the U.S. Constitution.

** State courts are generally reluctant to permit the extraterritorial application of state law although some legal commentators have argued that it may be possible to argue that state courts have jurisdiction under the theory of transitory torts.

*** U.S. criminal courts have extraterritorial jurisdiction for torture only.

ACCESS TO LEGAL REDRESS IN THE UNITED STATES

Relatives who believe their loved one was wrongfully killed may want the perpetrators held responsible through criminal prosecutions and may seek compensation through [civil action](#). Family members of victims of border killings may bring civil or [criminal actions](#) against CBP agents and, under certain circumstances, the United States government. Both federal and state laws provide causes of action for civil and criminal wrongdoing. This Part proceeds in four sections to first examine relevant civil causes of action based on federal law; then describe applicable civil claims based on state law; third, identify relevant federal crimes; and finally describe state crimes.

A. FEDERAL CIVIL SUITS

The purpose of a [civil action](#) is to determine if the [defendant](#) is responsible for the victim's injuries and to obtain monetary compensation for [damages](#). While a U.S. court may award successful [plaintiffs](#) money in a case involving a border killing, it will not order the CBP to suspend or change its policy (i.e. [injunctive relief](#)).

1. Causes of Action: The Right to Sue

Under U.S. law, there are three types of civil claims available to relatives of victims under (1) the Alien [Tort](#) Statute (ATS),²³ (2) federal [common law](#) (known as *Bivens* actions), (3) the Federal Tort Claims Act (FTCA). These claims are known as torts because they provide relief to a person who has suffered harm from wrongful acts committed by someone else. If a plaintiff proves the defendant is responsible for the harm, the court will award money damages.

²³ The Torture Victim Protection Act of 1991 (TVPA), 28 U.S.C § 1350 (2006), applies only to suits brought against foreign individuals. Accordingly, the TVPA is not a viable remedy because the perpetrators are U.S. federal officers.

Civil litigation may also serve the interests of families in other ways. For example, the exposure to civil liability, i.e. the order to pay money, may have a deterrent effect by providing an incentive to the government to prevent future border abuses. In addition, civil suits may force CBP to disclose information about the killing and satisfy the families' need to know what happened to their loved one. For example, CBP reportedly has refused to release the name of agents involved in killings.²⁴ For example, the names of the CBP agents who killed 16-year-old Jose Antonio Elena Rodriguez in Nogales, Mexico were kept from the public for almost two years until the victim's mother compelled the court to release the information through civil litigation.²⁵

a) Alien Tort Statute: Violations of International Law

Under the Alien Tort Statute (ATS), foreign nationals, but not U.S. citizens, may bring a [civil action](#) in federal court for certain violations of international law,²⁶ including extrajudicial killing (the arbitrary killing of a person by government agents) and torture.²⁷ Of the hundreds of cases filed in the last 30 years, fewer than two-dozen ATS civil cases have been successful.²⁸ When successful, courts award the [plaintiff](#) compensatory [damages](#), punitive damages, and attorneys' fees.²⁹ Generally, the punitive damages awarded in these cases have been in excess of tens of millions of

²⁴ Bob Ortega, *Secrecy continues to shroud killings by border agents*, USA TODAY (Sept. 14, 2014, 2:25 PM), <http://www.usatoday.com/story/news/nation/2014/09/14/border-deaths-agents-transparency/15629919/>.

²⁵ Order, *Rodriguez v. Unknown Party*, No. 4:14-cv-02251-RCC (D. Ariz. Nov. 13, 2014), https://www.aclu.org/sites/default/files/field_document/2014_11_13_040_order_denying_motion_to_seal.pdf. Courts or local police reportedly identified the agents in the few cases in which the names of the CBP agents involved in the killing are public. Charles Davis, *U.S. Customs and Border Protection has Killed Nearly 50 People in 10 Years - Most were Unarmed*, NEW REPUBLIC (Jan 4, 2015), <http://www.newrepublic.com/article/120687/border-patrol-officers-get-impunity-anonymity-immigrant-killings>.

²⁶ The ATS gives federal courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2012).

²⁷ See, e.g., *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (permitting ATS claims based on extrajudicial killing). The ATS does not create a cause of action, but rather creates federal jurisdiction over certain well-established violations of international law. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 723 (2004) (the ATS "is a jurisdictional statute creating no new causes of action . . ."). The ATS does not establish a statute of limitations. Courts generally apply the ten-year statute of limitations found in a related statute, the TVPA, 28 U.S.C § 1350 (2006). Courts have applied the doctrine of equitable tolling to extend the statute of limitations. *Jean v. Dorelien*, 431 F.3d 776, 780 (11th Cir. 2005).

²⁸ Roxanna Altholz, *Chronicle of A Death Foretold: The Future of U.S. Human Rights Litigation Post-Kiobel*, 102 Cal. L. Rev. 1495, 1515 n.117 (2014) (listing cases).

²⁹ Tracy Bishop Holton, *Cause of Action to Recover Civil Damages Pursuant to the Law of Nations and/or Customary International*, in 21 CAUSES OF ACTION 2D 327, §§ 49-50 (updated Dec. 2014).

dollars.³⁰ However, it has been impossible for the vast majority of successful ATS [plaintiffs](#) to collect monetary awards because [defendants](#) flee the United States or do not have sufficient assets in the United States to pay the court-ordered compensation.³¹

Courts have dismissed most ATS claims filed by the family members or victims of border abuses, most frequently, under the doctrine of [sovereign immunity](#). U.S. law prohibits lawsuits against the U.S. government without government consent.³² In *Hernandez v. United States*, for example, the Fifth Circuit dismissed ATS claims against the United States brought by the parents of a Mexican teenager fatally shot in Mexico by a CBP agent. Fifteen year old Sergio Adrian Hernández Guereca was playing a game with a group of friends that involved touching the fence that separates Mexico and the United States.³³ According to court records:

[a]s they were playing, United States Border Patrol Agent Jesus Mesa, Jr. arrived on the scene and detained one of Hernández's friends, causing Hernández to retreat 'beneath the pillars of the Paso del Norte Bridge' in Mexico to observe. Agent Mesa, still standing in the United States, then fired at least two shots at Hernández, one of which struck him in the face and killed him."³⁴

The Fifth Circuit held that the plaintiffs failed to show that the United States consented to suit or that the ATS waives sovereign immunity.³⁵ Similarly, in *Perez v. United States*, the court dismissed ATS claims filed on behalf of Jesus Alfredo Yañez Reyes, a Mexican national fatally shot in Mexico by a CBP agent, after finding that the United States had not consented to waive sovereign immunity.³⁶ On June 21, 2011, a CBP

³⁰ See Altholz, *supra* note 28, at 1522, n.178.

³¹ *Id.*, at 1523 n.181 (listing cases).

³² See *infra* Access to Legal Remedies in the United States A(6)(a).

³³ *Hernandez v. United States*, 757 F.3d 249, 255 (5th Cir. 2014), *aff'd en banc*, No. 11-50792, 2015 WL 1881566 (5th Cir. 2015).

³⁴ *Id.*

³⁵ *Id.* at 259.

³⁶ *Perez v. United States*, No. 3:13-cv-1417, 2014 WL 4385473, at *5 (S.D. Cal. Sept. 3, 2014).

agent shot and killed forty year old Yañez Reyes after he threatened to film the agent beating another man.³⁷

b) *Bivens* Actions: Constitutional Torts

A *Bivens* action is a civil claim for [damages](#) brought against a U.S. federal officer for a violation of the U.S. Constitution.³⁸ The purpose of a *Bivens* action is to deter the unconstitutional conduct of federal officers.³⁹ *Bivens* claims are based on constitutional protections, such as the Fourth Amendment prohibition against unreasonable search and seizure or Fifth Amendment due process rights.⁴⁰

Bivens actions are procedurally complex claims that have several limitations. Courts do not permit *Bivens* actions against the U.S. government, only the federal officer.⁴¹ *Bivens* actions may only be brought against the federal officer in his or her individual capacity, i.e. the individual officer, and not the government, is liable for damages.⁴² As a result, damage awards for *Bivens* actions are limited to whatever the individual officer can pay. Additionally, the [statute of limitations](#) for a *Bivens* action is typically two to three years.⁴³

Successful *Bivens* [plaintiffs](#) may recover compensatory damages, punitive damages, and attorneys' fees.⁴⁴ Since damages are payable by the individual officer, some

³⁷ *Id.*

³⁸ See *Bivens v. Six Unknown Names Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (creating *Bivens* cause of action).

³⁹ See *FDIC v. Meyer*, 510 U.S. 471, 476 (1994).

⁴⁰ RICHARD H. FALLON, JR. ET AL., *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 733 (6th ed. 2009).

⁴¹ See *FDIC*, 510 U.S. at 482 (the *Bivens* remedy is available only against the individual officer, not against the U.S. government).

⁴² FALLON, *supra* note 40, at 995.

⁴³ The *Bivens* statute of limitations is governed by the applicable personal injury limitations period in each state. See, e.g., *Van Strum v. Lawn*, 940 F.2d 406, 410 (9th Cir. 1991) (holding that the personal injury statute of limitations properly applies to *Bivens* claims).

⁴⁴ Julie Hunter, *Breaking Legal Ground: A Bivens Action for Noncitizens for Trans-Border Constitutional Torts Against Border Patrol Agents*, 15 SAN DIEGO INT'L L.J. 163, 175 (2013); see *Davis v. Passman*, 442 U.S. 228 (1979); *Carlson v. Green*, 446 U.S. 14 (1980).

[plaintiffs](#) may face difficulty recovering damages if the officer is financially insolvent. Plaintiffs are not entitled to injunctive or [declaratory relief](#).⁴⁵

Victims of border abuses or their relatives who have brought *Bivens* suits have met with mixed results. Some *Bivens* claims have survived [dismissal](#) in cases involving killings in the United States. In *Estate of Anastasio Hernandez-Rojas v. United States*, the court permitted *Bivens* claims brought against CBP agents and their supervisors by the family of a Mexican national beaten to death in California. The victim's family argued that the CBP agents had violated the victim's constitutional rights, including those protected by: (1) the Fourth Amendment (excessive force); (2) the Fifth Amendment (due process); (3) the First Amendment (retaliation); and (4) the Fourteenth Amendment (right to association).⁴⁶ The lawsuit survived dismissal although the [defendant](#) is now arguing that federal officers are immune from suit for constitutional violations.⁴⁷

Until recently, most courts had dismissed *Bivens* claims involving killings by CBP agents in Mexico.⁴⁸ Courts in California and Texas had ruled that the U.S. Constitution did not protect Mexican nationals killed by CBP agents in Mexico.⁴⁹ On July 9, 2015, however, a district court in Arizona held that the mother of a sixteen-year-old Mexican national killed in Mexico by a CBP officer could move forward with her claim that the killing violated her son's rights under the U.S. Constitution.⁵⁰

⁴⁵ *Davis*, 442 U.S. at 230 (under *Bivens*, "it is damages or nothing"); see *Higazy v. Templeton*, 505 F.3d 161 (2d Cir. 2007). Prisoners' rights cases permitting injunctive relief against federal prisons are not *Bivens* actions, but rather suits under 28 U.S.C. § 1331, which courts have interpreted to permit injunctions against federal prisons.

⁴⁶ Third Amended Complaint, *Estate of Anastasio Hernandez-Rojas v. United States*, No. 3:11-cv-522-L-DHB, ECF No. 53, 2014 WL 4829459, at *1, 9, 14, 18 (S.D. Cal. Sept. 29, 2014).

⁴⁷ Notice of Appeal, *Estate of Anastasio Hernandez-Rojas v. United States*, No. 3:11-cv-522-L-DHB, (S.D. Cal. Jan. 15, 2015), ECF No. 328.

⁴⁸ See, e.g., *Hernandez v. United States*, No. 11-50792, 2015 WL 1881566 (5th Cir. 2015).

⁴⁹ Order, *Perez v. United States*, No. 3:13-cv-1417-WQH-BGS (S.D. Cal. Sept. 3, 2014), ECF No. 46. *Hernandez v. United States*, No. 11-50792, 2015 WL 1881566 (5th Cir. 2015).

⁵⁰ Order, *Rodriguez v. Swartz*, No. 4:14-cv-02251-RCC (D. Ariz. July 9, 2015), ECF No. 58, 14 (considering the victim's voluntary connections with the United States and the Border Patrol's control over Mexican territory immediately adjacent to the international border fence in deciding that the U.S. Constitution granted the victim protection against arbitrary use of lethal force).

c) Federal Tort Claims Act: Common-Law Torts

The Federal [Tort](#) Claims Act (FTCA) permits a [civil action](#) against a U.S. official and the United States government for personal injury or death caused by a U.S. government employee while “acting within the scope of employment.”⁵¹ A CBP agent’s scope of authority includes all his or her duties related to the enforcement of U.S. immigration law. In general, the Attorney General must certify that the defendant was acting within the scope of employment before an FTCA claim can move forward.⁵² FTCA claims involve common-law torts, such as negligence or wrongful death, and not violations of the U.S. Constitution.⁵³ According to statutory language, the relatives of victims killed by CBP agents in Mexico may not sue under the FTCA.⁵⁴ The FTCA [statute of limitations](#) is two years.⁵⁵

The FTCA establishes a complex process for examining suits against U.S. officers. The [defendant](#) in an FTCA suit is the United States government. Under the Westfall Act, courts must treat all tort claims (except constitutional torts) brought against the government or its officials as FTCA claims.⁵⁶ If a [plaintiff](#) brings state tort claims against a federal officer in his individual capacity, the government will likely invoke the Westfall Act to convert the suit into an FTCA suit. If the plaintiff loses the FTCA suit, the plaintiff will be barred from re-filing the suit alleging the state claim.⁵⁷ As a practical matter,

⁵¹ 28 U.S.C. §§ 1346(b), 2671-2860 (2012).

⁵² 28 U.S.C. § 2679(d) (2012); FALLON, *supra* note 40, at 1007. If an officer acts beyond the scope of employment for FTCA purposes, an FTCA action is not available; state tort claims may available in this circumstance. *See infra* pp. 20.

⁵³ 28 U.S.C. §2679(b)(2)(A) (2012); *see* BETH STEPHENS & MICHAEL RATNER, INT’L HUM. RTS. LITIG. IN U.S. CTS. 284 (2d ed. 2008) [hereinafter STEPHENS].

⁵⁴ 28 U.S.C. § 2680(k) (2012).

⁵⁵ 28 U.S.C § 2401(b) (2012).

⁵⁶ 28 U.S.C. § 2679 (2012). The Westfall Act amended the Federal Tort Claims Act to permit courts to substitute the United States as a defendant in some cases where a federal employee who was acting within the scope of his or her employment is sued for civil damages. Carlos M. Vazquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the Bivens Question*, 161 U. PA. L. REV. 509, 569 (2013), http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1012&context=penn_law_review.

⁵⁷ 28 U.S.C. § 2676 (2012) (“The judgment in an action under section 1346 (b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.”).

victims of border abuses or their relatives can only bring suit against CBP agents and the U.S. government under the FTCA.

The FTCA permits only compensatory [damages](#) while punitive damages are available under ATS and Bivens actions.⁵⁸ In FTCA suits, [plaintiffs](#) may not recover punitive damages or [injunctive relief](#).⁵⁹ Successful FTCA plaintiffs collect damages directly from the U.S. treasury. This feature generally makes collection of damages awards easier. The FTCA limits attorneys' fees to 25% of any compensatory [damages](#) or settlement in litigation.⁶⁰

Some victims of border abuses committed in the United States have used the FTCA to sue the United States. The FTCA claim brought by the family of forty-two year old Anastasio Hernández Rojas, for example, survived a motion to dismiss. A Mexican national, long-time resident of San Diego, and father of five, Hernández Rojas was arrested on May 28, 2010 and taken to a CBP detention center.⁶¹ There, according to the complaint filed by his family members, he was physically abused and refused medical attention or an attorney. He was then taken to the Ysidro Port of Entry for deportation.⁶² Passersby filmed Hernández Rojas in handcuffs on the ground surrounded by at least 12 CBP agents.⁶³ Cell phone footage showed a CBP officer shooting the victim with a Taser gun while he pleaded for his life.⁶⁴ According to the complaint, he died as a result of being punched, kicked, hit with batons, and repeatedly

⁵⁸ *Fitch v. United States*, 513 F.2d 1013 (6th Cir. 1975) (permitting compensatory damages under the FTCA).

⁵⁹ 28 U.S.C. § 2674 (2012) (the United States “shall not be liable . . . for punitive damages.”).

