

U.S.-MEXICO CROSS-BORDER SHOOTINGS & *HERNANDEZ V. MESA*
(2020): MOVING FROM SEGREGATIONIST SECURITY TO
TRANSNATIONAL SECURITY VIA EXTRADITION POLICY

*Jefferson T. Stamp**

ABSTRACT

*One key measure of U.S.-Mexico transnational security over the last twenty years can be found in the area of extradition policy. During the past two decades, the focus has been on increasing extraditions from Mexico to combat drug trafficking. In contrast, when presented with extradition requests for Customs and Border Protection (“CBP”) officers in cross-border shooting cases, the U.S. government has declined the requests. While no public rationale has been provided, the denial of extradition in these cases reflects an outdated and segregationist security regime, which separates international human rights enforcement from U.S. national security operations. This segregationist approach to security is epitomized by the 2020 U.S. Supreme Court decision in *Hernandez v. Mesa*. In rejecting the plaintiff’s Constitutional claims, the decision leaves the Mexican victims of cross-border shootings without any recourse to vindicate their human rights. It also perpetuates historical justifications of violence against Mexican nationals at the border. In contrast, a more modern approach to transnational security resolves that the U.S. should adopt a policy of extraditing CBP officers who are responsible for cross-border shooting deaths and serious injuries. This targeted change in extradition policy will create a more stable U.S.-Mexico relationship because it will shift the asymmetrical balance of power from unaccountable CBP officers to unarmed Mexican nationals who pose no real threat to U.S. national security when they are on the other side of the border. Facilitating extraditions in cross-border shooting cases will also provide greater protection for international human rights and increase transnational security for both countries and their citizens.*

* Copyright © 2022 Jefferson T. Stamp. M.A., Candidate, International Policy & Development, Middlebury Institute of International Studies (2023). J.D., University of California, San Francisco College of the Law. B.A., University of California, Berkeley.

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I. INTRODUCTION: *HERNANDEZ V. MESA* AND THE SEGREGATIONIST SECURITY REGIME

On February 25, 2020, the U.S. Supreme Court (“the Court” or “the Supreme Court”) ruled in a 5-4 decision that the parents of Sergio Hernández-Güereca, a Mexican teenager who was shot by a CBP agent, had no legal remedy available under the U.S. Constitution for the resulting death of their son.¹ The primary basis for rejecting Constitutional claims of excessive force by government agents in cross-border incidents was the Court’s “respect for the separation of powers.”² Specifically, the Court found that Congress has left “the resolution of extraterritorial claims brought by foreign nationals to executive officials and the diplomatic process.”³ According to the majority opinion, the first factor which “counsel[s] hesitation” against such an expansion of Constitutional claims “is the potential effect on foreign relations.”⁴ Because the CBP officer shot from the U.S. side of the border and killed Sergio while he was on the Mexican side, the Court explained that this was “by definition an international incident.”⁵

The Supreme Court pointed out that the U.S. and Mexico have already engaged in diplomacy over the issue of cross-border shootings: “[in] 2014, Mexico and the United States established a joint Border Violence Prevention Council, and the two countries have addressed cross-border shootings through the United States-Mexico bilateral Human Rights Dialogue.”⁶ At the ninth Annual Bilateral Dialogue on Human Rights, the U.S. and Mexico “agreed on

¹ Andrew Chung & Lawrence Hurley, *U.S. Supreme Court Bars Lawsuit over Cross-Border Shooting of Mexican Teen*, REUTERS (Feb. 25, 2020, 8:19 AM), <https://www.reuters.com/article/us-usa-court-border/u-s-supreme-court-bars-lawsuit-over-cross-border-shooting-of-mexican-teen-idUSKBN20J1ZS>.

² *Hernandez v. Mesa*, 140 S. Ct. 735, 749 (2020).

³ *Id.* at 749–50.

⁴ *Id.* at 744.

⁵ *Id.*

⁶ *Id.* at 745.

the importance of prosecuting . . . human rights violations and reaffirmed their commitment to comply with their international obligations.”⁷ More recently in October 2021, the U.S.-Mexico High-Level Security Dialogue affirmed a commitment to “[i]ncrease [c]ooperation on [e]xtraditions,” while still acknowledging that such cooperation is limited “to facilitat[ing] the extradition of TCO [transnational criminal organization] members and related actors.”⁸

As a specific example of the limited cooperation, “the United States has been unwilling to extradite CBP agents to face the Mexican judiciary despite outstanding requests.”⁹ In a brief review of potential non-judicial remedies for cross-border shootings, one commentator noted: “the Mexican government has made repeated, albeit unsuccessful, requests for extradition of federal agents in the past.”¹⁰ Similarly, a 2015 report by the International Human Rights Clinic at the University of California, Berkeley School of Law found it “very unlikely the United States would extradite a CBP officer to Mexico to face criminal charges.”¹¹ *Hernandez v. Mesa* itself acknowledges that Mexico’s requested extradition of the defendant CBP officer was denied by the United States.¹²

In addition to Sergio’s death, “CBP agents have been responsible for the deaths and serious injuries of approximately twenty individuals on the Mexican side of the line since 2010.”¹³ It is estimated that during the five-year period beginning that same year, CBP officers killed at least ten Mexican nationals in response to what have been called rock-throwing attacks.¹⁴ “While the Mexican government has repeatedly condemned these killings and attempted to prosecute offending CBP agents, no CBP agent has faced legal

⁷ *Mexico and the United States of America Strengthen Their Bilateral Dialogue and Cooperation for the Promotion and Protection of Human Rights*, U.S. DEP’T OF STATE: MEDIA NOTE (Dec. 8, 2017), <https://2017-2021.state.gov/mexico-and-the-united-states-of-america-strengthen-their-bilateral-dialogue-and-cooperation-for-the-promotion-and-protection-of-human-rights/index.html>.

