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REPORT No. 198/20
PETITION 524-16
REPORT ON ADMISSIBILITY

ANASTASIO HERNANDEZ ROJAS AND FAMILY
UNITED STATES OF AMERICA

Approved electronically by the Commission on July 23, 2020.

Cite as: IACHR, Report No. 198/20. Petition P-524-16. Admissibility. Anastasio Hernández Rojas and family. United States of America. July 23, 2020.

I. INFORMATION ABOUT THE PETITION

Petitioner:	International Human Rights Law Clinic at the University of California (Roxanna Altholz) and Alliance San Diego (Andrea Guerrero)
Alleged victim:	Anastasio Hernandez Rojas and family ¹
Respondent State:	United States of America
Rights invoked:	Articles I (right to life, liberty and personal security); II (right to equality before the law); XVIII (right to a fair trial), XXV (right of protection from arbitrary arrest); and XXVI (right to due process of law) of the American Declaration of the Rights and Duties of Man ²

II. PROCEEDINGS BEFORE THE IACHR³

Filing of the petition	March 30, 2016
Notification of the petition to the State:	May 10, 2017
State's first response:	September 12, 2017

III. COMPETENCE

Competence <i>Ratione personae</i>	Yes
Competence <i>Ratione loci</i>	Yes
Competence <i>Ratione temporis</i>	Yes
Competence <i>Ratione materiae</i>	Yes, American Declaration (instrument of ratification of the OAS Charter deposited on June 19, 1951)

IV. DUPLICATION OF PROCEDURES AND INTERNATIONAL *RES JUDICATA*, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

Duplication of procedures and International <i>res judicata</i> :	No
Rights declared admissible	Articles I (right to life, liberty and personal security); II (right to equality before the law); XVIII (right to a fair trial); XXV (right of protection from arbitrary arrest); and XXVI (right to due process of law) of the American Declaration
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, November 6, 2015
Timeliness of the petition:	Yes

V. SUMMARY OF THE ALLEGED FACTS

1. Petitioners claim that Anastasio Hernandez Rojas, a Mexican national and resident of San Diego, was violently beaten and tasered to death by US Customs and Border Protection (hereinafter, "CBP") agents on May 31, 2010, while he was detained at the Chula Vista Border Patrol Facility and Detention Center. Petitioners hold that the penitentiary mistreatment, physical aggressions amounting to torture, and extrajudicial killing of Anastasio Hernandez took place within a broader pattern of excessive use of police force against Latin American migrants into the United States, which has resulted in nearly fifty killings between 2010 and 2016, and amounts to a context of structural discrimination. Furthermore, Petitioners claim that the United

¹ Petitioners identify the following persons as relatives of Mr. Anastasio Hernández Rojas: (1) Maria Puga, partner; (2) Maria de la Luz Rojas, mother; (3) Porfirio Hernandez, father; (4) Bernardo Hernandez Rojas, brother; (5) Martin Hernandez Rojas, brother; (6) Daisy Alejandra Hernandez, daughter; (7) Yeimi Judith Hernandez, daughter; (8) Fabian Anastasio Hernandez, son; (8) AA., son, born in 2006; (9) BB., daughter, born in 2006. In this report, the IACHR reserves the identity of minors AA. and BB., in order to safeguard their rights.

² Hereinafter the "the American Declaration".

³ The observations submitted by each party were duly transmitted by the Commission to the opposing party.

States has failed to criminally prosecute or impose disciplinary sanctions to the agents who were responsible for the detention, mistreatment, torture and killing of Anastasio Hernandez, thereby violating his family members' rights to justice, truth, full reparations and access to information, as well as their right to psychological integrity.

2. Anastasio Hernandez Rojas was born in 1968 in Mexico and emigrated to San Diego when he was 15 years old, where he eventually established a family composed of himself, his partner Maria and five children, two of which are still underage as of the present date. Having been removed from the United States by immigration authorities in May, 2010, he attempted to re-enter US territory from Mexico and rejoin his family in San Diego; however, he was apprehended on May 28, 2010 by CBP agents, who placed him at the Chula Vista Border Patrol Facility and Detention Center (hereinafter, "the Chula Vista facility"). Petitioners claim that once in detention Mr. Hernandez was subjected successively to physical and verbal mistreatment, beatings, lack of access to medical treatment –which he requested–, lack of access to an immigration judge – which he also requested–, and that thereafter he was the victim of an incident of violent physical aggression in which several CBP agents hogtied him, dragged him, beat him with batons, punches and kicks, stood and kneeled on his body against the ground, and tasered him repeatedly for extended lapses of time, even after he had become unresponsive, thus causing his death. Petitioners specify that as a result of these aggressions Mr. Hernandez sustained extensive bodily injuries, including bruising and abrasions on his face and body, five broken ribs, and hemorrhaging of internal organs; the aggressions caused Mr. Hernandez to suffer a heart attack, cardiac arrest, and brain damage. The officers responsible for these actions initially tried to administer CPR, and fifteen minutes after he became unresponsive he was taken by ambulance to Sharp Chula Vista Hospital, where he was diagnosed with brain death, remaining briefly on life support until he went into cardiac standstill and was pronounced dead on May 31st, 2010. Official autopsies conducted by the US authorities ruled his death as homicide, identifying as its causes the beatings and taserings he suffered. The death of Mr. Hernandez gave rise to two courses of legal action, one criminal, and one civil; no disciplinary measures have been taken to date and the officers who took part in the killing appear to remain on active duty.