⁶⁰ 28 U.S.C. § 2678 (2012) (attorneys may not “charge, demand, receive, or collect for services rendered” more than 20 percent of the amount of an administrative settlement or more than 25 percent of a judgment or a settlement of suit in litigation).

⁶¹ John Carlos Frey, Opinion Editorial, *What's going on with the Border Patrol?*, L.A. TIMES (Apr. 20, 2012), <http://articles.latimes.com/2012/apr/20/opinion/la-oe-frey-border-patrol-violence-20120420>.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Cristina Costantini & Elise Roley, *Anastasio Hernandez-Rojas Death: Border Patrol Tasing Incident Complicated By New Footage (VIDEO)*, HUFFINGTON POST, http://www.huffingtonpost.com/2012/04/20/anastasio-hernandez-rojas-death-border-patrol-tasing-footage_n_1441124.html (last updated Apr. 24, 2012, 12:40 PM).

Tased by CBP agents.⁶⁵ In *Estate of Hernandez-Rojas v. United States*, a California district court allowed the FTCA claim against the United States that alleged CBP agents had tortured Hernández Rojas to proceed.⁶⁶ The court held that a private person could be held liable for violating international law that prohibits torture because the prohibition is binding law in California.⁶⁷

In *Guerrero v. United States*, the mother of a nineteen year-old Mexican national, Carlos LaMadrid, brought an FTCA claim for negligence. On March 21, 2011, a CBP agent shot LaMadrid several times as he attempted to climb a ladder leaning against the border fence and flee into Mexico.⁶⁸ The agent claimed that he mistakenly shot the victim and was aiming at someone throwing rocks.⁶⁹ The lawsuit claims the agent's decision to shoot was "reckless, intentional, excessive, unwarranted, grossly negligent, and fell below any reasonable standard of care."⁷⁰ The trial took place in July 2015.⁷¹

Jesus Castro Romo, a Mexican national shot and wounded by a CBP agent in Arizona, won an FTCA suit against the U.S. government in Arizona.⁷² On November 16, 2010, a CBP agent had intercepted Castro Romo and a group of migrants trying to cross into the United States from Mexico.⁷³ After he surrendered, a CBP agent on horseback hit Romo repeatedly over the head with a lasso. When Romo tried to flee, the agent shot him in the back.⁷⁴ In February 2015, Romo prevailed on his FTCA claims and a district

⁶⁵ *Estate of Hernández-Rojas v. United States*, No. 3:11-CV-0522-L DHB, 2013 WL 5353822 (S.D. Cal. Sept. 24, 2013) (reconsideration denied); *Estate of Hernández-Rojas v. United States*, No. 3:11-CV-0522-L DHB, 2014 WL 3699929 (S.D. Cal. July 24, 2014).

⁶⁶ *Estate of Hernández-Rojas v. United States*, No. 3:11-CV-0522-L DHB, 2013 WL 5353822 (S.D. Cal. Sept. 24, 2013) (reconsideration denied); *Estate of Hernández-Rojas v. United States*, No. 3:11-CV-0522-L DHB, 2014 WL 3699929 (S.D. Cal. July 24, 2014).

⁶⁷ *Id.* at 5.

⁶⁸ *Order, Guerrero v. United States*, No. 4:12-cv-00370-TUC-JAS, 2015 WL 569875, at 1 (D. Ariz. Feb. 11, 2015).

⁶⁹ *Id.*

⁷⁰ *Guerrero v. United States*, No. 4:12-cv-00370-JAS, 2015 WL 569875 (D. Ariz. Feb. 11, 2015).

⁷¹ *Order, Guerrero v. United States*, No. 4:12-cv-00370-JAS (D. Ariz. Feb. 20, 2015), ECF No. 92.










⁷² *Complaint, Castro Romo v. United States*, No. 4:12-cv-00041-JAS, 2012 WL 4803909 (D. Ariz. 2012), ECF No. 1.

⁷³ *Id.*

⁷⁴ *Id.*

court ordered the United States government to pay Romo nearly \$500,000 in [damages](#).⁷⁵

Figure 2: Types of Relief Available in Civil Cases

	DECLARATORY	INJUNCTIVE	COMPENSATORY DAMAGES	PUNITIVE DAMAGES	ATTORNEY'S FEES
ATS					
<i>Bivens</i>					
FTCA					
State Tort					
Civil Suit in Mexico					

2. The Plaintiff: Who Can Sue

Some federal claims are unavailable based on the victim's nationality. A victim who is a U.S. citizen may not bring an ATS claim. An ATS victim must be an "alien."⁷⁶ Courts have construed the term "alien" under the ATS to mean any person who is not a U.S. citizen.⁷⁷ While the relatives of a U.S. citizen-victim may not assert an ATS claim, they may bring *Bivens* or FTCA claims. The relatives of a victim who is a U.S. legal permanent resident or foreign national may bring ATS, *Bivens*, or FTCA claims if the killing occurred in the United States.⁷⁸

⁷⁵ Bob Ortega, *U.S. ordered to pay \$500,000 in Border Patrol shooting*, U.S.A. TODAY (Feb. 11, 2015, 6:-- PM), <http://www.usatoday.com/story/news/nation/2015/02/11/border-patrol-shooting-unreasonable-lawsuit/23252269/>.

⁷⁶ 28 U.S.C. § 1350 (2006).

⁷⁷ 8 U.S.C. § 1101(22) (2012); see *Topo v. Dhir*, 210 F.R.D. 76 (S.D.N.Y. 2002) (defining the term "alien" under the ATS as a "foreign born person who has not qualified as a citizen of the country.").

⁷⁸ Some legal remedies may be limited for undocumented immigrants living in the United States. See Marsha Chien, *When Two Laws Are Better Than One: Protecting the Rights of Migrant Workers*, 28 BERKELEY J. INT'L L. 15 (2010); Brooke H. Russ, *Secrets on the Texas-Mexico Border: Leiva et al. v. Ranch Rescue and Rodriguez et al. v. Ranch Rescue and the Right of Undocumented Aliens to Bring Suit*, 35 U. MIAMI INTER-AM. L. REV. 405 (2004).

In order to sue, relatives must have [standing](#). In most states, the deceased parents, siblings, surviving spouse, domestic partner, children, or grandchildren have standing to sue.⁷⁹ Spouses must prove the marriage was valid or “believed in good faith” that the marriage was valid to have standing.⁸⁰ In *Mena vs. the United States*, a federal district court dismissed a lawsuit brought by the domestic partner and children of José Alejandro Ortiz Castillo, a twenty-three old Mexican national killed by a CBP agent on August 8, 2007 after he allegedly picked up a rock.⁸¹ The suit was dismissed because the [plaintiff](#) was unable to prove that she was married to the victim or that he was the biological father of her children.⁸²

3. The Defendants: Who Can Be Sued

There are three potential defendants in border killing cases: (1) the CBP agent; (2) the CBP agent’s supervisors; and (3) the U.S. government.

a) CBP Agent

Victims’ relatives may file suit against CBP agents in their individual or official capacity. Courts view a lawsuit against a U.S. officer in his official capacity as an action against the U.S. government and therefore the U.S. government is liable for [damages](#).⁸³ In contrast, courts consider a lawsuit against a U.S. officer in his individual capacity as an action against the individual officer and, therefore, the agent is personally liable for damages. Obviously, the U.S. government has “deeper pockets” than an individual officer and is a more attractive defendant in a civil suit.

⁷⁹ See e.g., Cal. Civ. Proc. Code § 377.60(a) (West 2015).

⁸⁰ Paredes Nino v. United States, No. 3:13-cv-0469-WQH-BGS, 2015 WL 1003617, at 4 (S.D. Cal. Mar. 6, 2015) (Cal. Code Civ. Proc. § 377.60(b)).

⁸¹ Adriana M. Chavez, *Juarez family sues over dad’s death*, EL PASO TIMES (Nov. 26, 2012, 12:00 AM), http://www.elpasotimes.com/ci_22065030/ju-225-rez-family-sues-over-dads-death.

⁸² Mena v. United States, No. EP-10-CV-282-KC, 2012 WL 6047039, at 1 (W.D. Tex. Dec. 5, 2012).

⁸³ Balser v. Dep’t of Just., Off. of U.S. 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.”).

Victims' relatives may assert ATS claims against CBP agents in their individual or official capacity. ATS suits against U.S. officers in their official capacity are viewed by courts as suits against the U.S. government, trigger the defense of [sovereign immunity](#), and are likely to be dismissed. U.S. officers sued in their personal capacity under the ATS are not entitled to sovereign immunity.⁸⁴

Victims' relatives must assert *Bivens* actions against U.S. officials in their individual capacity.⁸⁵ This makes the officer personally liable for payment of [damages](#). Collecting a damages award may be difficult to the extent the [defendant](#) does not have "deep pockets."⁸⁶

Victims' relatives must assert FTCA claims against U.S. federal government employees in their official capacity. Under the Westfall Act, the government may convert many [tort](#) claims against a U.S. officer in his or her official capacity into an FTCA suit.⁸⁷

b) CBP Agent's Supervisors

Some victims of border abuses may choose to assert claims against the CBP agent's supervisors. As with the offending CBP agent, [plaintiffs](#) may sue a CBP agent's supervisors in either their individual or official capacity.

To successfully assert a *Bivens* claim against a CBP agent's supervisors, a plaintiff must show that the supervisor is directly liable for the violation of the constitutional right. *Bivens* does not recognize vicarious liability, a tort doctrine that holds individuals accountable for wrongs committed by others based on certain relationships, such as an

⁸⁴ See, e.g., *Jama v. U.S. I.N.S.*, 343 F. Supp. 2d 338 (D. N.J. 2004) (holding INS officials sued in individual capacity under ATS are not entitled to sovereign immunity); William R. Casto, *Notes on Official Immunity in ATS Litigation*, 80 *FORDHAM L. REV.* 573 (2011).

⁸⁵ Damages suits for constitutional violations against U.S. federal officers in their official capacity are treated as suits against the U.S. government and therefore barred by sovereign immunity.

⁸⁶ If an officer acts beyond the scope of his authority for *Bivens* purposes, a *Bivens* action is not available; state tort claims may be available in this circumstance.

⁸⁷ 28 U.S.C. § 2679 (2012); STEPHENS, *supra* note 53, at 284

employer-employee relationship. In *Hernandez*, the parents of a fifteen year-old Mexican national fatally shot in Mexico claimed that CBP supervisors violated their son's constitutional rights "by tolerating and condoning a pattern of brutality and excessive force by Border Patrol agents [and] systematically failing to properly and adequately monitor and investigate incidents of brutality or supervise and discipline officers involved in such misconduct . . ."⁸⁸ The Fifth Circuit dismissed the claims because the [plaintiffs](#) failed to show that the supervisors had any personal involvement in the alleged constitutional violations.⁸⁹

c) U.S. Government

Finally, border plaintiffs may elect to sue the United States. While plaintiffs may assert ATS claims against the U.S. government, these claims are likely to be dismissed under [sovereign immunity](#). As discussed above, *Bivens* claims may not be asserted against the U.S. government. Lastly, FTCA claims are always treated as claims against the U.S. government.

4. Extraterritorial Jurisdiction: Location of Harm

Victims killed or injured in Mexico by CBP agents face a unique set of legal obstacles in seeking civil [redress](#).⁹⁰ Generally, U.S. courts only have [jurisdiction](#) over conduct committed within the United States. Under exceptional circumstances, a U.S. court may extend its jurisdiction to resolve disputes involving injuries suffered on foreign soil.⁹¹

In *Kiobel v. Royal Dutch Petroleum Co.*, the U.S. Supreme Court held that the ATS does not provide jurisdiction in cases where all relevant conduct occurs outside the United States.⁹² The Court established that ATS claims must sufficiently "touch and concern"

⁸⁸ *Hernandez*, 757 F.3d.

⁸⁹ *Id.* at 280.

⁹⁰ *Border Patrol Abuse Since 2010*, *supra* note 8.

⁹¹ Chien, *supra* note 78, at 37 (discussing extraterritorial jurisdiction over conduct in Mexico).

⁹² *Id.*; *Mujica v. AirScan Inc.*, 771 F.3d 580 (9th Cir. 2014) (dismissing ATS claims by Colombian citizens injured in Colombia against two U.S. corporations because they failed to prove that their claims sufficiently "touch and concern" the United States).

the United States to overcome the presumption that the U.S. law does not extend to another country.⁹³ In a subsequent case, a district court found that ATS claims against a U.S. citizen defendant for conspiring to persecute the LGBTI community in Uganda satisfied the touch and concern standard because the [defendant](#) was a U.S. citizen residing in the United States and the acts at issue took place “to a substantial degree within the United States, over many years, with only infrequent actual visits to Uganda.”⁹⁴ The killing of a non-citizen victim in the United States or Mexico by a U.S. federal agent is likely to meet the “touch and concern” standard.⁹⁵

To successfully assert a *Bivens* claim, [plaintiffs](#) must show that victim had rights under the U.S. Constitution.⁹⁶ In *Hernandez*, the Fifth Circuit found that the Fifth Amendment did not protect a Mexican citizen residing in Mexico and killed in Mexico by a U.S. federal officer⁹⁷ while a district court in Arizona has ruled that the U.S. Constitution does protect a sixteen year-old Mexican national killed in Mexico by a CBP agent.⁹⁸ The night of October 10, 2012, the teenager was walking home along a street that runs parallel to the border fence. According to eyewitnesses, CBP agent Lonnie Swartz fired at the victim fourteen to thirty times without provocation or warning.⁹⁹ The victim was struck ten times, mostly from behind, and died at the scene.¹⁰⁰

A victim injured abroad may not assert an FTCA claim. The “foreign country exception” bars lawsuits against the United States based on injuries suffered or “arising in a foreign country,” regardless of where the tortious act or omission occurred.¹⁰¹ In *Hernandez*, for

⁹³ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1669, 185 L. Ed. 2d 671 (2013).

⁹⁴ *See Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304, 321 (D. Mass. 2013).

⁹⁵ Several justices indicated in *Kiobel v. Royal Dutch Petroleum Co.* that an ATS claim against a defendant who is a U.S. national would “touch and concern” the United States. 133 S. Ct. 1659, 1669 (2013).

⁹⁶ In *Correctional Services Corporation v. Malesko*, the Court expressly limited *Bivens* actions to a narrow range of claims previously recognized under the Fourth, Fifth, and Eighth Amendments to the U.S. Constitution. 534 U.S. 61 (2001). However, *Malesko* did not address the extraterritorial application of *Bivens* claims.

⁹⁷ *Hernandez*, 757 F. 3d

⁹⁸ Order, *Rodriguez v. Swartz*, No. 4:14-cv-02251-RCC (D. Ariz. July 9, 2015), ECF No. 58, <http://www.justsecurity.org/wp-content/uploads/2015/07/Rodriguez-v.-Swartz-decision.pdf>.

⁹⁹ *Id.*

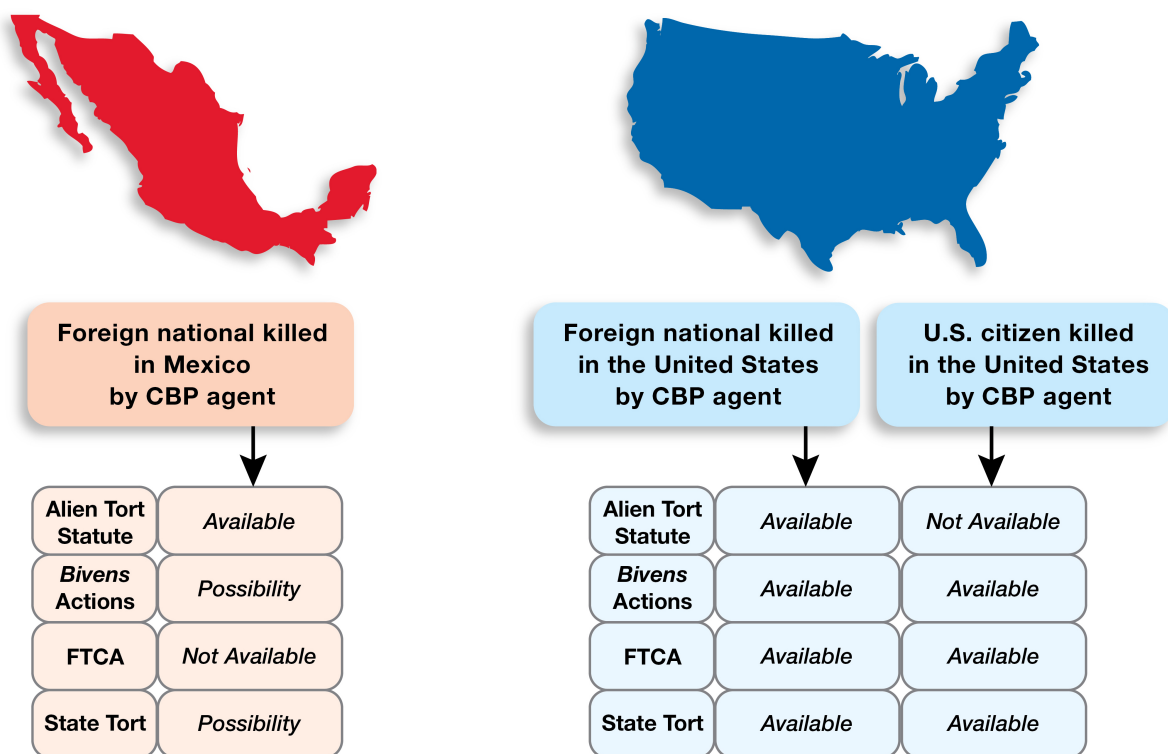
¹⁰⁰ *Id.*

¹⁰¹ 28 U.S.C. § 2680(k) (2012); *Hernandez*, 757 F. 3d at 258; *Sosa*, 542 U.S. at 700.

example, the Fifth Circuit dismissed FTCA claims based on assault and battery, negligence, excessive and deadly force, and negligent adoption of policies because the victim was standing in Mexico when fatally shot.¹⁰²

As a result of the combination of the “foreign country exception” and [sovereign immunity](#), the relatives of person killed in Mexico may not sue the United States government in courts for [damages](#).