⁸ *FACT SHEET: U.S.-Mexico High-Level Security Dialogue*, THE WHITE HOUSE: STATEMENTS & RELEASES (Oct. 8, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/08/fact-sheet-u-s-mexico-high-level-security-dialogue/>.

⁹ Eva L. Bitran, Note, *Boumediene at the Border? The Constitution and Foreign Nationals on the U.S.-Mexico Border*, 49 HARV. C.R.-C.L. L. REV. 229, 254 (2014).

¹⁰ 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, 199 (2013).

¹¹ ROXANNA ALTHOLZ & YASMIN EMRANI, *ELUSIVE JUSTICE: PURSUING LEGAL REDRESS IN THE UNITED STATES AND MEXICO FOR KILLINGS BY U.S. BORDER AGENTS* 59 (Int’l Hum. Rts. Clinic, 2015), <https://www.law.berkeley.edu/wp-content/uploads/2015/09/Working-Paper-Elusive-Justice-LARGE-FINAL.pdf>.

¹² *Hernandez v. Mesa*, 140 S. Ct. 735, 740 (2020).

¹³ Bitran, *supra* note 9, at 230.

¹⁴ Roxanna Altholz, *Elusive Justice: Legal Redress for Killings by U.S. Border Agents*, 27 BERKELEY LA RAZA L.J. 1, 4 (2017).

consequences in Mexico because the United States has refused to extradite the accused.”¹⁵ Without a civil penalty under *Hernandez v. Mesa* or any prospect of criminal prosecution, the victims have been left without a legal remedy for any alleged violations of their human rights.¹⁶

The reluctance to extradite CBP officers in cross-border shooting cases is part of the U.S. segregationist security regime in which international human rights enforcement is separated from security operations.¹⁷ This security modality is rooted in the “categorical and contrarian position that the obligations contained in the relevant human rights instruments have no extraterritorial application.”¹⁸ Accordingly, the U.S. position “reflects a strategic policy choice to endeavor to evade scrutiny for its extraterritorial exploits on the merits.”¹⁹ For example, the U.S. still has not ratified the 1978 American Convention on Human Rights, which provides for an Inter-American Commission to adjudicate human rights violations.²⁰ Nor has the U.S. ratified the 1998 Rome Statute of the International Criminal Court, which authorizes jurisdiction over cases involving genocide, war crimes, crimes against humanity and crimes of military aggression.²¹

Thus, in practice, U.S. security personnel are not subject to the same human rights standards for extraterritorial conduct generally imposed upon the international community. This segregationist security regime protects CBP officers from extradition even in the most egregious cross-border shooting cases that involve the death of unarmed Mexican nationals. As exemplified by the case of Hernández-Güereca, the U.S. focus is on whether there was sufficient evidence to pursue criminal charges in federal district court, and whether the officer acted “inconsistently with CBP policy or training regarding [the] use of force.”²²

The *de facto* U.S. policy of protecting American security personnel from international human rights enforcement is based upon a fear of politically

¹⁵ *Id.*

¹⁶ *See id.* at 25–30.

¹⁷ *Cf.* Fatma E. Marouf, *Extraterritorial Rights in Border Enforcement*, 77 WASH. & LEE L. REV. 751, 848–50 (2020) (discussing the “Manipulation of National Security as an Illusory Threat . . . in order to avoid judicial review, receive deference, or escape a remedy” in cross-border shooting cases).

¹⁸ Beth van Schaack, *The United States’ Position on the Extraterritorial Application of Human Rights Obligations: Now Is the Time for Change*, 90 INT’L L. STUD. 20, 23 (2014).

¹⁹ *Id.* at 24.

²⁰ Justin M. Loveland, *40 Years Later: It’s Time for U.S. Ratification of the American Convention on Human Rights*, 18 SEATTLE J. FOR SOC. JUST. 130, 131–32 (2020).

²¹ Claire Felter, *The Role of the International Criminal Court*, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/background/role-international-criminal-court> (Feb. 23, 2021, 11:00 AM).

²² *E.g.*, Press Release, U.S. Dep’t. of Just., Federal Officials Close Investigation into Death of Sergio Hernandez Guereca, <https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-sergio-hernandez-guereca> (Sept. 15, 2014).

motivated prosecutions in foreign jurisdictions.²³ Similarly, in *Hernandez v. Mesa* (2017), Chief Justice Roberts asked whether the operator of a drone who remotely directed a strike in Iraq from U.S. territory could be sued by foreign nationals.²⁴ The recent mistaken drone strike during the U.S. withdrawal from Afghanistan that killed ten innocent family members, including seven children, dramatically demonstrates the real world risks of such events.²⁵

To be sure, any precedent allowing judicial claims in cross-border shooting cases would invite the filing of innumerable lawsuits against military personnel, and even the U.S. President, by anyone affected by U.S. military operations abroad. In addition to valid claims by foreign nationals (such as the decimated family in Kabul), the litigation could also potentially be prompted by adversary governments seeking to debilitate U.S. forces abroad through harassment and discovery. If the Supreme Court approved a judicial remedy in cross-border shooting cases, such a precedent might also impact the Executive's authority in conducting foreign affairs and negatively affect the capability of the Executive in conducting military operations. Another problem is the potential impact on security personnel who may disengage from confronting real threats simply to avoid legal entanglements. Based on these national security and separation of powers concerns, the Supreme Court ultimately held that any remedy for cross-border shootings must, in the absence of a legislative remedy, be sought through diplomacy conducted by the Executive branch rather than through a judicial proceeding.²⁶

Although they involve legal processes, extraditions are ultimately diplomatic and thus political in nature, revealing fundamental insights into the strength of any bilateral relationship.²⁷ When approving an extradition request, the host state implicitly endorses the legitimacy of the requesting state's criminal justice system and engenders further cooperation in international law enforcement.²⁸

However, in the case of cross-border shootings, there also exists the transnational security need to protect the human rights of Mexican nationals

²³ Felter, *supra* note 21.