Figure 3: Jurisdictional Limitations by Victim’s Nationality and Location of Harm



5. Other Considerations: Venue, Forum, & Choice of Law

[Venue](#) refers to the legally proper place to file a claim, such as state court or federal court. Venue is an important consideration because cases filed in the wrong venue may

¹⁰² *Hernandez*, 757 F. 3d at 255 n.2, 257-58; *see also* *Garcia v. United States*, 826 F.2d 806 (9th Cir. 1987) (dismissing state law claims brought by Mexican national as a FTCA action).

be transferred to another court or dismissed. While re-filing may be possible, doing so may be costly and waste time. ATS and FTCA suits must be brought in federal court.¹⁰³

Bivens suits may be brought in either state or federal court. However, *Bivens* claims filed in state court are likely to be removed to federal court.¹⁰⁴

Forum non-conveniens permits [dismissal](#) of a lawsuit based on improper [venue](#).¹⁰⁵ It is a powerful defense in cases involving victims injured abroad—even if the [defendant](#) is a U.S. citizen.¹⁰⁶ However, defendants are unlikely to raise this defense in border killing cases because if the defendant objects to the suit in the United States, the court is likely to require him to consent to a lawsuit in Mexico.¹⁰⁷

[Choice-of-law](#) principles determine which type of law—state law, federal law, or foreign law—will govern the different aspects of the case. For example, courts that have addressed ATS claims against U.S. officers have applied U.S. law as opposed to state or foreign law.¹⁰⁸ FTCA cases require the application of both federal and state law.¹⁰⁹ Federal courts adjudicating an FTCA claim must apply the law of the state where the harm occurred to determine which [tort](#) claims and [damages](#) are available.¹¹⁰ However, federal law will prevail over state law in some circumstances under the FTCA. For

¹⁰³ 28 U.S.C. § 1350 (2006).

¹⁰⁴ THOMSON REUTERS, CIVIL ACTIONS AGAINST THE UNITED STATES, ITS AGENTS, OFFICERS AND EMPLOYEES ch. 3 (2d. ed. 2003).

¹⁰⁵ See *Piper Aircraft v. Reyno*, 454 U.S. 235 (1981) and *Gulf Oil Co. v. Gilbert*, 330 U.S. 501 (1947).

¹⁰⁶ Patrick J. Borchers, *Conflict-of-Laws Considerations in State Court Human Rights Actions*, 3 U.C. IRVINE L. REV. 45, 59 (2013); see *Mujica v. AirScan Inc.*, 771 F.3d 580 (9th Cir. 2014) (dismissing state-law personal injury and wrongful death claims by Colombian citizens against two U.S. corporations for injuries suffered during the bombing of a Colombian village by the Colombian military on grounds of *forum non conveniens* because all relevant conduct occurred in Colombia).

¹⁰⁷ *Forum non Conveniens*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/forum_non_conveniens (last visited Aug. 11, 2015).

¹⁰⁸ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004).

¹⁰⁹ The FTCA makes the federal government liable to the same extent as a private party would be based on “the law of the place where the act or omission occurred.” 28 U.S.C. § 1346(b)(1) (2012); see *Richards v. United States*, 369 U.S. 1, 9-10 (1962) (applying choice-of-law principles of the state where the negligence occurred to determine which state’s substantive law on damages would govern).

¹¹⁰ See STEPHENS, *supra* note 53, at 285.

instance, the FTCA prohibits punitive damages and [injunctive relief](#), even if permitted under state law.¹¹¹

6. Legal Defenses: How Claims Fail

To defeat a legal claim brought by a victims' relatives, CBP agents or the United States government may raise certain legal defenses. A successful defense results in the [dismissal](#) of a legal claim.

a) Sovereign Immunity

[Sovereign immunity](#) bars suits against the U.S. government without its consent.¹¹²

In other words, the U.S. government is immune from suit in U.S. courts unless the government agrees to be sued.¹¹³ Courts view a suit against a U.S. officer in his official capacity as a suit against the U.S. government.¹¹⁴

The purpose of sovereign immunity is to protect the government against suits by private individuals. Sovereign immunity frequently results in the [dismissal](#) of ATS suits against U.S. government officials.¹¹⁵ In *Hernandez*, for example, the Fifth Circuit dismissed the ATS claims after determining that the U.S. government did not consent to suit.¹¹⁶

Bivens actions do not implicate sovereign immunity because they are actions against the officer in his individual capacity although damage awards for *Bivens* actions are limited to whatever the individual officer can pay, which is probably very little. If a victim

¹¹¹ See LESTER S. JAYSON & ROBERT C. LONGSTRETH, HANDLING FEDERAL TORT CLAIMS § 9.02 (1996); *Moon v. Takisaki*, 501 F.2d 389 (9th Cir. 1974).

¹¹² See FALLON, *supra* note 40, at 841.

¹¹³ See *U.S. v. Mitchell*, 463 U.S. 206, 212-13 (1983).

¹¹⁴ *Balser v. Dep't of Just., Off. of U.S. Trustee*, 327 F.3d 903, 907 (9th Cir. 2003) ("In sovereign immunity analysis, any lawsuit against an agency of the United States or against an officer of the United States in his or her official capacity is considered an action against the United States.").

¹¹⁵ See Hunter, *supra* note 44, at 173-74.

¹¹⁶ *Hernandez*, 757 F.3d at 259. According to the Fifth Circuit, even if the prohibition against extrajudicial killing is part of customary international law, courts have not interpreted the ATS as a waiver of sovereign immunity. *Id.*

brings a constitutional claim against the government, it will likely be barred by [sovereign immunity](#).¹¹⁷

The FTCA sets aside the government's immunity for certain [torts](#) committed by U.S. government employees, such as negligence.¹¹⁸ The FTCA, however, does not authorize suits against federal employees involving a failure to properly use discretionary authority.¹¹⁹ In *Guerrero v. United States*, the court found that sovereign immunity barred a claim by victims' relatives that CBP supervisors were negligent in the hiring, retention, and supervision of CBP agents.¹²⁰

b) Qualified Immunity

Qualified immunity protects public officials from being sued for certain constitutional violations that did not violate "clearly established rights" when the violation was committed.¹²¹ This doctrine applies only in *Bivens* suits; it does not apply in ATS or FTCA suits.¹²² To successfully assert the defense, the officer must show that he did not violate "clearly established" rights;¹²³ i.e. a reasonable officer would not have believed that his actions were lawful.¹²⁴

Courts have decided this matter in contradictory ways. For example, the Fifth Circuit found that when a CBP agent fatally shot fifteen year-old Sergio Adrian Hernández Guereca in Mexico in 2010, there was no "clearly established" law confirming that

¹¹⁷ See THOMSON REUTERS, *supra* note 104; *F.D.I.C. v. Meyer*, 510 U.S. 471 (1994); *Hernandez*, 757 F.3d at 258 n.6.

¹¹⁸ 28 U.S.C. § 2680(a) (2012); 28 U.S.C. §§ 1346(b), 2671-2860 (2012).

¹¹⁹ 28 U.S.C. § 2680(a) (2012).

¹²⁰ *Guerrero v. United States*, No. 4:12-cv-00370, 2015 WL 569875 (D. Ariz. Feb. 11, 2015), ECF No. 14. Compare *Garcia v. United States*, 826 F.2d 806, 809 (9th Cir. 1987) (finding that CBP agent's duties did not fall within the discretionary function exception).

¹²¹ *Butz v. Economou*, 438 U.S. 478 (1978).

¹²² *Frag v. United States*, 587 F. Supp. 2d 436 (E.D.N.Y. 2008) (qualified immunity not available in FTCA suits).

¹²³ Qualified immunity differs from absolute immunity. Absolute immunity protects officials such as judges and prosecutors who may not be held liable for damages under any circumstances, even if they intentionally violate federal rights.

¹²⁴ *Wilson v. Layne*, 526 U.S. 603 (1999). See *Gallegos v. United States*, 5:14-cv-00136 (S.D. Tex. Aug. 27, 2014); *Perez v. United States*, No. 3:13-cv-01417 (S.D. Cal. Nov. 19, 2014).

Bivens actions could apply to injuries suffered in Mexico.¹²⁵ In *Rodriguez v. Swartz*, however, a federal district court in Arizona held “at the time he shot [the victim], [CBP agent] Swartz was an American law enforcement officer standing on American soil and well-aware of the limits on the use of deadly force against U.S. citizens and non-citizens alike” to reject the [defendant’s](#) argument that he had qualified immunity for a shooting of a Mexican national in Mexico.¹²⁶

B. STATE CIVIL SUITS

Victims of abuses at the border may also use state law claims, such as wrongful death, assault, battery, negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress, to sue CBP agents. [Plaintiffs](#) may prefer to bring state civil claims if federal claims are unavailable. For instance, the ATS is not available to U.S. citizens who are victims of abuses at the border.¹²⁷ It is not possible, however, to sue the U.S. government for a violation of state law.¹²⁸

The following section describes civil claims based on state law in four U.S. states that border with Mexico – Arizona, California, New Mexico, and Texas.

¹²⁵ *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 (2010). In general, most courts have not imposed an exhaustion requirement on ATS claimants. See Altholz, *supra* note 28, at 1516, n.131. In contrast, courts have applied an exhaustion requirement in *Bivens* cases when a statute applicable to the underlying constitutional claim so requires. *Nyhuis v. Reno*, 204 F.3d 65 (3d Cir. 2000). 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).

¹²⁶ Order at 19-21, *Rodriguez v. Swartz*, No. 4:14-cv-02251-RCC (D. Ariz. July 9, 2015), ECF No. 58, <http://justsecurity.org/wp-content/uploads/2015/07/Rodriguez-v.-Swartz-decision.pdf>.

¹²⁷ The ATS gives federal courts “original jurisdiction of any civil action by an alien . . .” 28 U.S.C. § 1350 (2012).

¹²⁸ The Federal Employees Liability Reform and Tort Compensation Act, 28 U.S.C. § 2679(b) and (d), makes the FTCA the exclusive remedy for torts committed by federal officials acting within the scope of employment.

1. Causes of Action: The Right to Sue

In the context of abuses at the border, the main type of state civil claim is a [tort](#) claim. Two other possibilities are *Bivens*-type claims based on state constitutions or claims based on violations of international law.

a) State Law Torts

Victims' relatives may be able to sue CBP agents for personal injury and wrongful death torts. The torts available in a given [jurisdiction](#) vary by state.¹²⁹ The following torts are generally available for abuses at the borders:

Assault: Apprehension of a harmful or offensive contact with the person.¹³⁰

Battery: Intentional and unpermitted contact with the person.¹³¹

Intentional infliction of emotional distress (IIED): Causing a victim emotional distress or anxiety through extreme and offensive conduct.¹³²

Negligent infliction of emotional distress (NIED): Unintentional conduct that causes severe emotional distress.¹³³

Wrongful death: A death caused by another person that occurs without justification or excuse.

Negligence: When the failure to act carefully causes the [plaintiff's](#) injury.

Examples include negligent hiring and negligent supervision.

¹²⁹ Texas does not recognize a tort cause of action for negligent infliction of emotional distress. *Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993).

¹³⁰ RESTATEMENT (SECOND) OF TORTS § 21 (1965).

¹³¹ *Id.* § 18.

¹³² *Id.* § 46.

¹³³ *Id.*

The relief and [damages](#) available vary by state. The [statute of limitations](#) is generally two to three years.¹³⁴

Many ATS claims can be pled as state [tort](#) claims. In *Linder v. Calero Portocarrero*, for example, the family of a U.S. citizen barred from bringing an ATS claim alleged the tort of wrongful death under Florida law.¹³⁵ [Plaintiffs](#) in cases involving border killings have also used the FTCA to assert state claims.¹³⁶

State law claims can play an important strategic role in cases filed in federal court. If a federal court finds that federal laws do not apply, the case will be dismissed unless the court decides to consider the plaintiff's state law claims. In *Doe v. Exxon Mobile Corp.*, for example, the court dismissed federal ATS claims but permitted state tort claims for wrongful death and assault and battery.¹³⁷

b) Other State-Law Claims

Advocates have proposed two other types of claims that border abuse plaintiffs have not yet used. First, plaintiffs may be able to allege a *Bivens*-type action under a state constitution.¹³⁸ One legal scholar observed that “[t]here is a growing and promising trend amongst attorneys ‘to seek civil [damages](#) for state constitutional violations because state courts are starting to give their citizens greater protection than the federal courts offer and because of the barriers blocking plaintiffs from federal relief.’”¹³⁹ California

¹³⁴ *Chart: Statute of Limitations in All 50 States*, NOLO, <http://www.nolo.com/legal-encyclopedia/statute-of-limitations-state-laws-chart-29941.html> (last visited Aug. 11, 2015).

¹³⁵ *Linder v. Calero Portocarrero*, 963 F.2d 332, 333–34 (11th Cir. 1992) (family of U.S. citizen executed in Nicaragua brought state law tort claims against leaders of the Nicaraguan organization responsible for his death).

¹³⁶ See e.g., *Hernandez v. United States*, 757 F.3d 249, 255 (5th Cir.) reh'g and reh'g en banc granted, 771 F.3d 818 (5th Cir. 2014) and adhered to in part on reh'g en banc, 785 F.3d 117 (5th Cir. 2015); *Garcia v. United States*, 826 F.2d 806 (9th Cir. 1987).

¹³⁷ *Doe v. Exxon Mobile Corp.*, 527 F. App'x 7 (D.C. Cir. 2013). Similarly, in *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10 (D.D.C. 2005), the court dismissed ATS claims but permitted state law claims for wrongful death and assault and battery. See Altholz, *supra* note 28, at 1519 n.151.

¹³⁸ Gary S. Gildin, *Redressing Deprivations of Rights Secured by State Constitutions Outside the Shadow of the Supreme Court's Constitutional Remedies Jurisprudence*, 115 Penn St. L. Rev. 877, 889-903 (2011).

¹³⁹ See Helen Gugel, *Remaking the Mold*, 110 COLUM. L. REV. 1294, 1297, 1315 (2010) (citing Lance R. Chism, *Bivens-Type Actions Under State Constitutions-Will Tennessee Give You a Remedy?*, 30 U. MEM. L. REV. 409, 419 (2000)).

courts have used the *Bivens* framework to recognize private causes of action for damages based on state constitution.¹⁴⁰ Second, some legal scholars have argued that international law is part of state [common law](#) and courts may hold private persons liable for violations.¹⁴¹

2. The Plaintiff: Who Can Sue

U.S. citizens and foreign nationals may bring state [tort](#) claims. Who has [standing](#) to sue—the victim’s parents, spouse, children, or grandchildren—will depend on the requirements established by state law.¹⁴²

3. The Defendants: Who Can Be Sued

Victims may assert state-law tort claims against individual CBP agents in their personal capacity and official capacity under certain circumstances. State-law claims against individual officers have their advantages: [sovereign immunity](#) does not apply, a jury trial may be permitted, and punitive [damages](#) may be available.

Victims may sue the CBP agent’s supervisors directly or under a theory of vicarious liability. Vicarious liability is a tort doctrine that holds individuals accountable for wrongs committed by others based on certain relationships, such as an employer-employee relationship.