²⁴ Transcript of Oral Argument at 4–5, *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017) (No. 15-118).

²⁵ See Gibran Naiyyar Peshimam, *Afghan Family Decimated by U.S. Drone Strike Awaits Justice from Washington*, REUTERS (Nov. 10, 2021, 8:46 AM), <https://www.reuters.com/world/asia-pacific/afghan-family-decimated-by-us-drone-strike-awaits-justice-washington-2021-11-10/>.

²⁶ *Mesa*, 140 S. Ct. at 745 (“In the absence of judicial intervention, the United States and Mexico would attempt to reconcile their interests through diplomacy—and that has occurred.”).

²⁷ Emily Edmonds-Poli & David Shirk, *Extradition as a Tool for International Cooperation: Lessons from the U.S.-Mexico Relationship*, 33 MD. J. INT'L L. 215, 242–43 (2018).

²⁸ *See id.* at 217–18.

on the other side of the border.²⁹ The current legal division demonstrates how “[t]erritoriality of law conflicts with the postulated universality of human rights because individuals cannot hold a state other than their own responsible for violating their rights.”³⁰ A greater transnational conception of security thus expands upon the U.S. segregationist security regime, which is otherwise oriented towards protecting American citizens from cross-border threats originating from Mexico.³¹ The expansion of security beyond this limit bends the historical asymmetry in security matters at the border and introduces greater reciprocity into the U.S.-Mexico relationship. Recognizing that mutual government legitimacy is at least in part grounded in the ability to protect ordinary citizens from cross-border threats *on both sides of the border*, the U.S. should change its policy of declination and instead approve the extradition of CBP officers to Mexico in cross-border shooting cases.

II. THE 1919 CROSS-BORDER SHOOTING CASE OF CONCEPCIÓN GARCÍA

At the end of the Mexican-American War (1846-1848), the relationship between Mexico and the U.S. was driven almost entirely by the resolution of international claims.³² Invariably, the most pressing claims from the American side concerned expropriated business investments, while the Mexican claims dealt more with land confiscation in violation of the Treaty of Guadalupe and other human rights abuses.³³ Following the 1910-1920 Mexican Revolution, a new international claims commission was established as a condition for U.S. diplomatic recognition of the new Mexican government.³⁴ However, because the American business claims far exceeded the assigned value of the Mexican human rights claims, Mexican nationals with valid claims received little if any

²⁹ See generally Mark Gibney, Katarina Tomaševski & Jens Vedsted-Hansen, *Transnational State Responsibility for Violations of Human Rights*, 12 HARV. HUM. RTS. J. 267, 267 (1999) (“[B]roadening state responsibility to include violations of human rights in other states as well as towards citizens of other states is not only desirable and feasible, but also necessary.”).

³⁰ *Id.*

³¹ See *Written Testimony of DHS Southern Border and Approaches Campaign Joint Task Force-West Director Robert Harris for a House Committee on Oversight and Government Reform Hearing Titled “Violence on the Border: Protecting U.S. Personnel,”* U.S. DEP’T OF HOMELAND SEC., <https://www.dhs.gov/news/2015/09/09/written-testimony-dhs-southern-border-and-approaches-campaign-joint-task-force-west> (Nov. 8, 2019) [hereinafter *Written Testimony of DHS Southern Border*].

³² See, e.g., Stephen R. Niblo, *The United States-Mexico Claims Commission of 1868*, 50 N.M. HIST. REV. 101, 101 (2021) (“On July 4, 1868, the United States and Mexico signed a treaty creating the United States-Mexican Claims Commission.”).

³³ See John J. McDonald & Carlyle R. Barnett, *The American-Mexican Claims Arbitration*, 18 AM. BAR ASS’N J. 183, 184 (1932).

³⁴ Rodolfo O. de la Garza & Karl Schmitt, *Texas Land Grants and Chicano-Mexican Relations: A Case Study*, 21 LAT. AM. RSCH. REV. 123, 126 (1986).

restitution.³⁵ Rather, the Mexican claims were used to offset the balance of what was adjudged to be owed by the Mexican government to U.S. business interests.³⁶

The unaccountability for international human rights violations at the U.S.-Mexico border has come into greater focus since the Supreme Court's decision in *Hernandez v. Mesa*. As that decision demonstrates, adopting a policy of accountability faces significant national security hurdles. Moreover, any new policy must address how accountability can be fitted to a bilateral relationship that has been contorted by centuries of power asymmetry and accompanied by historically persistent border violence.

In 2019, historian Monica Muñoz Martinez testified before the U.S. Congress about the legacy of violence at the U.S.-Mexico border.³⁷ This was a problem that “legislators and the judicial system failed to correct . . . and [as a result] violence continued throughout the 20th century.”³⁸ In her 2018 book *Injustice Never Leaves You*, Muñoz Martinez describes “a period of racial terror between 1910 and 1920 when Mexican Americans and Mexican nationals were targeted with racial violence.”³⁹ Her research demonstrates how politicians “funded militarization of the border” while “[l]aw enforcement and vigilantes enjoyed a culture of impunity.”⁴⁰ Many examples of unaccountable killings at the border were provided to support this account, including the case of Concepción García.⁴¹

Concepción was a nine-year-old Mexican girl who was killed by a U.S. military officer on April 8, 1919 while crossing the Rio Grande with her family from the U.S. side into Mexico.⁴² Concepción became sick while attending school in Texas, and her family was bringing her home to recover.⁴³ The American officer, who believed the raft was being used for smuggling, fired several shots attempting to redirect the family to return to the U.S. side of the border.⁴⁴ One of the shots fatally struck Concepción. While the officer was initially found guilty of manslaughter by a court martial, a Washington,

³⁵ *See id.* at 131–32.

³⁶ *Id.*

³⁷ *Oversight of the Trump Administration's Border Policies and the Relationship Between Anti-Immigrant Rhetoric and Domestic Terrorism: Hearing Before the Subcomm. on Immigr. and Citizenship of the Comm. on the Judiciary H.R.*, 116th Cong. 2 (2019) (statement of Monica Muñoz Martinez, Stanley J. Bernstein Assistant Professor of American and Ethnic Studies, Brown University) [hereinafter Statement of Monica Muñoz Martinez].

³⁸ *Id.* at 17.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Statement of Monica Muñoz Martinez, *supra* note 37, at 11.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Edwin M. Borchard, *Important Decisions of the Mixed Claims Commission United States and Mexico*, 21 AM. J. INT'L L. 516, 518 (1927).

D.C. Review Board reversed the decision and recommended the officer's return "to duty" – a decision subsequently approved by President Woodrow Wilson.⁴⁵

Years later, the 1926 U.S.-Mexico General Claims Commission found that "the American officer had been especially instructed to enforce on the river border different sets of acts and/or regulations which forbade crossing, smuggling, and similar offenses."⁴⁶ However, a military "Bulletin" had been circulated which stated: "firing on unarmed persons supposed to be engaged in smuggling or crossing the river at unauthorized places, is not authorized."⁴⁷ In summary, "[t]he court-martial decided that this Bulletin had been violated by the officer. The President of the United States gave a contrary decision after submission of reports which held, among other things, that the Bulletin had not been violated."⁴⁸

Thus, despite the death of nine-year-old Concepción García, the U.S. Executive determined that the officer's actions comported with national security policy. In effect, the death of an innocent child in a cross-border shooting was deemed to be justifiable collateral damage in service of a greater policy of "securing" the U.S.-Mexico border from smugglers and other unauthorized crossings. Thus, rather than securing the border for people seeking safe passage, the Executive's decision subordinated the human rights of a nine-year-old girl to the perceived U.S. national security interest.

In contrast, the General Claims Commission applied an international standard regarding the use of armed force at an international border and found that "[i]f this international standard of appraising human life exists, it is the duty not only of municipal authorities but of international tribunals as well to obviate any reckless use of firearms."⁴⁹ While ultimately deciding that the fired shots by the American officer created an unnecessary danger under international law, the Commission awarded a meager \$2,000 (roughly \$30,000 when adjusted for inflation) as "reparation [for] pecuniary loss" and the "indignity suffered" by the family due to the offsetting consideration of the family's illegal crossing.⁵⁰ Even though some form of limited compensation was provided, the award did not fully vindicate the international human rights of nine-year-old Concepción García. On the contrary, the proceeding could be characterized as facilitating the U.S. segregationist security regime by allowing the American government to buy absolution for a nominal sum of cash.

⁴⁵ *Id.* at 518–19.

⁴⁶ *Garcia v. United States*, 4 R.I.A.A. 119, 120 (Gen. Claims Comm'n 1926).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 121.

⁵⁰ *Id.* at 123.

III. THE LACK OF ACCOUNTABILITY FOR U.S.-MEXICO CROSS-BORDER SHOOTINGS

The bilateral tension caused by the segregationist security regime has continued into the twenty-first century with a series of approximately forty shooting deaths “along the U.S.-Mexico border” since the early 1990s.⁵¹ In its *amicus* brief submitted to the U.S. Supreme Court in *Hernandez v. Mesa*, the Mexican government identified cross-border shootings as a significant problem affecting its sovereignty as well as the fundamental rights of its citizens:

Many Border Patrol shootings have resulted in death, and a number of those killings involved shots fired across the border. . . . As a sovereign and independent state, Mexico has a responsibility to look after the well-being of its nationals. When agents of the United States government violate fundamental rights of Mexican nationals and others within Mexico’s jurisdiction, it is a priority [of] Mexico to see that the United States provides adequate means to hold the agents accountable and to compensate the victims.⁵²

The media has documented many of the fatal incidents referenced by the Mexican government. In an extended piece of investigative journalism, *VICE News* identified seven cross-border shootings from 2006 to 2012 that resulted in the death of Mexican citizens who were in Mexico when they were shot.⁵³ In addition, the Mexican government has cited the CBP’s own statistics showing that CBP officers “have reported use of deadly force over 200 times from October 2012 to October 2018, nearly all of them at or near the U.S.-Mexico border.”⁵⁴ Since then, there have been twenty-nine incidents of “use of force” by CBP agents at the border that also involved the discharge of a firearm.⁵⁵

⁵¹ See ALTHOLZ & EMRANI, *supra* note 11, at 1, app. at 64–71 (showing a chart that summarizes the names, ages, dates of killings, locations, nationality, incident descriptions and known legal outcomes).

⁵² Brief of the Government of the United Mexican States as Amicus Curiae in Support of the Petitioners at 2–3, *Hernandez v. Mesa*, 140 S. Ct. 735 (2019) (No. 17-1678).

⁵³ Taylor Dolven, *What Happens When U.S. Border Patrol Kills – in Mexico?*, VICE NEWS (June 9, 2017, 3:14 AM), <https://www.vice.com/en/article/bjdaga/what-happens-when-u-s-border-patrol-kills-in-mexico>.