The U.S. government may not be sued for violating state law.¹⁴³

¹⁴⁰ *Id.* at 1322 (citing *Gay Law Students Ass’n v. Pac. Tel. & Tel. Co.*, 595 P.2d 592, 602 & n.10 (Cal. 1979)).

¹⁴¹ Burt Neuborne, *Some Quick Thoughts on Transnational Human Rights Litigation in American Courts After Kiobel*, N.Y.U. J. INT’L L. & POL. (Apr. 19, 2013), <http://nyujilp.org/some-quick-thoughts-on-transnational-human-rights-litigation-in-american-courts-after-kiobel/> (noting “maybe it’s time to explore the international human rights enforcement capabilities of state courts. . . a customary international law claim should be enforceable in state court as a matter of state common law”). International customary law reflects those actions or practices that have become accepted by the international community as applicable law, and is binding upon all states regardless of whether the state has ratified a treaty containing the rule in question. *See also* Borchers, *supra* note 106, at 51 (stating that “In theory, state courts could develop customary-international-law tort law and remedies . . . but in practice this seems unlikely to happen on a broad scale.”).

¹⁴² For example, under Texas state law, the biological children of a deceased parent have standing to bring a wrongful death claim. Tex. Civ. Prac. & Rem. Code Ann. § 71.004(a) (West 2015) and this biological link must be proven by clear and convincing evidence. *Id.*

Figure 4: Who Can Be Sued in Court

	 CBP AGENT	 CBP SUPERVISOR	 U.S. GOVERNMENT
Alien Tort Statute	✓	✓	✗*
<i>Bivens</i> Actions	✓	✓	✗
FTCA	✓	✓	✓
State Tort	✓	✓	✗
Civil Suit in Mexico	✓**	✗	✗

* U.S. law prohibits lawsuits against the United States without government consent.

** If the defendant is present in Mexico, then the plaintiff can file a civil suit in Mexico.

4. Extraterritorial Jurisdiction: Location of Harm

Victims injured in Mexico may not be able to successfully sue CBP agents for violations of state law in state court. State courts are generally reluctant to permit the extraterritorial application of state law.¹⁴⁴ According to some commentators, however, “[a]s long as a state court has personal [jurisdiction](#) over the [defendant](#), that court will generally have jurisdiction to hear claims arising out of human rights violations in a foreign state—claims such as wrongful death, assault and battery, and false imprisonment.”¹⁴⁵ For example, in *Martinez v. City of Los Angeles*, a Mexican national successfully brought state law claims against Los Angeles police officers for providing

¹⁴³ The FTCA is the *exclusive* remedy for torts committed by federal officials acting in the course of their official duties. 28 U.S.C. § 2679(b), (d) (2012).

¹⁴⁴ However, plaintiffs injured abroad could use alternate theories of jurisdiction to urge a state court to hear their claims. Under the doctrine of transitory torts, state courts have jurisdiction to hear claims based on injuries inflicted outside of the United States. Paul Hoffman & Beth Stephens, *International Human Rights Cases Under State Law and in State Courts*, 3 UC IRVINE L. REV. 9, 11 (2013).

¹⁴⁵ *Id.*

Mexican authorities with false information that led to his imprisonment in Mexico.¹⁴⁶ Additionally, state courts that define “harm” based on the location of the conduct causing the injury (e.g. where the shot was fired) rather than the location of the injury (e.g. where the victim was killed) may allow cases involving killings in Mexico.

5. Other Considerations: Venue, Forum, & Choice of Law

State law claims may be brought in either state court or federal court. [Plaintiffs](#) consider a number of factors in determining where to file a suit.

Personal Jurisdiction: A state court must have personal jurisdiction over the parties. A state court will have personal jurisdiction over the plaintiff (whether U.S. or foreign national) once the plaintiff files suit. However, a state court may lack jurisdiction over the [defendant](#) unless the defendant lives in the state where plaintiffs filed the suit or has certain minimum contacts with the state.

Supplemental Jurisdiction: Plaintiffs who file in federal court may also assert state law claims in federal court in accordance with the doctrine of supplemental jurisdiction. A valid federal claim, such as an ATS, *Bivens*, or FTCA claim, will also trigger a federal court’s supplemental jurisdiction over any related state law claims.¹⁴⁷

Removal: In cases that could be filed in either federal or state court, if the plaintiff files in state court, the defendant has a right to “remove” (or transfer) the case to federal court.¹⁴⁸ In some border cases, the defendants have successfully removed the case to federal court because they are federal officers.¹⁴⁹ A defendant may request removal to federal court to gain a practical or strategic advantage.

¹⁴⁶ *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1376 (9th Cir. 1998).

¹⁴⁷ See 28 U.S.C. § 1367 (2012).

¹⁴⁸ See 28 U.S.C. § 1441 (2012) (setting forth the statutory framework for removal of actions from state court to federal court).

¹⁴⁹ See Notice of Removal, *Arizona v. Corbett*, No. 4:07-cr-01508-DCB-BPV (D. Ariz. Aug. 23, 2007); *Arizona v. Elmer*, 21 F.3d 331, 334 (9th Cir. 1994).

Diversity: A non-citizen victim can assert state law claims in federal court by virtue of his or her nationality. Federal courts have jurisdiction over cases between U.S. citizens and non-citizens (known as diversity jurisdiction).¹⁵⁰ Border cases involving a non-citizen victim and U.S. federal defendants likely meet the diversity requirement.¹⁵¹

Forum non-conveniens permits defendants to argue that there is another court that would be more appropriate or convenient for the litigation.¹⁵² As discussed above, defendants have not raised this doctrine in cases involving alleged abuses by CBP agents.

Choice of law principles determine which type of law will govern the critical aspects of the case. How a court decides whether to apply state, federal, or foreign law varies by state. The decision generally turns on whether the parties are citizens or residents of the state where the suit was brought and whether the relevant conduct took place in the state.¹⁵³ In cases involving border killings, courts are likely to apply federal or state law, not foreign law, because the defendant is a U.S. citizen.¹⁵⁴

6. Legal Defenses: How Claims Fail

CBP agents may assert different legal defenses to defeat a lawsuit brought under state law.

¹⁵⁰ 28 U.S.C. § 1332(a)(2) (2012).

¹⁵¹ See, e.g., *Doe v. Exxon Mobil*, 654 F.3d 11, 71 (D.C. Cir. 2011) (holding that the federal court had diversity jurisdiction over tort claims filed by Indonesian citizens against Exxon Mobil, a U.S. citizen).

¹⁵² State *forum non-conveniens* doctrine is similar in relevant respects to federal doctrines. PETER HAY, PATRICK J. BORCHERS, & SYMEON C. SYMEONIDES, *CONFLICT OF LAWS* 559 (5th ed. 2010) (“[S]tate and federal application of forum non conveniens [sic] is generally identical.”).

¹⁵³ Hoffman & Stephens, *supra* note 144, at 19; Christopher A. Whytock, Donald Earl Childress III & Michael D. Ramsay, *Foreword: After Kiobel—Inter-national Human Rights Litigation in State Courts and Under State Law*, 3 U.C. IRVINE L. REV. 1, 7 (2013).

¹⁵⁴ Borchers, *supra* note 106, at 50.

Self-Defense: [Defendants](#) may claim that their actions were justified because they were defending themselves or someone else.

Comparative Negligence: Defendants may claim that the victim's negligent conduct caused or contributed to the victim's injuries.

Assumption of Risk: Defendants may claim they should not be held liable because the victims voluntarily and knowingly exposed themselves to the danger.

Immunity: Defendants may claim immunity from civil liability based on their status as a U.S. federal officer.

Comity: A court may decline to decide a case involving foreign conduct based on principles of comity.¹⁵⁵ The purpose of comity is to eliminate state interference with the federal government and to respect the sovereignty of foreign nations.¹⁵⁶

Foreign Affairs Preemption: A court may dismiss state law claims if state law conflicts with federal policies or foreign affairs decisions.¹⁵⁷

C. FEDERAL CRIMINAL PROSECUTIONS

Aside from the civil system, state and federal prosecutors have the authority to bring criminal charges. Victims can file a complaint to initiate action by law enforcement although prosecutors have discretion to decide whether to prosecute. Successful criminal prosecutions provide two forms of relief: fines and/or imprisonment.

¹⁵⁵ "Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Mujica v. AirScan Inc.*, 771 F.3d 580, 597 (9th Cir. 2014) (noting *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 543 n.27, 107 S.Ct. 2542, 96 L.Ed.2d 461 (1987)).

¹⁵⁶ *Id.* at 615.

¹⁵⁷ *Hoffman & Stephens*, *supra* note 144, at 20.

Additionally, criminal prosecutions may provide public scrutiny and oversight by drawing public attention to actions of CBP officers.

CBP officers are rarely prosecuted for killing or injuring border residents or migrants. Federal authorities have closed the criminal investigations of nearly all border killings without pursuing criminal charges.¹⁵⁸ President George W. Bush pardoned the only two agents convicted of federal charges for border abuses in the agency's history.

The following section describes relevant federal criminal offenses.

1. Crimes: The Grounds for Prosecution

Federal prosecutors may charge CBP agents who allegedly used unlawful lethal force with three types of federal criminal offenses: (1) common federal crimes; (2) federal criminal civil rights statutes; and (3) the crime of torture.

a) Common Federal Crimes

Although federal law criminalizes homicide and assault, the Department of Justice has closed all criminal investigations into border killings by CBP agents since 2005.¹⁵⁹ For example, the Department of Justice declined to pursue criminal charges in the case of Sergio Hernández Guereca, a 15-year old Mexican teenager shot in the head by CBP officers.¹⁶⁰ The DOJ has brought charges against only two agents for border abuses during the law enforcement agency's one-hundred-year history. Prosecutorial discretion and political considerations may explain the rarity of criminal prosecutions against CBP agents for border killings.

¹⁵⁸ Associated Press, National Briefing, *Southwest, Arizona: Case Dropped in Death*, N.Y. TIMES (Dec. 12, 2008), <http://query.nytimes.com/gst/fullpage.html?res=9E0DE7DD1F38F931A25751C1A96E9C8B63>.

¹⁵⁹ *Border Patrol Abuse Since 2010*, *supra* note 8.

¹⁶⁰ *Federal Officials Close Investigation into the Death of Sergio Hernandez-Guereca*, U.S. DEP'T OF JUST., OFF. OF PUB. AFF. (Apr. 27, 2012), <http://www.justice.gov/opa/pr/federal-officials-close-investigation-death-sergio-hernandez-guereca>.

(1) Federal Homicide

Federal law criminalizes murder,¹⁶¹ the murder of a U.S. national in a foreign country by a U.S. national,¹⁶² manslaughter,¹⁶³ and attempted murder or manslaughter.¹⁶⁴ While indictments for murder or foreign murder of U.S. nationals may be delivered at any time after the crime, the [statute of limitations](#) for noncapital federal offenses such as manslaughter and attempted murder or manslaughter is five years.¹⁶⁵ The punishment for murder is a prison sentence and possibly a life sentence or death.¹⁶⁶

Federal homicide requires a showing of excessive or unreasonable use of force.¹⁶⁷ In border killings, this would require a showing that the CBP agent used excessive or unreasonable use of force in violation of CBP policy and practice.¹⁶⁸ For example, the Department of Justice (DOJ) closed the federal investigation into the 2010 death of Sergio Adrian Hernández Guereca, the fifteen year-old shot in Mexico by a CBP agent and concluded that:

the agent's actions constituted a reasonable use of force or would constitute an act of self-defense in response to the threat created by a group of smugglers hurling rocks at the agent and his detainee. The investigation also revealed that, on these particular facts, the agent did not act inconsistently with CBP policy or training regarding use of force. Based on a careful review and analysis of all the evidence, the team concluded that evidence would not be sufficient to prove

¹⁶¹ 18 U.S.C. § 1111 (2012). "Every murder perpetrated by . . . willful, deliberate, malicious, and premeditated killing . . . is murder in the first degree." "Any other murder is murder in the second degree." *Id.* § 1111(a).

¹⁶² *Id.* § 1119.

¹⁶³ *Id.* § 1112. "Manslaughter is the unlawful killing of a human being without malice."

¹⁶⁴ *Id.* § 1113.

¹⁶⁵ Charles Doyle, Congressional Research Service, Statutes of Limitation in Federal Criminal Cases: An Overview (2012), <https://www.fas.org/sgp/crs/misc/RL31253.pdf> (prepared for members and committees of Congress).

¹⁶⁶ A person convicted of first degree murder "shall be punished by death or imprisonment for life" and a person convicted of second degree "shall be imprisoned for any term of years or for life." 18 U.S.C. § 1111(b) (2012). Voluntary manslaughter requires a term of imprisonment of "not more than 15 years." *Id.* § 1112(b).

¹⁶⁷ See *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985) (holding that "deadly force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.").

¹⁶⁸ U.S. Customs & Border Protection, Use of Force Policy, Guidelines & Procedures Handbook 3-4 (2014), <http://www.cbp.gov/sites/default/files/documents/UseofForcePolicyHandbook.pdf>.

beyond a reasonable doubt that the CBP agent violated the federal homicide laws in the shooting of Hernández-Guereca.¹⁶⁹

CBP previously condoned the use of deadly force in response to rock throwers.¹⁷⁰ However, the CBP's 2014 *Use of Force Policy, Guidelines, and Procedures Handbook* mandates training in the use of safe tactics, requires that officers carry less lethal devices, and provides guidance on responding to thrown projectiles.¹⁷¹

(2) Federal Assault

Federal law criminalizes assault,¹⁷² including assault with intent to commit murder¹⁷³ and assault with a dangerous weapon.¹⁷⁴ For most federal offenses, U.S. federal prosecutors have five years to charge the [defendant](#).¹⁷⁵ The defendant may face up to 20 years in prison for assault depending on the circumstances.¹⁷⁶

In 2005, federal prosecutors brought multiple federal charges against CBP agents José Compeán and Ignacio Ramos for shooting an unarmed Mexican national and attempting to conceal their crime. Along a remote stretch of the U.S.-Mexico border, the two agents cornered a van they suspected of smuggling drugs and shot the unarmed driver, Osvaldo Aldrete-Davila, when he exited the van and tried to surrender.¹⁷⁷ According to investigators, instead of arresting Aldrete-Davila, a Mexican national, border agent Compeán tried to hit him with the butt of his shotgun.¹⁷⁸ Aldrete-Davila fled and the CBP

¹⁶⁹ *Federal Officials Close Investigation into the Death of Sergio Hernandez-Guereca*, *supra* note 160.

¹⁷⁰ Fisher Memo, *supra* note 11.

¹⁷¹ *See generally* U.S. Customs & Border Protection, *supra* note 168.

<http://www.cbp.gov/sites/default/files/documents/UseofForcePolicyHandbook.pdf>.

¹⁷² An assault is an attempt to hit another person or an act that causes another person to reasonably expect impending harm.

¹⁷³ *Id.* § 113(a)(1).

¹⁷⁴ *Id.* § 113(a)(3).

¹⁷⁵ DOYLE, *supra* note 165, at 2, n.12.

¹⁷⁶ 18 U.S.C. § 113(a)(6) (2012).

¹⁷⁷ Pamela Colloff, *Badges of Dishonor*, TEX. MONTHLY (Sept 2007), <http://www.texasmonthly.com/story/badges-dishonor?fullpage=1>. Border patrol later recovered almost 750 pounds of marijuana from the van.

¹⁷⁸ *Id.*

agents shot at him fifteen times, hitting the victim's buttocks.¹⁷⁹ The injured victim continued to run and crossed the border into his home country. The agents did not report the shooting to their supervisors and attempted to conceal the incident by disposing of the spent shells.¹⁸⁰ After a criminal investigation was launched, the agents claimed they had acted in self-defense.¹⁸¹

A Federal Grand Jury indicted Ramos on seven charges and Compeán on nine charges related to the shooting and cover-up.¹⁸² The charges included assault with the intent to commit murder and tampering with and obstruction of an official proceeding.¹⁸³ The agents were found guilty on all charges except attempted murder.¹⁸⁴ Ramos and Compeán were convicted in 2006 and sentenced to more than eleven years in prison and ordered to pay a \$2,000 fine.¹⁸⁵ The former agents began serving their sentences in 2007. However, President George W. Bush pardoned the agents in 2009 without an explanation.¹⁸⁶

b) Federal Civil Rights Violations

Federal law makes it a crime for a person acting under [color of law](#) to willfully deprive a person of a constitutional right.¹⁸⁷ Prosecutors must establish that a law enforcement officer willfully deprived an individual of a constitutional right, beyond reasonable doubt. Prosecutors must prove that the [defendant](#) acted with deliberate and specific intent to

¹⁷⁹ *Id.*

¹⁸⁰ *United States v. Ramos*, 537 F.3d 439, 442 (5th Cir. 2008).