⁵⁴ Brief of the Government of the United Mexican States as Amicus Curiae in Support of the Petitioners, *supra* note 52, at 2 (citing *CBP Use of Force Statistics, Fiscal Year 2018*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/newsroom/stats/cbp-use-force> (Feb. 18, 2022)).

⁵⁵ *Assaults and Use of Force Statistics: Use of Force Incidents by Type*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/newsroom/stats/assaults-use-force> (Jan. 24, 2022).

Arturo Sarukhán, the former Mexican Ambassador to the United States from 2007 to 2013,⁵⁶ expressed the Mexican government's objections to the cross-border shootings as follows:

[T]he firing of weapons across international borders runs counter to basic principles of international law. . . . We have clearly and repeatedly expressed our strongest condemnation whenever these incidents have occurred, as well as the need for thorough investigations and for those responsible to be brought to justice, *both in the United States and in Mexico.*⁵⁷

Nevertheless, the U.S. Supreme Court has now ruled that the pathway to justice does not run through the U.S. court system. In deciding there was no civil remedy available, the Supreme Court focused upon the case of Hernández-Güereca, who was shot and killed in 2010 by CBP officer Mesa on a concrete culvert border region between Juarez and El Paso.⁵⁸ This was the test case. Any other foreign national making an extraterritorial claim of excessive force against U.S. security personnel is now effectively blocked from seeking a civil remedy in U.S. courts due to the unfavorable *Hernandez v. Mesa* precedent.

The prospect of pursuing criminal cases in the U.S. is equally daunting. The difficulty of trying criminal cases in American courts is due to the benefit of reasonable doubt provided to officers who claim to be acting in accordance with agency rules while defending against national security threats.⁵⁹ According to the Department of Homeland Security's Southern Border Joint Task Force-West Director Robert Harris, "the primary threats are southbound gun smuggling, northbound drug trafficking, human trafficking/smuggling, illegal immigration, and the violence associated with these criminal activities."⁶⁰ The reasonable and necessary protection against such threats constitutes part of the same segregationist security regime that explains the Executive's reversal of the conviction in the Concepción García case back in 1919.

Thus, in order to effectively apply the international standard for the protection of human rights at the U.S.-Mexico border, the case must be brought in a different forum in which the law is not restricted by the segregationist security regime, and where international human rights laws would be applicable. One such approach is to set up an international

⁵⁶ Arturo Sarukhan: *Biography*, U.C. SAN DIEGO CTR. ON GLOB. TRANSFORMATION, <https://cgt.ucsd.edu/fellows/past/sarukhan.html> (last visited Mar. 4, 2022).

⁵⁷ Joseph J. Kolb, *Mexican Ambassador Condemns Cross-Border Shootings by US Agents*, FOX NEWS (Nov. 29, 2012) (emphasis added), <https://www.foxnews.com/world/mexican-ambassador-condemns-cross-border-shootings-by-us-agents>.

⁵⁸ See Dolven, *supra* note 53.

⁵⁹ See Altholz, *supra* note 14, at 16–17.

⁶⁰ *Written Testimony of DHS Southern Border*, *supra* note 31.

commission to adjudicate the claims as was done in the Concepción García case through the U.S.-Mexico General Claims Commission. For example, under the Organization of American States framework, the American Convention on Human Rights instituted an Inter-American Commission to adjudicate violations of international human rights.⁶¹ “However, the US has rarely implemented the decisions of the Commission, considering them to be mere recommendations or suggestions.”⁶²

Faced with this reality, the family of one victim lobbied Mexican President Lopez Obrador to pursue the extradition of the CBP officer for a trial in Mexico.⁶³ In a statement to the press, the aunt of one victim proclaimed that her nephew “wasn’t murdered in the U.S., José Antonio was murdered here in Mexico, [on] this sidewalk.”⁶⁴ According to VICE News, “[t]he Mexican government has tried to extradite border patrol officers in some of these cases to be tried in Mexican courts, but the U.S. government has denied their requests. The Department of Justice said the agency does not comment on extraditions.”⁶⁵ It is this opacity in extradition decisions that contributes to and sustains the segregationist security regime at the border.

Some alternative policies have been proposed by legal commentators to address the resulting lack of accountability. The proposals mainly concern the need to provide monetary compensation through legislative remedies.⁶⁶ Similarly, another law review comment “proposes that a human rights paradigm . . . be integrated into U.S. constitutional jurisprudence.”⁶⁷ While these proposals seek to be ameliorative, it bears noting that federal law already provides the U.S. State Department with the discretion to resolve such claims up to a cap of \$15,000.⁶⁸ Thus, Congress need only amend the statute to account for inflation and set up a more transparent claims procedure.⁶⁹

⁶¹ Loveland, *supra* note 20, at 131.

⁶² *Id.* at 132.

⁶³ Rafael Carranza, *Family of Slain Nogales, Sonora, Teen Will Seek Arizona Border Agent’s Extradition to Mexico*, AZCENTRAL.COM, <https://www.azcentral.com/story/news/politics/border-issues/2019/10/11/slain-nogales-sonora-teen-family-seeks-border-agent-extradition-to-mexico/3939239002/> (Oct. 12, 2019, 12:43 PM).

⁶⁴ *Id.*

⁶⁵ Dolven, *supra* note 53.

⁶⁶ Sebastian A. Navarro, Comment, *Remedies for United States-Mexico Cross-Border Incidents*, 22 SAN DIEGO INT’L L.J. 189, 190 (2020); see also David Rice, *The Right to Kill: How Congress Can Solve the Problem Presented by Hernandez v. Mesa* 5 (Feb. 14, 2021) (unpublished comment) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3777584).

⁶⁷ Marc E. Jácome, Comment, *Human Rights on the Border: A Critical Race Analysis of Hernandez v. Mesa*, 67 UCLA L. REV. 1268, 1268 (2020).

⁶⁸ See 22 U.S.C. § 2669(b) (2018); see also *Hernandez v. Mesa*, 140 S. Ct. 735, 749 (2020).

⁶⁹ In 1962, the U.S. Congress adopted the Hickenlooper Amendment to the Foreign Assistance Act. Pub. L. No. 87-565, 76 Stat. 255 (1962) (codified as amended in scattered sections of 22 U.S.C.). This amendment conditioned all U.S. foreign aid upon the resolution of

In addition, the foregoing proposals lose sight of the asymmetrical power imbalance affecting U.S.-Mexico relations and inadvertently reinforce it by viewing the issue solely from a U.S.-centric, monetary perspective rather than from a transnational security lens, which validates Mexican sovereignty and international human rights laws. Under the latter approach, more inclusive solutions become easier to imagine and articulate because the transnational view contemplates a distribution of power and assures the protection of international human rights through multiple power centers.⁷⁰

One move in this direction has been made by some of the victims' families who have filed a joint petition with the Inter-American Commission on Human Rights.⁷¹ The petition aims to obtain a declaration of human rights violations.⁷² Nevertheless, neither money nor public shaming resolves the lack of accountability by individual CBP officers. It is only through the individual accountability of CBP officers that the asymmetrical balance of power can be shifted in specific U.S. officer-Mexican civilian interactions; only then can there be established a more transnational security model that will inure greater tranquility to the citizens on both sides of the U.S.-Mexico border.

any claims by American companies and nationals "within a reasonable time" (which was not to exceed six months). *See id.* at 261. At the insistence of the State Department, Part IV of the amendment includes an overlooked provision which allows for the "prompt settlement" of any personal injury or property claim by any foreign national against the United States; however, claims are capped at \$15,000. *See Contemporary Practice of the United States Relating to International Law*, 59 AM. J. INT'L L. 103, 107 (1965) (citing Pub. L. 87-565, 76 Stat. 263).

⁷⁰ *See generally* Tilmann Altwicker, *Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts*, 29 EUR. J. INT'L L. 581, 583–84 (2018) (explaining that a "transnational law perspective . . . is problem-centred (rather than source-centred), follows a functional (rather than territorial) logic and accepts competing multipolar, regulatory approaches to common problems.").

⁷¹ *See* Rafael Carranza, *After Supreme Court Rules Against Them, Families in Cross-Border Shootings Turn to International Watchdog*, AZCENTRAL.COM (Oct. 9, 2020, 7:09 PM), <https://www.azcentral.com/story/news/politics/border-issues/2020/10/09/families-cross-border-shootings-take-cases-international-watchdog/5929805002>.

⁷² *Id.*

IV. EXTRADITION MAY PROVIDE A REMEDY FOR U.S.-MEXICO CROSS-BORDER SHOOTINGS

The operative extradition treaty between the U.S. and Mexico was signed in May 1978 and became effective in January 1980.⁷³ The treaty “consists of twenty-three articles that specify the conditions that must apply for a suspect to be extradited from one country to another.”⁷⁴ The most important provision regarding cross-border shootings is Article 9, which makes extradition of one country’s own nationals discretionary.⁷⁵ Consequently, the decision to extradite CBP officers is ultimately a political decision for the Executive.⁷⁶ As previously observed, “political discretion will resolve the political problems of extradition of government agents regardless of the legal disposition of the case.”⁷⁷ At the same time, “serious policy pressures” based on “international and municipal law” can be effective to “argue in favor of extraditing U.S. government agents who violate foreign municipal law.”⁷⁸

One example of policy pressure is the global public’s reaction to the unaccountable police shootings of unarmed minorities, like George Floyd, which have sparked worldwide protests.⁷⁹ In the same way, unaccountable cross-border shootings have continued to perpetuate the segregationist security regime by the U.S. government, which abuses the fundamental human rights of Mexican citizens.⁸⁰ This parallel has not been lost in the press. For example, in February 2020, the PBS News Hour reported: “Federal use of force shooting incidents have escaped the kind of scrutiny faced by state and local law enforcement officers involved in shootings of unarmed black men, which gave rise to the Black Lives Matter movement and community policing reforms.”⁸¹ Similarly, the goal of transnational security at the U.S.-Mexico

⁷³ Emily Edmonds-Poli & David Shirk, *Extradition as a Tool for International Cooperation: Lessons from the U.S.-Mexico Relationship*, 33 MD. J. INT’L L. 215, 225 (2018). For a history of U.S.-Mexico extraditions, see generally Bruce Zagaris & Julia Padierna Peralta, *Mexico-United States Extradition and Alternatives: From Fugitive Slaves to Drug Traffickers—150 Years and Beyond the Rio Grande’s Winding Courses*, 12 AM. U.J. INT’L L. & POL’Y 519 (1997).

⁷⁴ Edmonds-Poli & Shirk, *supra* note 73, at 225.

⁷⁵ See Extradition Treaty Between the United States of America and the United Mexican States, Mex.-U.S., at 192, May 4, 1978, 31 U.S.T. 5059.

⁷⁶ See Jeffrey J. Carlisle, *Extradition of Government Agents as a Municipal Law Remedy for State-Sponsored Kidnapping*, 81 CALIF. L. REV. 1541, 1583 (1993).

⁷⁷ *Id.* at 1570.

⁷⁸ *Id.* at 1581.

⁷⁹ See Habiba Ahmed et al., *The George Floyd Protests: A Global Rallying Cry for Democracy*, CTR. FOR STRATEGIC & INT’L STUD. (June 11, 2020), <https://www.csis.org/analysis/george-floyd-protests-global-rallying-cry-democracy>.