¹⁸¹ Colloff, *supra* note 177.

¹⁸² *Ramos*, 537 F.3d 439, 442.

¹⁸³ Prosecutors also charged the agents with assault with a dangerous weapon and aiding and abetting, assault with serious bodily injury and aiding and abetting; discharge of a firearm in relation to a crime of violence; tampering with an official proceeding by obstructing and impeding a contemporaneous investigation surrounding the shooting; tampering with an official proceeding by failing to report the discharge of his firearm, and deprivation of rights under color of law. *Ramos*, 537 F.3d 439, 442.

¹⁸⁴ *Id.* at 446.

¹⁸⁵ *Ramos v. United States*, No. EP-05-CR-856-KC-1, 2012 WL 10921, at *12 (W.D. Tex. Jan. 3, 2012).

¹⁸⁶ Eric Lichtblau, *Bush Commutes 2 Border Agents' Sentences*, N.Y. TIMES (Jan. 19, 2009),

http://www.nytimes.com/2009/01/20/washington/20sentence.html?_r=0.

¹⁸⁷ 18 U.S.C. § 242 (2012).

violate the law. This is a high standard that is not satisfied by acts of mere negligence or poor judgment.¹⁸⁸

A conviction may result in fines and/or imprisonment up to one year. If bodily injury results or if the acts included the use of a dangerous weapon, a [defendant](#) faces up to 10 years in prison. If death results from the acts, a defendant faces imprisonment for “any term of years or for life, or both, or may be sentenced to death.”¹⁸⁹

CBP agents José Compeán and Ignacio Ramos are the only CBP agents to have been convicted of federal civil rights violations for a border killing, although CBP agents have been convicted of civil rights violations for assaulting Mexican nationals.¹⁹⁰

c) Torture

Federal law also criminalizes acts of torture committed outside the United States. For a torture prosecution to move forward, the defendant must be a U.S. national.

Alternatively, if the defendant is a foreign national, the defendant must be present in the United States during the prosecution.¹⁹¹ The U.S. criminal code defines torture as “an act committed by a person acting under the [color of law](#) specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control[.]”¹⁹²

Persons convicted of torture are eligible for sentences of up to 20 years, and if death

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ For example, in 2010, U.S. Border Patrol Agent Eduardo Moreno pleaded guilty to a federal criminal civil rights charge after admitting that “he kicked [a Mexican National in detention], struck him in the stomach with a baton, threw him down to [the] ground, and punched him, all without any legitimate law enforcement reason to use force.” *Border Patrol Agent Pleads Guilty to Civil Rights Violation*, U.S. DEP’T OF JUST., OFF. OF PUB. AFF. (June 3, 2010), <http://www.justice.gov/opa/pr/border-patrol-agent-pleads-guilty-civil-rights-violation>. Another former Border Patrol agent was sentenced to more than 15 years in 2011 for raping a woman in 2003 that he had pulled from a bus at an inland checkpoint. *Former Border Patrol Agent Convicted of Aggravated Sexual Assault Sentenced*, U.S. ATT’Y OFF., S.D. TEX (July 1, 2011), <http://www.justice.gov/archive/usao/txs/1News/Releases/2011%20July/110701%20Sullivan.htm>.

¹⁹¹ 18 U.S.C. § 2340A (2012).

¹⁹² 18 U.S.C. § 2340 (2012).

results, imprisonment for any term of years, life, or the death penalty. There is no [statute of limitations](#).

In 2009, a U.S. court convicted and sentenced Charles McArthur Emmanuel, a paramilitary leader and son of former Liberian dictator Charles Taylor, to ninety-seven years imprisonment for his role in the torture of Liberian civilians during the civil war in Liberia.¹⁹³ His prosecution was the first and only federal prosecution for torture under the federal Torture Statute.¹⁹⁴

CBP agents who use deadly force against persons in Mexican territory may be criminally liable for torture depending on the circumstances of the death. CBP agents responsible for deaths in the United States cannot be prosecuted for torture. For example, Anastasio Hernández-Rojas, a Mexican national, was shot with a Taser and beaten to death by at least twelve CBP agents.¹⁹⁵ Although these actions may constitute torture, prosecutors cannot charge the CBP agents with torture because the incident occurred in California.

2. Extraterritorial Jurisdiction: Location of Harm

U.S. criminal law generally does not apply to offenses committed outside the United States. Federal prosecutors will bring charges against [defendants](#) for actions that occurred outside the United States in limited circumstances, such as for the crime of torture.¹⁹⁶

¹⁹³ Verdict, *United States v. Belfast*, No. 06-20758-CR-ALTONAGA (S.D. Fla. Oct. 30, 2008).

¹⁹⁴ 18 U.S.C. §§ 2340-2340B (2006).

¹⁹⁵ John Carlos Frey, Opinion Editorial, *What's going on with the Border Patrol?*, L.A. TIMES (Apr. 20, 2012), <http://articles.latimes.com/2012/apr/20/opinion/la-oe-frey-border-patrol-violence-20120420>.

¹⁹⁶ Brian L. Porto, *Extraterritorial Criminal Jurisdiction of Federal Courts*, 1 A.L.R. Fed. 2d 415 (2005). For a list of federal criminal laws that expressly allow extraterritorial application and federal crimes subject to federal prosecution when committed overseas, see Charles Doyle, *Extraterritorial Application of American Criminal Law*, CONGRESSIONAL RESEARCH SERVICE 40-68 (2012).

3. Legal Defenses: Legal Obstacles to Convictions

Self-defense is the most common defense used by CBP agents in cases of deadly force. The use of deadly force by a law enforcement officer is legally justified if the officer reasonably believes it was necessary to defend himself or someone else against imminent harm.¹⁹⁷

4. Victims' Rights

The Crime Victims' Rights Act (CVRA) provides victims of federal offenses with certain participatory rights in criminal proceedings, including the right to information, protection, notification, and restitution for certain crimes.¹⁹⁸ Foreign victims are entitled to these rights, whether or not they reside in the United States.¹⁹⁹

The family members of border victims have not asserted victims' rights in the few criminal prosecutions of CBP agents. Crime victims' rights legislation provides family members with a way to gain access to information about the criminal prosecution, including the decision not to prosecute; requires prosecutors to confer with victims, requires the court to allow family members to speak about the impact the crimes before plea and sentencing, and obligates courts to order restitution. Recognition by a court of victim status may also support family members' eligibility for U-visas.²⁰⁰

¹⁹⁷ See *Garcia v. United States*, 826 F.2d 806 (9th Cir. 1987) (CBP agent prevailed on self-defense against claim by Mexican national).

¹⁹⁸ 18 U.S.C. § 3771 (2012). Under the federal Crime Victims' Rights Statute, crimes victims rights include the right to: (1) be reasonably protected from the accused; (2) be notified of any public court proceeding or of the release of the accused; (3) attend the proceeding; (4) be reasonably heard at any public proceeding in the district court including those involving release, plea, sentencing, or parole; (5) reasonably confer with prosecutors; (6) full and timely restitution as provided by law; (7) proceedings free from unreasonable delay; and (8) be treated with fairness and with respect for their dignity and privacy. *Id.*

¹⁹⁹ U.S. DEPT OF JUST., OFF. OF JUST. PROGRAMS, OFF. FOR VICTIMS OF CRIME, ATT'Y GEN. GUIDELINES FOR VICTIM & WITNESS ASSISTANCE 35 (2012), http://www.justice.gov/sites/default/files/olp/docs/ag_guidelines2012.pdf.

²⁰⁰ A U-visa is temporary visa for "victims of certain crimes who have suffered mental or physical abuse and are helpful to law enforcement or government officials in the investigation or prosecution of criminal activity." *Victims of Criminal Activity: U Nonimmigrant Status*, U.S. DEPARTMENT OF HOMELAND SECURITY, <http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status>.

D. STATE CRIMINAL PROSECUTIONS

State prosecutors may also charge CBP agents with state crimes. Each state has its own criminal statutes distinct from federal criminal statutes. Whether a given crime is prosecuted by a state or by the federal government depends on multiple factors.²⁰¹

State prosecutors handle most criminal prosecutions. The federal government generally prosecutes crimes in which there is a federal interest, such as crimes against federal officials. State prosecutors, particularly in Arizona, have been more active than federal prosecutors in pursuing charges against CBP officers for the use of deadly force.

1. Crimes: The Grounds for Prosecution

Prosecutors may charge CBP agents who used lethal force with two types of federal criminal offenses: (1) state common crimes and (2) state criminal civil rights statutes. Each state's criminal code or statutes establish the criminal offenses, the [statute of limitations](#) for bringing charges, the state's [jurisdiction](#) over the offense, and the associated criminal penalties.

All four border states—Arizona, California, New Mexico, and Texas—criminalize the killing of another person. Homicide is further divided into specific offenses. In Arizona, homicide includes first-degree murder, second-degree murder, manslaughter or negligent homicide.²⁰² There is no statute of limitations for homicide: a prosecution for any homicide may be initiated at any time.²⁰³ According to Arizona law, Arizona courts have jurisdiction over a crime if any part of the crime or action to advance the crime occurred within the state.²⁰⁴

²⁰¹ See *Federal and State Legal Systems*, U.S. DEPARTMENT OF JUSTICE, <http://www.justice.gov/usao/justice-101/faq>.]

²⁰² ARIZ. REV. STAT. ANN. § 13-1101 (West 2015) (“A person commits negligent homicide if with criminal negligence the person causes the death of another person, including an unborn child.”); *Id.* § 13-1102 (“A person commits manslaughter by [r]ecklessly causing the death of another person.”); *Id.* § 13-1103 (“A person commits second degree murder if without premeditation: The person intentionally causes the death of another person.”); *Id.* § 13-1104 (“A person commits first degree murder if: 1. Intending or knowing that the person’s conduct will cause death, the person causes the death of another person.”).

²⁰³ *Id.* § 13-107.

²⁰⁴ *Id.* § 13-108(A)(1).

Arizona is the only state to have prosecuted CBP agents for homicide. Arizona prosecutors brought homicide charges against CBP agent Michael Andrew Elmer in 1994.²⁰⁵ In 1992, Elmer shot Dario Miranda Valenzuela twice in the back with a high-powered rifle as the victim fled toward the border.²⁰⁶ Elmer suspected the twenty-six-year-old Mexican national of smuggling drugs and, after shooting him, dragged the injured victim to a ravine to hide his body.²⁰⁷ Miranda Valenzuela bled to death because Elmer never called for medical assistance or reported the event.²⁰⁸ Arizona prosecutors charged Elmer with first-degree murder, civil rights violations, aggravated assault, and obstruction of justice. The case was then removed to federal court and a federal jury acquitted Elmer who claimed he had acted in self-defense.²⁰⁹

In 2007, Arizona prosecutors brought criminal charges in state court against CBP agent Nicholas Corbett for the shooting death of Francisco Javier Dominguez Rivera.²¹⁰ 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.²¹¹ Dominguez Rivera, a twenty-two-year-old Mexican national who had been working in New York City for five years, died at the scene.²¹² 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.²¹³ Corbett faced a four to twenty-two year sentence if convicted. The

²⁰⁵ Arizona v. Elmer, No. 4:92-CR-456-JMR (D. Ariz. July 14, 1992).

²⁰⁶ 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.

²⁰⁷ *Id.*

²⁰⁸ Arizona v. Elmer, 21 F.3d 331, 333 (9th Cir. 1994).

²⁰⁹ *Id.*

²¹⁰ Arizona v. Corbett, Cochise County Superior Court, No. S-0800-CR-200700536.

²¹¹ Arthur H. Rotstein, *Witness: Agent shot surrendering migrant*, TUCSON CITIZEN (Feb. 28, 2008), <http://tucsoncitizen.com/morgue/2008/02/28/78175-witness-agent-shot-surrendering-migrant/>

²¹² *Id.*

²¹³ *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).

case was removed to federal court, where the trial proceeded on the state counts.²¹⁴ The case went to trial twice in federal court in Arizona, and both times ended in hung juries.²¹⁵

The four states that border with Mexico criminalize assault and have prosecuted CBP agents for the crime.²¹⁶ For example, in 2014, Arizona prosecutors charged a CBP agent with aggravated assault for punching a fifteen-year-old teenager from Mexico in the stomach after catching him with a cellphone at a detention facility at the Nogales Border Patrol station.²¹⁷

a) State Criminal Civil Rights Statutes

State laws also criminalize violations of civil rights. For example, California's Bane Act establishes criminal penalties for certain violations of state and federal rights, including the right to association, due process, and freedom from personal restraint.²¹⁸

2. Extraterritorial Jurisdiction: Location of Harm

States may only prosecute crimes committed within their boundaries.²¹⁹ In contrast, the federal government's authority to prosecute crimes extends throughout the United States.

3. Legal Defenses: Legal Obstacles to Convictions

When a federal officer is criminally liable is a matter of considerable debate.²²⁰ Federal officers may have immunity from state prosecutions.²²¹ The U.S. Constitution grants

²¹⁴ Gentry Braswell, *Removal to federal court goes unopposed*, SIERRA VISTA HERALD (Aug. 31, 2007).

²¹⁵ 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/>.

²¹⁶ ARIZ. REV. STAT. ANN. §§ 13-1203, 13-1204 (West 2015); CAL. PENAL CODE § 240 (West 2015); TEX. PENAL CODE ANN. § 22.01 (West 2015); N.M. STAT. ANN. § 30-3-1 (West 2015).

²¹⁷ Arizona v. Francisco Arteaga, Santa Cruz County Superior Court, No. J-1201-CR-20140496.

²¹⁸ Cal. Civ. Code § 52.1; See *California's Civil and Criminal Laws Pertaining to Hate Crimes*, CALIFORNIA DEPARTMENT OF JUSTICE, <https://oag.ca.gov/civil/htm/laws>.

²¹⁹ CAL. PENAL CODE § 778 (West 2015); TEX. PENAL CODE ANN. § 1.04 (West 2015).

²²⁰ Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L.J. 2195, 2197 (2003).

immunity to federal officers acting in discharge of their official duties from criminal prosecutions brought by state and local prosecutors. Federal law also permits federal agents facing criminal charges in state court to remove their state prosecutions to federal courts if the alleged criminal act was committed *while the officer was carrying out her federal duties*.²²² Once removed, the officer may invoke the federal immunity defense.

In 2007, when Arizona state prosecutors brought criminal charges against CBP agent Nicholas Corbett,²²³ Corbett asserted that he was immune from state prosecution and the case should be removed to federal court.²²⁴ Although Corbett was successful in removing the prosecution to federal court, the court rejected Corbett's effort to dismiss the case.²²⁵

4. Victims' Rights

State laws afford crime victims rights, compensation, and assistance.²²⁶ The scope and quality of victims' rights program varies from state to state. For instance, Arizona's criminal code and constitution recognize victims' rights.²²⁷ Arizona law establishes that a victim is to be treated with fairness, respect, and dignity, and to be free of intimidation, harassment or abuse throughout the criminal or juvenile justice process.²²⁸ There is no requirement that the victim be a U.S. citizen.²²⁹ These rights accrue upon the arrest or

²²¹ U.S. CONST. art. VI, cl. 2; *In re Neagle*, 135 U.S. 1, 75 (1890) (holding that a federal agent who shot a man in the performance of his official duties was immune from state murder prosecution); *Whitehead v. Senkowski*, 943 F.2d 230, 233-34 (2d Cir. 1991) (holding that a state court has no jurisdiction if the federal agent was performing an act which he was authorized to do by the law of the United States, and in performing the authorized act, the federal agent did no more than what was necessary and proper for him to do); *Clifton v. Cox*, 549 F.2d 722, 730 (9th Cir. 1977).

²²² 28 U.S.C. § 1442 (2012).

²²³ First-degree murder (ARIZ. REV. STAT. ANN. §§ 13-1105, 13-1101, 13-604, 13-703, 13-701, 13-702 (West 2015)); Second-degree murder (ARIZ. REV. STAT. ANN. §§ 13-1103, 13-1101, 13-604, 13-701, 13-702, 13-8010 (West 2015)); manslaughter (ARIZ. REV. STAT. ANN. §§ 13-1103, 13-1101, 13-604, 13-701, 13-702, 13-801 (West 2015)); negligent homicide (ARIZ. REV. STAT. ANN. §§ 13-1102, 13-1101, 13-604, 13-701, 13-702, 13-801 (West 2015)).

²²⁴ Order, *Arizona v. Corbett*, No. 4:07-cr-01508-DCB-BPV (D. Ariz. Feb. 25, 2008), ECF No. 58.

²²⁵ *Id.*

²²⁶ See, e.g., ARIZ. CONST. art. 2, § 2; CAL. CONST. art. I; N.M. CONST. art. 2, § 24; TEX. CONST. art. 1, § 30.

²²⁷ ARIZ. REV. STAT. ANN. § 13-4401; Victims' Bill of Rights, ARIZ. CONST. art. 2, § 2.1.

²²⁸ ARIZ. REV. STAT. ANN. § 13-4401; Victims' Bill of Rights, ARIZ. CONST. art. 2, § 2.1.

²²⁹ ARIZ. REV. STAT. ANN. § 13-4401 (West 2015) ("Victim" means a person against whom the criminal offense has been committed, including a minor, or if the person is killed or incapacitated, the person's spouse, parent, child, (cont'd on next page)

formal charging of the accused. Law enforcement must provide notice of the rights and inform the victim of the victim's right to be heard at the initial appearance.²³⁰

Compensation programs often cover medical, funeral, and counseling expenses, and reimburse victims and their families for lost wages.

ACCESS TO LEGAL REDRESS IN MEXICO

Families of victims who find the doors of U.S. courts closed may successfully seek [redress](#) in Mexico under certain circumstances. Mexican law authorizes victims to initiate criminal investigations, have access to information about on-going criminal investigations, and intervene in criminal proceedings. Several criminal investigations of border killings are on-going in Mexico.²³¹ If Mexican authorities fail to investigate border abuses, victims may compel the investigation through a legal action called an *amparo*. Criminal investigations and lawsuits in Mexico may also serve as leverage to pressure

grandparent or sibling, any other person related to the person by consanguinity or affinity to the second degree or any other lawful representative of the person, except if the person or the person's spouse, parent, child, grandparent, sibling, other person related to the person by consanguinity or affinity to the second degree or other lawful representative is in custody for an offense or is the accused.”).

²³⁰ See *id.* § 13-4405. For California, see Marsy's Law, CAL. CONST. art. I, § 28(b). For New Mexico, see Rights of Crime Victims, N.M. CONST. art. II, § 24; Victims of Crime Act, N.M. STAT. ANN. § 31-26 (West 2015). For Texas, see TEX. CRIM. PROC. CODE ANN. art 56 (West 2015); TEX. CONST. art. I, § 30.

²³¹ Press Release, Embajada de México en Estados Unidos [Mex. Embassy to the U.S.], Reunión con la Familia de Anastasio Hernández Rojas en la Embajada de México [Meeting with the Family of Anastasio Hernández Rojas at Embassy of Mexico] (May 10, 2012), <http://embamex.sre.gob.mx/eua/index.php/en/comunicados2012/571-reunion-con-la-familia-de-anastasio-hernandez-rojas-en-la-embajada-de-mexico>; Congreso del Estado de Chihuahua [State Congress of Chihuahua], Acuerdo No. 462/2012 II P.O. Unánime [Agreement No. 462/2012 II P.O. Unanimous] (2012), <http://www.congresochihuahua.gob.mx/biblioteca/dictamenes/archivosDictamenes/1429.pdf>; Segunda Comisión de Trabajo de la Comisión Permanente del Congreso, [Second Working Group of the Permanent Congressional Commission], Acuerdo Que Exhorta a la Secretaría de Relaciones Exteriores y a la Embajada de México en los Estado Unidos de Norteamérica para que, en Colaboración con la Procuraduría General de la Republica, Gestionen la Extradición de Jesus Meza Jr., Agente de la Patrulla Fronteriza Estadounidense [Agreement that Calls on the Ministry of Foreign Affairs and the Embassy of Mexico in the United States of America, in Collaboration with the Attorney General's Office, to Request the Extradition of Jesus Meza Jr., U.S. Border Patrol Agent] (May 22, 2012), http://sil.gobernacion.gob.mx/Archivos/Documentos/2012/05/asun_2885021_20120523_1337790827.pdf; Press Release, CNN México, Autoridades de México y EU investigan muerte de un mexicano en la frontera [Authorities in the U.S. and Mexico are investigating the death of a Mexican at the border] (June 22, 2011), <http://mexico.cnn.com/nacional/2011/06/22/autoridades-de-mexico-y-eu-investigacion-muerte-de-un-mexicano-en-la-frontera>; Press Release, Arturo Zamora, Condena Senado el Asesinato de José Antonio Elena Rodríguez en Manos de la Patrulla Froteriza de EU [Senate condemns the murder of Jose Antonio Elena Rodriguez at the hands of the U.S. border patrol] (last visited Aug. 13, 2015), <http://www.arturozamora.com/portafolio/condena-senado-el-asesinato-de-jose-antonio-elena-rodriguez-en-manos-de-la-patrulla> (last visited Aug. 13, 2015).

institutional reform and criminal investigations of border abuses by CBP agents in the United States.

This section explores remedies available in Mexico to victims of CBP abuse. Section A briefly describes the Mexican legal system. Section B discusses legal and non-legal actions taken by the Mexican government in response to border killings by U.S. law enforcement. Section C describes relevant civil causes of action available in Mexico. Finally, Section D discusses under what circumstances Mexican prosecutors and courts may investigate and prosecute CBP agents responsible for killings at the border.

E. THE MEXICAN LEGAL SYSTEM

Mexico is a civil law country, which means that its laws are made through legislation rather than by court decisions.²³² The primary sources of law in Mexico are the *Constitución Política de los Estados Unidos Mexicanos* (the Federal Constitution) and five codes: the Civil Code, the Code of Civil Procedure, the Penal Code, the Code of Penal Procedure, and the Code of Commerce.²³³

Mexico's federal constitution has 130 articles governing a broad range of topics, including family relations, labor issues, and individual rights.²³⁴ The Constitution has been amended over 500 times²³⁵ and protects both Mexican nationals and foreign citizens.²³⁶ In 2011, the Mexican Congress approved constitutional amendments

²³² *The Common Law and Civil Law Traditions*, ROBBINS COLLECTION, U.C. BERKELEY LAW, <http://www.law.berkeley.edu/library/robbins/CommonLawCivilLawTraditions.html> (last visited Aug. 14, 2015).

²³³ See JORGE A. VARGAS, *MEXICAN LAW FOR THE AMERICAN LAWYER* 23 (2009); Jorge A. Vargas, *An Introductory Lesson to Mexican Law: From Constitutions and Codes to Legal Culture & NAFTA*, 41 SAN DIEGO L. REV., 1337 (2004). A judicial decision in Mexico may not automatically have precedential value. There is a complicated system for determining whether a court decision is binding on subsequent cases. One type of binding case law, *jurisprudencia obligatoria* or *jurisprudencia definida*, is created after a court has considered and decided the same issue five consecutive times in the same way. *Id.*

²³⁴ Jose Maria Serna De La Garza, *THE CONSTITUTION OF MEXICO: A CONTEXTUAL ANALYSIS* 135-161 (2013); Rubens Medina, *The Mexican Legal System*, in *INTRODUCTION TO FOREIGN LEGAL SYSTEMS* 83 (1994).

²³⁵ Vargas, Jose A., *Mexico and Its Legal System*, Law and Technology Resources for Legal Professionals, (Feb. 27, 2008, 0:00 AM), <http://www.llrx.com/mexicolegalsystem.htm>.

²³⁶ Boris Kozolchik, *A Negligence Action in Mexico: An Introduction to the Application of Mexican Law in the United States*, 7 ARIZ. J. INT'L & COMP. L. 1, 10 (1989).

recognizing human rights, as defined by treaties ratified by Mexico and international customary law.²³⁷ Under these amendments, international human rights treaty obligations override national law when there is a conflict.²³⁸ The addition of human rights enhanced protections for the right to life and due process in Mexico.²³⁹

Thirty-one states, each with separate constitutions and codes, and a Federal District comprise the federal republic of Mexico. Either federal law or state law may govern a dispute. The law of each Mexican state is nearly identical to Mexican federal law. This section will focus on the six Mexican states that border the United States: Baja California, Chihuahua, Coahuila, Nuevo Leon, Sonora, and Tamaulipas.

F. MEXICO'S RESPONSE TO BORDER ABUSES

The Mexican government has publically and repeatedly condemned border killings by CBP agents. The national government has publicly issued more than twenty diplomatic notes of protest to the U.S. State Department regarding Mexicans killed or seriously injured by CBP agents.²⁴⁰ Mexican elected representatives have called on Mexican authorities to conduct criminal investigations. In one diplomatic note, Mexico, for example, requested that the United States investigate and prosecute those responsible for the shooting of twenty year-old Guillermo Martínez Rodríguez and criticized CBP's disproportionate use of force.²⁴¹ In response to another killing, then President of Mexico Felipe Calderón pledged to "use all resources available to protect the rights of Mexican

²³⁷ Constitución Política de los Estados Unidos Mexicanos [C.P.], artículo [article] 1 (C)(IV), Diario Oficial de la Federación [DOF], 5 de Febrero de 1917 (Mex.).

²³⁸ *Mexican Constitution protects human rights*, AIDA (July 7, 2011), <http://www.aida-americas.org/mexican-constitution-protects-human-rights>.

²³⁹ Daniela Pastrana, *Mexico, Strong on Human Rights Abroad, Not at Home*, INTER PRESS SERV., <http://www.ipsnews.net/2013/03/mexico-strong-on-human-rights-abroad-not-at-home/> (last visited Aug. 14, 2015).

²⁴⁰ HUMAN RIGHTS WATCH, *supra* note 21.

²⁴¹ Press Release, Secretaría de Relaciones Exteriores [Ministry of Foreign Affairs], Follow-up to the Guillermo Martínez Rodríguez case (Jan. 5, 2006), http://web.archive.org/web/20070927212556/http://www.sre.gob.mx/english/events/guillermo_case.htm.

migrants.”²⁴² In 2013, Mexico filed an amicus (“friend of the court”) brief in the *Hernandez* case before the Fifth Circuit that emphasized the need for accountability.

The brief states:

When agents of the United States Government violate fundamental rights of Mexican nationals, it is one of Mexico’s priorities to ensure that the United States has provided adequate means to hold the agents accountable and compensate the victims.²⁴³

Mexico also issued an arrest warrant for the CBP agent, Jesus Mesa, Jr., who fatally shot Sergio Adrian Hernández Guereca, but the United States has refused to extradite him.²⁴⁴

G. CIVIL CLAIMS

The Federal Constitution and the Federal Civil Code establish the civil remedies available in Mexico. State constitutions and civil codes in Mexico mirror their federal counterparts.²⁴⁵ Mexican law permits moral [damages](#), which includes compensation for injuries such as harm to one’s honor or reputation or loss of one’s personal freedom, but prohibits punitive damages.

²⁴² *Mexico’s fury as U.S. border guard shoots dead boy, 14... for throwing stones at him*, DAILY MAIL, <http://www.dailymail.co.uk/news/article-1285302/Mexico-demands-investigation-U-S-border-agent-shoots-teenager-dead--throwing-stones-him.html#ixzz3WA3xoZVJ> (last updated June 9, 2010, 10:37 AM).

²⁴³ Brief for the Government of the United Mexican States as Amicus Curiae in Support of Appellants at 2-3, *Hernandez v. United States*, 757 F.3d 249 (5th Cir. 2014) (No. 12-50217), 2012 WL 3066823.

²⁴⁴ Press Release, Cámara de Diputados Congreso de la Unión [Chamber of Deputies, Congress of the Union], Boletín No. 5156, Pide diputada Pérez Reyes que SRE solicite a E.U. extradición del agente fronterizo Jesús Meza [Bulletin No. 5156, Deputy Pérez Reyes asks that SRE request US Border Patrol agent for the extradition of Jesús Meza] (May 13, 2012), http://www3.diputados.gob.mx/camara/005_comunicacion/a_boletines/2012_2012/005_mayo/13_13/5156_pide_diputada_perez_reyes_que_sre_solicite_a_e_u_extradicion_del_agente_fronterizo_jesus_meza.

²⁴⁵ See VARGAS, *supra* note 235.

1. Causes of Action: The Right to Sue

The relatives of victims killed by CBP agents may pursue two types of civil claims in Mexico: (1) [torts](#) and (2) claims based on international law.

a) Tort Liability

Tort law in Mexico is known as *responsabilidad extra-contractual*, or extra-contractual liability. While U.S. law recognizes specific types of torts (*e.g.*, wrongful death, negligence), Mexico has a single law of non-contractual civil wrongs.²⁴⁶ Courts consider the seriousness of the injury, the perpetrator's role in causing the injury, and the victim's role in contributing to the injury. In Mexico, unlike the United States, whether a wrongful act was intentional or negligent has no bearing on liability.²⁴⁷

The [statute of limitations](#) for bringing suit is two years and [plaintiffs](#) must pay a court fee to file a lawsuit.²⁴⁸ Plaintiffs must also prove it is probable that the [defendant](#) caused the harm. [Damages](#) awarded under Mexican law are low compared to U.S. standards.²⁴⁹ Federal and state civil codes typically allow plaintiffs to recover medical expenses, lost wages, and any devaluation of the victim's property.²⁵⁰ Mexico does not permit punitive damages, damages for pain and suffering, or damages for the loss of the benefits of a family relationship.²⁵¹ The losing party must pay costs but not attorney's fees.²⁵²

²⁴⁶ These laws are codified in Chapter V of the Federal Civil Code. For example, Article 1910 provides: "Whoever, by acting illicitly or against the good customs and habits, causes damage to another shall be obligated to compensate him unless he can prove that the damage was caused as a result of the fault or inexcusable negligence of the victim." Código Civil Federal [CC] [Federal Civil Code], artículo 1910, Diario Oficial de la Federación [DOF], 1928, últimas reformas [last amended] DOF 24-12-2013 (Mex.).

²⁴⁷ Vargas, Jose A., 2 Mexican Law: A Treatise for Legal Practitioners and International Investors 217 (1998).

²⁴⁸ See VARGAS, *supra* note 224, at 411.

²⁴⁹ Some Latin American legislatures have adopted a "Model Law on International Jurisdiction and Applicable Law to Tort Liability," which allows for the damages law of a foreign country to be applied. Borchers, *supra* note 106, at 53.

²⁵⁰ Vargas, Jose A., 2 Mexican Law: A Treatise for Legal Practitioners and International Investors 215 (1998).

²⁵¹ See generally, Jorge A. Vargas, *Moral Damages Under the Civil Law of Mexico. Are These Damages Equivalent to U.S. Punitive Damages?*, 35 U. MIAMI INTER-AM. L. REV. 183, 189 (2004). Moral damages are distinct from, but similar to, pain and suffering. They are not punitive damages. *Id.* at 423; Edith Friedler, *Moral Damages in Mexican Law: A Comparative Approach*, 8 LOY. L.A. INT'L & COMP. L. REV. 235, 236, 265 (1986) ("the concept of moral damages under Mexican law has nothing to do with the notion of punitive damages present in American jurisprudence, it is similar to the United States' practice of awarding damages for emotional distress. . . . [T]he

(cont'd on next page)

Mexican law limits monetary [damages](#) to an amount based on Mexico's Federal Labor Act.²⁵³ In general, damages for personal injuries are the same as for workplace injuries which substantially reduces recovery. Mexican law permits moral damages for injuries to a person's reputation, dignity, or honor.²⁵⁴ The Mexican Supreme Court generally has limited recovery of moral damages to cases where the [defendant](#) was willful, wanton, or negligent.²⁵⁵

Even with the possibility of moral damages, however, [tort](#) cases in Mexico are likely to result in lower damages awards than tort actions in the United States. For example, the Mexican state of Nuevo Leon limits wrongful death liability to approximately \$5,700 plus unspecified moral damages²⁵⁶ and Mexican law limits the award for the loss of a child's life to approximately \$2,500.²⁵⁷

b) Claims Based on International Law

Under international law, Mexico has a duty to protect its own nationals within Mexico and abroad.²⁵⁸ Victims' relatives may use an *amparo* action to compel the Mexican government to investigate killings at the border.²⁵⁹ The purpose of the *amparo* writ (*amparo* means protection) is to protect individuals from abuse of authority and

common law concept of infliction of emotional distress comes the closest to the Mexican law notion of moral damages.").

²⁵² Código Civil Federal [CC] [Federal Civil Code], fracción [chapter] 2, Diario Oficial de la Federación [DOF], 1928, últimas reformas [last amended] DOF 24-12-2013 (Mex.).

²⁵³ Código Civil Federal [CC] [Federal Civil Code], artículo [article] 1915, Diario Oficial de la Federación [DOF], 1928, últimas reformas [last amended] DOF 24-12-2013 (Mex.); Jorge A. Vargas, *Mexican Law and Personal Injury Cases* 38 (U. San Diego Law Sch. Legal Stud. Res. Paper Series, Res. Paper No. 07-77, 2006).