⁸⁰ See Altholz, *supra* note 14, at 26.

⁸¹ MacKenzie Shuman et al., *Federal Agents’ Shootings Escape Scrutiny, Use-of-Force Reforms*, PBS: NEWS HOUR (Feb. 24, 2020, 9:06 PM), <https://www.pbs.org/newshour/nation/federal-agents-shootings-escape-scrutiny-use-of-force-reforms>.

border can only be achieved through the de-legitimization of cross-border shootings against unarmed Mexican nationals, which continues as a form of racialized violence that has been historically perpetuated under the U.S. segregationist security regime.

Therefore, rather than segregating international human rights from national security operations, current policy should be updated through the “transnationalization” of human rights at the border.⁸² In order to achieve this crossover, the U.S. Executive should recognize the legitimacy of Mexico’s legal system and allow for the criminal prosecution of cross-border shootings via extraditions of CBP officers.⁸³ In such extradition cases, the American Convention on Human Rights would be binding in Mexican courts.⁸⁴ By allowing for human rights enforcement in Mexico, CBP officers will be more inclined to assess how their tactics are affecting unarmed persons in Mexico. This will afford Mexican nationals some assurance that their international human rights are being considered by CBP officers during any set of interactions at the border. The mutual cognizance of human rights and respect will allow for a greater sense of transnational security.⁸⁵

Moreover, fundamental legal principles governing international human rights support Mexico’s interest in prosecuting criminal offenses resulting from cross-border shooting deaths. As pointed out in Mexico’s *amicus* brief in *Hernandez v. Mesa*, “both Mexico and the United States have ratified the International Covenant on Civil and Political Rights (ICCPR), which provides in Article 6(1) that “[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”⁸⁶ Article 2(3) of the ICCPR further provides “that individuals whose rights are violated ‘shall have an effective remedy’”⁸⁷ The U.S. Supreme Court similarly recognized that “Mexico has an interest in exercising sovereignty over its territory and in protecting and obtaining justice for its

⁸² See Altwicker, *supra* note 70, at 582–83.

⁸³ This is not to say that the Mexican legal system is without its own challenges. See generally *Impunity Still Rules: Fewer than 5% of Federal Cases Are Prosecuted: Study*, MEXICAN NEWS DAILY (Apr. 28, 2021), <https://mexiconewsdaily.com/news/fewer-than-5-percent-federal-cases-prosecuted/>.

⁸⁴ Christina M. Cerna, *Status of Human Rights Treaties in Mexican Domestic Law*, AM. SOC’Y OF INT’L L. (Feb. 23, 2016), <https://www.asil.org/insights/volume/20/issue/4/status-human-rights-treaties-mexican-domestic-law>.

⁸⁵ Any accused officer is still afforded basic legal protections in the U.S. as he or she may challenge certification of extradition based on lack of probable cause or any other legal deficiency by filing a *habeas corpus* petition in U.S. district court. *E.g.*, *In re Extradition of Santos*, 228 F. Supp. 3d 1034 (C.D. Cal. 2017) (demonstrating that the federal district court refused to certify extradition because evidence was obtained through coercion).

⁸⁶ Brief of the Government of the United Mexican States as Amicus Curiae in Support of the Petitioners, *supra* note 52, at 10.

⁸⁷ *Id.*

nationals.”⁸⁸ Thus, by refusing to extradite CBP officers, the U.S. is preventing a remedy from being afforded in Mexico, interfering with Mexico’s sovereignty and obstructing justice for Mexican nationals.

The refusal to extradite is also inconsistent with the reasonable expectation that the unlawful firing of a weapon into another jurisdiction will result in the prosecution of the assailant in the affected jurisdiction. As explained in the 1915 *Ruling Case Law*,

[W]here a shot is fired at a person across a state line . . . the view has generally been taken that actual presence in a state is not necessary to make a person amenable to its laws for a crime committed there; for if a crime is the immediate result of his act, he may be made to answer for it in its courts, although actually absent from the state at the time he does the act.⁸⁹

Similarly, under international law, jurisdiction may be properly established based on “objective territoriality” because the “effects” of the fired shot are felt objectively in the state where the bullet lands.⁹⁰

Approving extraditions in cross-border shooting cases is also in line with current U.S.-Mexico policy as indicated by the U.S. Embassy’s website:

The USG is working closely with Mexican counterparts to make effective use of our bilateral extradition treaty and other legal mechanisms in order to ensure that our shared border does not serve as a barrier behind which fugitives from justice may flee, find safe haven, and continue to commit crimes.⁹¹

Thus, the limited expansion of U.S. extradition policy to include CBP officers in cross-border shooting cases would not detract from U.S. national security, but rather would build upon the current policy of using the Extradition Treaty to further law enforcement between the two countries. Such expansive extradition policies between the United States and Mexico serve to increase the mutual respect for the legal systems, sovereignty, and human rights of both countries.

⁸⁸ *Hernandez v. Mesa*, 140 S. Ct. 735, 745 (2020).

⁸⁹ 8 RULING CASE LAW: AS DEVELOPED AND ESTABLISHED BY THE DECISIONS AND ANNOTATIONS CONTAINED IN LAWYERS REPORTS ANNOTATED, AMERICAN DECISIONS, AMERICAN REPORTS, AMERICAN STATE REPORTS, AMERICAN AND ENGLISH ANNOTATED CASES, AMERICAN ANNOTATED CASES, ENGLISH RULING CASES, BRITISH RULING CASES, UNITED STATES SUPREME COURT REPORTS, AND OTHER SERIES OF SELECTED CASES 101 (William M. McKinney & Burdett A. Rich, eds., 1915); *see also* 14 AM. JUR. 1D *Criminal Law* § 227 (1936); *Simpson v. State*, 92 S.E. 984, 985 (Ga. 1893); *Strassheim v. Daily*, 221 U.S. 280, 285 (1911) (remanding by the U.S. Supreme Court of a criminal defendant into custody for extradition to the jurisdiction affected by the criminal fraud).