²⁵⁴ Carlos R. Soltero & Amy Clark-Meachum, *The Common Law of Mexican Law in Texas Courts*, 26 HOUS. J. INT'L L. 119, 126 (2003).

²⁵⁵ VARGAS, *supra* note 251.

²⁵⁶ Soltero & Clark-Meachum, *supra* note 254, at 143-44 (citing Vasquez v. Bridgestone/Firestone, Inc., 325 F.3d 665, 672 n.4 (5th Cir. 2003)).

²⁵⁷ *Id.* (citing Gonzalez v. Chrysler, 301 F.3d 377, 381-83 (5th Cir. 2002)).

²⁵⁸ Jorge A. Vargas, *U.S. Border Patrol Abuses, Undocumented Mexican Workers, and International Human Rights*, 2 SAN DIEGO INT'L L.J. 1, 72 (2001).

²⁵⁹ The cause of action for a violation of the Mexican Constitution is an *amparo*. An *amparo* is a federal claim of last resort brought by an individual (national or foreigner) whose constitutional rights are threatened by acts of a government official. An individual may challenge official acts of any authority (federal, state, municipal) as violating constitutional rights. Ley de Amparo [LA] [Legal Protection Law], Diario Oficial de la Federación [DOF], 2 de Abril de 2013 (Mex.), http://www.diputados.gob.mx/LeyesBiblio/pdf/LAmp_140714.pdf.

guarantee their constitutional rights. Under the Mexican Constitution and treaty obligations, Mexico has a duty to investigate and prosecute human rights violations.²⁶⁰ Mexico has ratified numerous human rights treaties²⁶¹ that obligate Mexico to conduct a prompt, impartial, thorough, and independent official investigation of human rights violations,²⁶² such as killings in Mexico involving CBP agents, regardless of whether victims or their family members file complaints.²⁶³ Mexico also has a duty to prosecute individuals suspected of involvement in human rights violations²⁶⁴ and to punish those found guilty.²⁶⁵ Through an *amparo*, relatives of victims may request that a court order Mexican authorities to open an investigation and conduct prompt, impartial, thorough, and independent official investigation of killings committed by CBP agents in Mexico.²⁶⁶

2. The Parties: Who Can Sue & Who Can Be Sued

Both Mexican citizens and noncitizens may assert civil claims in Mexico. The Federal Civil Code and the Federal Constitution “apply to all persons within the Republic[.]”²⁶⁷ The United States government and its officers are immune from civil suit in Mexico.

²⁶⁰ Constitución Política de los Estados Unidos Mexicanos [C.P.], artículos [articles.] 17-23, Diario Oficial de la Federación [DOF], 5 de Febrero de 1917 (Mex.); JAVIER DONDÉ MATUTE, DUTY TO PROSECUTE HUMAN RIGHTS ABUSES IN MEXICO (2009); Javier Dondé Matute, *International Criminal Law Before Mexican Supreme Court* 10 INT’L CRIM. L. REV. 571 (2010).

²⁶¹ American Convention on Human Rights, Nov. 21, 1969, O.A.S. T.S. No. 36; 1144 U.N.T.S. 143; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT]; International Convention for the Protection of All Persons from Enforced Disappearance, G.A. res A/61/177 (2006), *reprinted in* 14 Int’l. Hum. Rts. Rep. 582 (2007).

²⁶² Hum. Rts. Comm., *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 15, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

²⁶³ *Id.* INTERNATIONAL COMMISSION OF JURISTS, THE RIGHT TO A REMEDY AND TO REPARATION FOR GROSS HUMAN RIGHTS VIOLATIONS – A PRACTITIONERS GUIDE 65-66 (2006).

²⁶⁴ Human Rights Committee, *Concluding Observations of the Human Rights Committee, Serbia and Montenegro*, ¶ 9, U.N. Doc. CCPR/CO/81/SEMO (Aug. 12, 2004) (by Pablo de Grieff).

²⁶⁵ Sub-Comm’n on Prevention of Discrimination and Protection of Minorities, *Question of the Impunity of Perpetrators of Human Rights (Civil and Political)*, ¶ 7, *delivered to the Commission on Human Rights*, U.N. Doc. E/CN.4/Sub.2/1997/20/Rev.1 (Oct. 2, 1997). According to certain human rights treaties, the duty to prosecute perpetrators of gross human rights violations extends to a state regardless of whether the crime was committed in its territory. *See, e.g.*, CAT, *supra* note 261, arts. 5(2), 7(1); ICED, art. 9(2).

²⁶⁶ Amparo en Revisión 554/2013 (Derivado de la Solicitud de Ejercicio de la Facultad de Atracción 56/2013), Ciudad de México. La Primera Sala de la Suprema Corte de Justicia de la Nación, en sesión correspondiente al 25 de marzo de 2015.

²⁶⁷ Código Civil Federal [CC] [Federal Civil Code], artículo 12, Diario Oficial de la Federación [DOF], 1928, últimas reformas [last amended] DOF 24-12-2013 (Mex.).

3. Extraterritorial Jurisdiction: Location of Harm

A victim injured in Mexico may assert civil claims in Mexico if a Mexican court is able to assert [jurisdiction](#) over the [defendant](#) because, for example, the defendant is present in Mexico.²⁶⁸ If the killing of a Mexican national occurred in the United States, victims' relatives cannot bring a civil claim for [damages](#) because Mexican civil courts do not have jurisdiction over harms committed abroad.²⁶⁹

4. Legal Defenses: How Claims Fail

Negligencia contributaria (contributory negligence) bars recovery in Mexico.²⁷⁰ If a court finds that a [tort](#) victim caused or contributed to the injury, the victim may not recover damages. Many border cases allegedly involve “rock throwing” by the victim. No Mexican court has ruled on whether rock throwing would constitute “contributory” negligence.

H. CRIMINAL PROSECUTIONS

The Federal Constitution and the *Código Penal Federal* (Federal Penal Code) establishes what conduct constitutes a crime in Mexico. The *Código Federal de Procedimientos Penales* (Federal Code of Criminal Procedure) establishes how prosecutors, courts, and victims pursue criminal charges and participate in criminal prosecutions. State constitutions and codes generally mirror federal criminal laws. Given the overlap, this paper will discuss both systems together, below.

²⁶⁸ Any act that takes place within Mexico is subject to Mexican law. *Id.* at article 406. In the unlikely scenario that a Mexican court gets jurisdiction over a CBP agent (e.g. because the defendant is present in Mexico) and the plaintiffs win the lawsuit, it may be possible for plaintiffs to seek that a U.S. court enforces the Mexican judgment. Indeed, a U.S. court is likely to enforce the judgment unless it was obtained by fraud, bribery, or corruption. Timothy G. Nelson, *U.S. Courts Decline Recognition to Three Judgments from Mexico*, GPSOLO, Vol. 28, No. 6 36 (September 2011).

²⁶⁹ Código Penal Federal [CPF] [Federal Criminal Code], artículo [article] 4, Diario Oficial de la Federación [DOF], 14 de Agosto de 1931, últimas reformas [last amended] DOF 12-03-2015 (Mex.).

²⁷⁰ JORGE A. VARGAS, MEXICAN LEGAL DICTIONARY A490, Westlaw (database updated Sept. 2012) (All or Nothing Principle).

1. Crimes: The Grounds for Prosecution

CBP agents who used lethal force against Mexican nationals may have committed two types of offenses under Mexican law: (1) domestic crimes and (2) international crimes. Like the United States, Mexico criminalizes homicide and those convicted of the crime face a sentence of thirty to sixty years.²⁷¹ The [statute of limitations](#) for this crime is seven to fifteen years depending of the number of victims.²⁷² In 1991, Mexico adopted national legislation that criminalizes torture and imposes a punishment of three to twelve years.²⁷³ All states in Mexico criminalize homicide and most criminalize torture.²⁷⁴

2. Extraterritorial Jurisdiction: Location of Harm

Under Mexican law, Mexican authorities may investigate and prosecute criminal offenses committed by CBP agents that occurred in Mexico or the United States if the United States has failed to investigate the crime and the accused is present in Mexico.²⁷⁵ Under the Federal Criminal Code, crimes committed against Mexican citizens in foreign territories are punishable under Mexican law if: (i) the accused is physically on Mexican territory, (ii) he/she has not been sentenced in the foreign State; and (iii) the action he is accused of also constitutes a crime under the law of the State where the act occurred.²⁷⁶

²⁷¹ Código Penal Federal [CPF] [Federal Criminal Code], artículo [article] 320, Diario Oficial de la Federación [DOF] 14 de Agosto de 1931, últimas reformas [last amended] DOF 12-03-2015 (Mex.), <http://info4.juridicas.unam.mx/ijure/tcfed/8.htm?s>.

²⁷² *Id.* at artículo [article] 105.

²⁷³ Article 3 & 4 of Mexico's Federal Act to Prevent and Punish Torture, 1991.

²⁷⁴ REDRESS, Country Report: Mexico 7, <http://www.redress.org/downloads/country-reports/Mexico.pdf> (last accessed Aug. 14, 2015).

²⁷⁵ Federal Criminal Code, Article 4 provides: "Crimes committed in a foreign territory by a Mexican against a Mexican or against a foreigner, or by a foreigner against a Mexican, will be punished in the Republic of Mexico, in accordance with federal law, if the following requirements are met:

I. That the accused be in the Republic of Mexico;

II. That the prisoner has not been definitively tried in the country where he committed the crime, and;

III. That the infraction with which he is charged be a crime both in the country where it was committed and in the Republic of Mexico." Código Penal Federal [CPF] [Federal Criminal Code], artículo [article] 4, Diario Oficial de la Federación [DOF], 14 de Agosto de 1931, últimas reformas [last amended] DOF 12-03-2015 (Mex.).

²⁷⁶ *Id.*

Mexico could criminally prosecute a CBP officer who killed or injured a Mexican citizen in the United States *if* the CBP officer is in Mexico *and* if prosecutors have closed the criminal case in the United States. Local and federal representatives and the Ministry of Foreign Relations have requested that Mexico's Attorney General's Office (Procuraduría General de la República) investigate several killings.²⁷⁷

3. The Duty to Investigate & Extradite

Both federal and local authorities have authority to investigate crimes and may investigate concurrently and later consolidate the investigations. Federal authorities generally investigate organized crime and weapons trafficking.²⁷⁸

In 2006, for example, Mexico investigated the case of twenty year-old Guillermo Martínez Rodríguez, who was shot in the United States by a CBP agent and taken to the Red Cross in Tijuana where he died a few hours later.²⁷⁹ The Mexican government condemned the death and requested that CBP, the San Diego Police Department, the DOJ, and the San Diego office of the U.S. Attorney General conduct an immediate and broad investigation of the death and prosecute of those responsible.²⁸⁰ Mexico's federal Attorney General also opened a homicide investigation.²⁸¹ The status of that investigation is unclear.

Mexican law does not permit trial in absentia. The [defendant](#) must be physically present in Mexico for the prosecution to move forward.²⁸² Although the extradition treaty

²⁷⁷ See *supra* note 231.

²⁷⁸ Código Federal de Procedimientos Penales [CFPP] [Federal Criminal Procedural Code], artículo [article] 10, Diario Oficial de la Federación [DOF], 30 de Agosto de 1934, últimas reformas [last amended] DOF 12-29-2014 (Mex.).

²⁷⁹ Press Release, Secretaría de Relaciones Exteriores [Ministry of Foreign Affairs], Follow-up to the Guillermo Martínez Rodríguez Case (Jan. 5, 2006),

http://web.archive.org/web/20070927212556/http://www.sre.gob.mx/english/events/guillermo_case.htm.

²⁸⁰ James C. McKinley, Jr., *A Border Killing Inflames Mexican Anger at U.S. Policy*, N.Y. TIMES (Jan. 4, 2006), <http://www.nytimes.com/2006/01/14/international/americas/14mexico.html?pagewanted=all>.

²⁸¹ Press Release, Secretaría de Relaciones Exteriores [Ministry of Foreign Affairs], Follow-up to the Guillermo Martínez Rodríguez Case (Jan. 5, 2006),

http://web.archive.org/web/20070927212556/http://www.sre.gob.mx/english/events/guillermo_case.htm.

²⁸² Mexico does not permit *juicio por ausencia* (trials in absentia). The defendant must be physically present or in custody for a trial to proceed. See e.g., Código Federal de Procedimientos Penales [CFPP] [Federal Criminal Procedural Code], artículo [article] 87, Diario Oficial de la Federación [DOF], 30 de Agosto de 1934, últimas reformas [last amended] DOF 12-29-2014 (Mex.).

between Mexico and the United States provides for the return of those who have committed crimes and fled across the U.S.-Mexico border, the treaty does not obligate either party to extradite its own nationals.²⁸³ It is very unlikely the United States would extradite a CBP officer to Mexico to face criminal charges.

As mentioned, in the case of Sergio Hernández Guereca, a court of the state of Chihuahua issued a warrant for the agent's arrest and Mexico's Foreign Ministry requested that the United States extradite the agent in 2011.²⁸⁴ The chances that the United States will extradite a U.S. law enforcement officer to Mexico to face criminal charges however are slim.²⁸⁵

4. Victims' Rights

The Mexican Constitution, federal, and state law recognize a broad range of victims' rights. The Mexican Constitution establishes the right of victims to justice, protection, and reparations. For example, the constitution requires the prosecutor to request reparations for [damages](#) and prohibits the judge from denying the request if the [defendant](#) is convicted.²⁸⁶

In 2013, the Mexican congress approved *Ley General de Víctimas* (General Law of Victims).²⁸⁷ The law establishes the National Registry of Victims²⁸⁸ and the National

²⁸³ Extradition Treaty Between the United States and Mexico, May 4, 1978, art. 9, 31 U.S.T. 5059.

²⁸⁴ *Congela PGR orden de arresto*, EL HERALDO DE CHIHUAHUA (May 6, 2012), <http://www.oem.com.mx/elheraldodechihuahua/notas/n2531201.htm>

²⁸⁵ Roxana Poescu, *Deadly Patrols: Challenges to Prosecution*, INEWSOURCE (July 19, 2012), <http://inewssource.org/2012/07/19/deadly-patrols-challenges-to-prosecution/>; *Hernandez v. United States*, 757 F.3d 249 (5th Cir. 2014).

²⁸⁶ Constitución Política de los Estados Unidos Mexicanos [C.P.], artículo [article] 20(C)(IV), Diario Oficial de la Federación [DOF], 5 de Febrero de 1917 (Mex.).

²⁸⁷ Ley General de Víctimas [General Law of Victims], Diario Oficial de la Federación [DOF], 9 de enero de 2013 (Mex.), <http://www.diputados.gob.mx/LeyesBiblio/pdf/LGV.pdf>. In 2014, Mexico approved regulations to implement the law. Reglamento de la Ley General de Víctimas [Regulations of the General Law of Victims], Diario Oficial de la Federación [DOF], 28 de noviembre de 2014 (Mex.), http://www.dof.gob.mx/nota_detalle.php?codigo=5372628&fecha=28/11/2014

²⁸⁸ Ley General de Víctimas [General Law of Victims], artículos [articles] 96-105, Diario Oficial de la Federación [DOF], 9 de enero de 2013 (Mex.), <http://www.diputados.gob.mx/LeyesBiblio/pdf/LGV.pdf>.

System of Attention to Victims.²⁸⁹ The law defines “victims” to include the direct victim of the crime as well as his or her family members.²⁹⁰ Under the General Law of Victims, federal, state, and municipal governments will compensate victims for mental and material [damages](#) and lost opportunities, and provide monetary support, psychological services, educational services, and protection.²⁹¹

In many ways, the General Law of Victims reaffirmed rights that already existed at the federal or state level. In both federal and state investigations, victims have the right to access information about the investigation and may initiate criminal investigations.²⁹² Victims may also act as *acusador coadyuvante* or private prosecutor and intervene in criminal proceedings through legal representation.²⁹³ Under the General Law of Victims, private prosecutors can influence the direction, content, and timing of the criminal investigation by compelling the public prosecutor to follow a certain line of investigation and by requesting that a judge keep a criminal investigation open or take the case to trial.²⁹⁴ In addition, the victim’s lawyer may intervene during the hearings and trial through written and oral pleadings and submit evidence to the court.²⁹⁵ Private prosecutors also have the right to request judicial review of prosecutorial or court decisions.²⁹⁶ In order to invoke their rights as victims, victims’ relatives must submit a request for recognition to the public prosecutor, court, or other authority.²⁹⁷ Under Mexican criminal procedure codes, the victims’ rights can only be claimed by the victim or the victim’s family.²⁹⁸

²⁸⁹ *Id.* at arts. 82-95.

²⁹⁰ *Id.* at art. 4.

²⁹¹ *Id.* at arts. 28-43.

²⁹² *Id.* at arts. 12, 14.

²⁹³ Constitución Política de los Estados Unidos Mexicanos [C.P.], artículo [article] 20, Diario Oficial de la Federación [DOF], 5 de Febrero de 1917 (Mex.), Ley General de Víctimas [General Law of Victims], artículo 12, Diario Oficial de la Federación [DOF], 9 de enero de 2013 (Mex.), <http://www.diputados.gob.mx/LeyesBiblio/pdf/LGV.pdf>.

²⁹⁴ Ley General de Víctimas [General Law of Victims], artículos [articles] 11-17, Diario Oficial de la Federación [DOF], 9 de enero de 2013 (Mex.), <http://www.diputados.gob.mx/LeyesBiblio/pdf/LGV.pdf>.

²⁹⁵ *Id.*

²⁹⁶ *Id.* at arts. 12-16.

²⁹⁷ *Id.* at arts. 96-112.

²⁹⁸ *Id.* at art. 4.

Additionally, six Mexican states allow private prosecutors to intervene in criminal proceedings under state law. For example, the state of Chihuahua, which shares a border with Texas, recognizes the right of private prosecution provisions to intervene in criminal proceedings.²⁹⁹ The provisions establish several rights: (1) the right to access all case files; (2) the right to help the public prosecutor with the investigation; (3) the right to be informed of any key decision that ends the criminal prosecution; and (4) the right to be heard during the trial. The first case to use the provision involved a woman who was attacked by two men while working in her office.³⁰⁰ After the victim objected to a proposed plea deal, the case went to trial and the [defendants](#) were found guilty.³⁰¹

²⁹⁹ Código de Procedimientos Penales de Chihuahua [Chihuahua Criminal Code of Procedure], artículo [article] 221, Diario Oficial de la Federación [DOF] 9 de Agosto de 1996, últimas reformas [last amended] DOF 19-11-2015 (Mex.); Veronica Michel-Luviano, Access to Justice, Victims' Rights, and Private Prosecution in Latin America: The Cases of Chile, Guatemala, and Mexico 256 (August 2012) (dissertation).

³⁰⁰ *Id.* at 272.

³⁰¹ Michel-Luviano, *supra* note 299.

CONCLUSION

The goal of this working paper is to inform advocates, activists, and the relatives of victims regarding the opportunities to pursue justice for abuses by CBP along the U.S.-Mexico border. The courthouse doors in the United States have been closed to many: prosecutors have declined to prosecute every killing committed by CBP in the last five years and many civil lawsuits have been unsuccessful. Without legislative changes in the United States and/or a strong political commitment from Mexico to investigate, justice will remain elusive for many of the relatives of victims.

There is, however, growing legal pressure to hold CBP agents accountable. Several important civil cases in the United States survived motions to dismiss by the defense and a trial judgment is imminent. In addition, the family of Sergio Adrian Hernández Guereco, the Mexican teenager killed in Mexico by a CBP agent, has asked the U.S. Supreme Court to overturn an appeals court's ruling that U.S. Constitution did not protect the victim and the agent had immunity from suit.³⁰² In Mexico, authorities have opened criminal investigations in some cases.

The relatives of victims may also reframe killings by CBP agents and the lack of legal accountability as violations of their human rights and submit complaints before international human rights bodies. The Inter-American Commission on Human Rights (IACHR), for example, has [jurisdiction](#) to hear an individual complaint against the United States. The IACHR has the authority to determine if the United States government is responsible for human rights violations, rather than the criminal or civil liability of CBP agents.³⁰³ Although the Commission's final decisions are not legally binding, during the

³⁰² *Hernandez v. United States*, 785 F.3d 117 (5th Cir. 2015), *petition for cert. filed*, (U.S. Jul. 27, 2015) (No. 15-118).

³⁰³ The Commission has issued decisions against the United States for denying the right to due process to migrants, jeopardizing a migrant's right to health with deportation, and discriminatorily failing to protect girls and women from domestic violence. In these cases, the Commission has recommended that the government provide monetary compensation, investigate and prosecute the perpetrators, and enact legal reforms as reparations for these violations of international law. See Wayne Smith, Hugo Armendariz, et al., v. United States, Case 12.562, Inter-Am. Comm'n (cont'd on next page)

litigation, victims are on equal footing with the U.S. government and human rights experts determine the scope and nature of the United States' liability.

H.R. Report No. 81/10 (2010); *Andrea Mortock v. United States*, Case 12.534, Inter-Am. Comm'n H.R. Report No. 63/08 (2008); *Lenahan (Gonzales) v. United States*, Case 12.626, Inter-Am. Comm'n H.R. Report No. 80/11 (2011).

APPENDIX

Known Border Killings since 1992

Name	Age	Date of Killing	Location	Nationality	Incident	Known Legal Outcome
Francisco Manuel Cesena	40	December 24, 2014	San Ysidro Port of Entry, San Diego, California	U.S.	Killed at border crossing.	Civil Case No information found. Criminal Prosecution No criminal charges have been filed in the United States.
Edgar Amaro López	23	October 24, 2014	Tucson, Arizona	Mexican	Fatally shot in the head by a border patrol agent.	Civil Case No information found. Criminal Prosecution No criminal charges have been filed in the United States.
Jose Luis Arambula	31	May 30, 2014	Green Valley, Arizona	U.S.	Border agent Daniel Marquez shot the victim behind his left ear as he attempted to flee.	Civil Case No information found. Criminal Prosecution Local authorities closed the criminal investigation.
Julian Ramirez Galindo	41	February 18, 2014	Otay Mountains, San Diego	Mexican	Border agent Daniel Basinger shot and killed the victim.	Civil Case Civil lawsuit is ongoing. Criminal Prosecution No criminal charges have been filed in the United States.
Gabriel Sánchez Velázquez	31	January 16, 2014	Apache and Portal, Arizona	Mexican	According to a border agent, he shot the victim when he reached for his weapon. The Pima County Medical Examiner's Office determined that the gunshots had a downward trajectory and that shots were fired from an "indeterminate/distant range" from the subject.	Civil Case No information found. Criminal Prosecution No criminal charges have been filed in the United States.

Name	Age	Date of Killing	Location	Nationality	Incident	Known Legal Outcome
Ernesto Gutiérrez Cortez	38	October 19, 2013	Otay Mesa, California	U.S.	Shot and killed by Border Patrol agents as he fled in a car towards Mexico.	Civil Case No information found. Criminal Prosecution No criminal charges have been filed in the United States.
Margarito López Morales	19	December 3, 2012	Tohono O'odham Nation, Arizona	Guatemalan	Shot and killed by a Border Patrol agent.	Civil Case No information found. Criminal Prosecution No charges have been filed in the United States.
Jose Antonio Elena Rodríguez	16	October 10, 2012	Nogales, Mexico	Mexican	Border agent Lonnie Swartz shot the victim multiple times as he walked home.	Civil Case On July 9, 2015, court ruled that family could proceed with fourth amendment claim and U.S. Constitution protects Mexican national in Mexico because Nogales border area effectively under CBP control and victim had sufficient voluntary connection to U.S. Also ruled that <u>defendant</u> cannot assert qualified immunity. Criminal Prosecution Criminal investigation is ongoing.
Valeria Munique Tachiquin-Alvarado	32	September 28, 2012	Chula Vista, California	U.S.	Border agent Justin Craig Tackett shot the victim nine times as she tried to flee in her car.	Civil Case Civil lawsuit in ongoing. Criminal Prosecution No criminal charges have been filed in the United States.
Guillermo Arévalo Pedraza	36	September 3, 2012	Nuevo Laredo, Mexico	Mexican	Border agent Christopher Boatwright shot the victim twice from an airboat while the victim was at a park picnic with his wife and daughters.	Civil Case Civil lawsuit is ongoing. Criminal Prosecution No criminal charges have been filed in the United States.

Name	Age	Date of Killing	Location	Nationality	Incident	Known Legal Outcome
Byron Sosa Orellana	28	December 6, 2011	Sells, Arizona	Guatemalan	Fatally shot and killed after allegedly assaulting an agent and police dog.	<p>Civil Case Civil lawsuit is ongoing.</p> <p>Criminal Prosecution No criminal charges have been filed in the United States.</p>
Gerardo Lozano Rico	20	November 3, 2011	Corpus Christi, Texas	Mexican	Two border agents fatally shot the victim as he was driving vehicle with a group of undocumented immigrants.	<p>Civil Case Civil lawsuit is ongoing.</p> <p>Criminal Prosecution No charges were filed in the United States after lethal use of force found justified.</p>
Jesus Alfredo Yañez Reyes	40	June 21, 2011	Tijuana, Mexico	Mexican	Border agent Dorian Diaz shot the victim in the head while he was in a tree on Mexican territory.	<p>Civil Case Court dismissed case against supervisory officials but allowed the suit to proceed against two agents involved in the shooting and the Chief of the U.S. Border Patrol, Michael J. Fisher, after ruling that the doctrine of qualified immunity did not apply.</p> <p>Criminal Prosecution No charges have been filed in the United States.</p> <p>The killing is under investigation in Mexico.</p>
Carlos Lamadrid	19	March 21, 2011	Douglas, Arizona	U.S.	Border agent Lucas Tidwell shot the victim three times in the back while he attempted to climb over the border fence and flee to Mexico.	<p>Civil Case Bench trial took place in July 2015; the verdict is pending.</p> <p>Criminal Prosecution DOJ closed investigation without pursuing charges on August 9, 2013.</p>

Name	Age	Date of Killing	Location	Nationality	Incident	Known Legal Outcome
Ramses Barron Torres	17	January 5, 2011	Nogales, Mexico	Mexican	The victim was fatally shot in the chest after allegedly ignoring Spanish-language commands to stop throwing rocks at border patrol agents on the American side of the fence.	<p>Civil Case No information found.</p> <p>Criminal Prosecution DOJ criminal closed investigation without bringing charges on August 9, 2013.</p>
Juan Méndez, Jr.	18	October 5, 2010	Eagle Pass, Texas	U.S.	Border agent Taylor Poitevent shot the victim twice in the back.	<p>Civil Case On September 8, 2014, judge found lethal use of force was reasonable, ruled in favor of the defendant's motion to dismiss and for summary judgment, and dismissed the case.</p> <p>Criminal Prosecution The U.S. Justice Department and the local U.S. attorney's office both declined to prosecute.</p>
Sergio Adrián Hernández Guereca	15	June 7, 2010	Nogales, Mexico	Mexican	Border agent Jesus Mesa Jr. shot and killed the victim.	<p>Civil Case On August 8, 2011, Fifth Circuit held that victim was not protected by the constitutional prohibition against illegal search and seizure because the shooting occurred in Mexico, the agent had qualified immunity, and dismissed the case. Plaintiffs have appealed the decision to the Supreme Court.</p> <p>Criminal Prosecution DOJ closed investigation without bringing criminal charges on April 27, 2012.</p>

Name	Age	Date of Killing	Location	Nationality	Incident	Known Legal Outcome
Victor Santillan de la Cruz	36	March 31, 2010	Laredo, Texas	Mexican	Shot and killed during a struggle with border agent.	Civil Case No information found. Criminal Prosecution No criminal charges have been filed in the United States.
Jorge Alfredo Solis Palma	28	January 4, 2010	Douglas, Arizona	Mexican	Border agent Miguel Torres-Vasquez fatally shot the victim after he allegedly threw rocks.	Civil Case No information found. Criminal Prosecution No criminal charges have been filed in the United States.
Alexander Arthur Martin	24	March 15, 2009	Campo, California	U.S.	Car driven by the victim exploded after agents made attempts to stop it. Medical examiner ruled the incident a homicide.	Civil Case No information found. Criminal Prosecution No criminal charges have been filed in the United States.
Tomas Sánchez Orzuna	39	July 8, 2008	San Clemente, California	Mexican	The victim died while in custody after border agents sprayed him with pepper spray.	Civil Case In June 2012, wrongful death suit dismissed after family members agreed to settle the case for \$15,000. Criminal Prosecution No criminal charges have been filed in the United States.
Ronald Deugan	49	February 1, 2008	Campo, California	U.S.	Border agents fatally shot the victim as he tried to elude capture.	Civil Case No information found. Criminal Prosecution No criminal charges have been filed in the United States.
Jose Alejandro Ortiz-Castillo	23	August 8, 2007	El Paso, Texas	Mexican	Border agent Brian Ernest Ault shot the victim five times after he allegedly threw rocks.	Civil Case In 2012, wrongful death lawsuit dismissed because partner was unable to prove that she was married to victim or the father of her children. Criminal Prosecution No criminal charges have been filed in the

						United States.
Name	Age	Date of Killing	Location	Nationality	Incident	Known Legal Outcome
Ramiro Gamez Acosta	20	March 26, 2007	El Centro, California	Mexican	Border agent Arturo Lorenzo fatally shot the victim while he was trying to run back across the border into Mexico.	Civil Case No information found. Criminal Prosecution No criminal charges have been filed in the United States.
Francisco Javier Dominguez Rivera	22	January 12, 2007	Douglas, Arizona	Mexican	Border agent Nicholas Corbett fatally shot the victim at close range.	Civil Case On September 13, 2011, the civil case was dismissed after family reached a settlement agreement with the United States government for \$850,000. Criminal Prosecution Corbett was charged twice with multiple counts and both prosecutions ended with hung juries.
Antonio Pérez Ramírez	20	August 27, 2006	Yuma, Arizona	Mexican	A border agent fatally shot the victim when he allegedly threw rocks while standing on Mexican territory.	Civil Case No information found. Criminal Prosecution No criminal charges have been filed in the United States.
Oscar Abraham Garcia Barrios	22	May 29, 2006	San Ysidro Port of Entry, San Diego, California	Mexican	Two border agents shot and killed the victim when he attempted to elude capture in a vehicle.	Civil Case No information found. Criminal Prosecution No criminal charges have been filed in the United States.
Lourdes Cruz Morales	12	March 5, 2006	Dateland, Arizona	Mexican	Border agent Gregorio Garcia drove into a bush where Lourdes and her father were hiding and killed the girl.	Civil Case Civil suit was dismissed after a settlement conference. Criminal Prosecution No criminal charges have been filed in the United States.

Name	Age	Date of Killing	Location	Nationality	Incident	Known Legal Outcome
Unknown	–	October 2, 2005	Otay Mesa, California	–	A border agent shot and killed the victim when he allegedly reached for the agent's weapon.	Civil Case No information found. Criminal Prosecution No criminal charges have been filed in the United States.
Juan de Jesús Rivera Cota	16	May 11, 2005	Tohono O'odham Nation, Arizona	Mexican	The victim was driving a truck with five Mexican passengers through the O'odham Nation, when a Border Patrol agent tried to stop the vehicle. Rivera hit the agent's car while trying to flee and the agent then fired at the truck and hit Rivera, who later died from his injuries.	Civil Case No information found. Criminal Prosecution No criminal charges have been filed in the United States.
Julio César Yáñez Ramírez	31	February 19, 2005	Rio Rico, Arizona	Mexican	According to border agent Denin Hermosillo, he accidentally shot and killed the victim.	Civil Case The federal wrongful death lawsuit was dismissed in 2009 because the civil complaint was filed more than six months after the denial of the administrative claim and plaintiff was unable to demonstrate the agent intentionally shot the victim. Criminal Prosecution Agent Denin Hermosillo was charged with negligent homicide on February 19, 2005 by the state of Arizona, but the charge was dismissed in January 2006 after the case was removed to federal court.

Name	Age	Date of Killing	Location	Nationality	Incident	Known Legal Outcome
Martín García Martínez	30	May 29, 1994	San Ysidro Port of Entry, San Diego, California	Mexican	The victim was attempting to cross into the United States with four relatives and was steps from the fence when a border patrol agent shot him in the stomach at close range.	<p>Civil Case No information was found on the current status of a civil suit initiated in 1995.</p> <p>Criminal Prosecution No criminal charges have been filed in the United States.</p>
Dario Miranda Valenzuela	26	June 12, 1992	Nogales, Arizona	Mexican	Border agent Michael A. Elmer fatally shot the victim in the back as he fled towards Mexico.	<p>Civil Case On February 16, 1995, the court dismissed the case after the family reached a settlement with the government and defendant's insurance company for \$612,000.</p> <p>Criminal Prosecution The defendant was acquitted twice: first, on December 16, 1992 after a trial for second-degree murder in state court and a second time on February 3, 1994 after a federal trial for civil-rights violations.</p>