⁹⁰ JAN KLABBERS, *INTERNATIONAL LAW* 100 (2nd ed. 2017).

⁹¹ Ocampomi, *Law Enforcement*, U.S. EMBASSY & CONSULATES IN MEX. (Mar. 22, 2021), <https://mx.usembassy.gov/law-enforcement/>.

Mexico's cooperation in extraditions to the U.S. dramatically increased after a decision by the Mexican Supreme Court in January 2001, which "affirmed the executive branch's discretion to extradite Mexican nationals for foreign prosecution."⁹² This increased cooperation was demonstrated through Mexico's extradition efforts in the Brian Terry case.⁹³ Terry was a CPB officer who was killed eleven miles north of the border in Arizona by a group of bandits who were preying on marijuana smugglers.⁹⁴ Due to the assistance of Mexican authorities, the perpetrators were located in Mexico, extradited to the U.S. and eventually convicted of Terry's murder.⁹⁵ Mexico's assistance was provided even though the weapon used to kill Terry was connected to the "Fast and Furious" scandal in which the Obama administration secretly allowed hundreds of guns to be smuggled into Mexico in violation of its sovereignty.⁹⁶ Given Mexico's extradition of the fugitives who murdered CPB officer Brian Terry, true reciprocity would mean that CPB officers who themselves are legitimately accused of unlawful cross-border shootings would likewise be extradited to Mexico for prosecution.

Yet, despite the growing cooperation in extraditions on both sides, the U.S. has not kept pace with Mexico's extraditions. Looking at data from the U.S. Marshals and the Congressional Research Service, Edmonds-Poli and Shirk noted a "decade-long surge in the number of extraditions from Mexico to the United States between 2003 and 2016. . . ."⁹⁷ The 2018 data from the U.S. Marshals also showed a "significant increase" in U.S. extraditions to Mexico but "it was not as dramatic as that seen in the other direction[.]"⁹⁸ It was concluded that "[b]y the 2000s, Mexico was typically sending more than three times as many fugitives as the United States in any given year, and most of these were Mexican nationals."⁹⁹ Given the disparity in the numbers, a decision to extradite CPB officers would constitute a significant step toward restoring balance and mutuality to the U.S.-Mexico relationship, further engendering cooperation between the two countries in bilateral law enforcement.

⁹² Edmonds-Poli & Shirk, *supra* note 73, at 228; see Rodrigo Labardini, *Mexico's Supreme Court Allows the Extradition of Mexican Nationals*, 17 INT'L ENF'TL REP. 106, 108–12 (2001); see also *United States v. Corona-Verbera*, 509 F.3d 1105, 1116 (9th Cir. 2007) (finding that "extradition became more likely in 2002").

⁹³ See Reuters Staff, *Mexico to Extradite Accused Gunman to U.S. for 'Fast and Furious' Slaying*, REUTERS (Apr. 12, 2017, 7:54 PM), <https://www.reuters.com/article/us-usa-mexico-border/mexico-to-extradite-accused-gunman-to-u-s-for-fast-and-furious-slaying-idUSKBN17F0AZ>.

⁹⁴ *United States v. Soto-Barraza*, 947 F.3d 1111, 1114–15 (9th Cir. 2020).

⁹⁵ *Id.* at 1115–16.

⁹⁶ Reuters Staff, *supra* note 93.

⁹⁷ Edmonds-Poli & Shirk, *supra* note 73, at 233.

⁹⁸ *Id.* at 234–35.

⁹⁹ *Id.* at 237.

Finally, given the discretionary authority over U.S. nationals under Article 9 of the Extradition Treaty,¹⁰⁰ the U.S. government can establish a targeted extradition policy, which is limited to the specific class of cross-border shootings involving CPB officers. In addition, Article 5, Paragraph 3 provides that “[e]xtradition shall not be granted when the offense for which extradition is requested is a purely military offense.”¹⁰¹ Given this military exclusion, the global national security apparatus of the United States would hardly be threatened by the extradition of CBP officers in cross-border shooting cases. The only threat would be to the U.S. segregationist security regime at the U.S.-Mexico border, which would be replaced by a more transnational security model which is better equipped to protect international human rights.

V. CONCLUSION

The Supreme Court’s decision in *Hernandez v. Mesa* has left the victims of CBP cross-border shootings without any legal remedy in the United States. As a result, there is no practical forum available to hold CPB officers accountable for the violation of international human rights. The decision has called into question the U.S. Executive’s blanket refusal to extradite offending CBP officers to Mexico for prosecution. The current *de facto* extradition policy is the product of the U.S. segregationist security regime, which separates international human rights enforcement from security operations. The refusal to extradite also perpetuates historical justifications of violence against Mexican nationals at the border. For these reasons, the U.S. government should change its policy of refusing extradition and instead approve Mexico’s requests for the extradition of CBP officers in cross-border shooting cases. By holding the individual CBP officers accountable for any reckless disregard of life that occurs when firing their weapons into Mexico, a more transnational security model will emerge – one that will interject mutual respect and reciprocity into the U.S.-Mexico relationship, validate Mexico’s sovereignty, and expand the protection of international human rights to citizens on both sides of the U.S.-Mexico border.

¹⁰⁰ Extradition Treaty Between the United States of America and the United Mexican States, *supra* note 75, at 192.

¹⁰¹ *Id.* at 191.