3. As for the criminal case, Petitioners indicate that the San Diego Police Department was informed of the incident by CBP agents on May 29, 2010, one day after the beating, and on that date began the criminal investigation. Petitioners argue that CBP was allowed control of the crime scene during this early stage of the investigation, and that CBP agents scattered eyewitnesses from the scene and destroyed images, video and audio taken by such witnesses to the beating, although a number of them were eventually interviewed during the investigation, and one of them posted video and audio recordings of the incident online. Petitioners report that at least twenty-one law enforcement agents were interviewed during the investigation, but most of the interviews took less than fifteen minutes. On July 9, 2010, the San Diego Police Department referred the case to the United States Attorney's Office in San Diego. In May 2012 the US Department of Justice (hereinafter, "DOJ") opened a criminal investigation into Mr. Hernandez's death. Petitioners report that between 2010 and 2012, Mr. Hernandez's relatives repeatedly sought to contact the Civil Rights Division of the DOJ, asking for information on the investigation, but to no avail. On November 6, 2015, the DOJ publicly announced, by means of a press release, its decision to close the investigation into the death of Mr. Hernandez. Citing extensive evidence produced during the criminal investigation, the DOJ concluded that it had no grounds to disprove the CBP agents' claim that Mr. Hernandez was combative, non-compliant and physically assaultive; therefore, they used reasonable force against him in an attempt to subdue and restrain him.

4. With regard to the alleged failure to investigate this crime, Petitioners argue that the United States did not conduct an independent and impartial investigation consistent with the applicable international human rights standards, *inter alia* because of its unjustified delay, and of the DOJ's decision to close it five years later. They also claim that Mr. Hernandez's relatives' right of access to information and to participate in the proceedings was disregarded by the United States, and that the overall outcome of the case has been a serious violation of their right to personal integrity, given the deep psychological and emotional impacts it has borne upon them, particularly upon his children. Finally, the Petitioners hold that being part of a pattern of discriminatory and excessive use of police force against undocumented Latin American immigrants, the case of Mr. Hernandez also violates his and his family's rights to equality before the Law and non-discrimination. They assert that the case of Anastasio Hernandez is one in a long list of cases of killings of unarmed migrants, and also US citizens, at the US-Mexico border.

5. As for the civil case, the Petitioners report that on March 23, 2011, Mr. Hernandez's relatives filed a wrongful death claim against the US Government in the United States District Court for the Southern District of California, on the grounds that US federal agents caused his death violating his constitutional rights. The court denied the defendants' request for a summary judgment on September 29, 2014, also rejecting their claim of sovereign or qualified immunity, and upholding Mr. Hernandez's relatives' right to allege a violation of the *ius cogens* prohibition of torture, as well as common law violations of his constitutional rights. This decision was appealed by the defendants before the Ninth Circuit Court of Appeals, which had the effect of staying the proceedings pending the outcome of the appeal. At the moment of submitting their petition to the Inter-American Commission on Human Rights (hereinafter, "the IACHR"), Petitioners informed that the district court had not established a trial date for the case, which remained unresolved after more than five years. As will be described below, the State reported that in the course of these civil proceedings, a settlement was reached and implemented between the parties.

6. In its response the United States does not contest the facts of Mr. Hernandez's detention, mistreatment, beating, taser and killing by US agents, instead it focuses on Mr. Hernandez's alleged aggressive, non-compliant behavior prior to the response of the law enforcement agents. The State also argues that it is not legally bound by the American Declaration; and that the case should be declared inadmissible in light of the settlement agreement that the United States reached with the relatives of Mr. Hernandez in the course of the civil proceedings followed before US Courts.

7. As for the inadmissibility of the petition, the State maintains that supervening information has rendered the current petition before the IACHR manifestly groundless, thus inadmissible under Article 34 of the IACHR Rules of Procedure. It corroborates that Mr. Hernandez was detained by CBP agents on May 28, 2010, taken to the Chula Vista detention facility, and that in the course of processing and deportation, Mr. Hernandez Rojas physically resisted CBP officers, who took steps to restrain him, including through the use of a taser. Mr. Hernandez Rojas went into cardiac arrest, was transported to a hospital, and died two days later after being removed from life support. The State also confirms that the criminal investigation initiated on May 29, 2010 by the San Diego Police Department, which was referred to the federal prosecutor, was eventually closed by a decision of the DOJ that was described in a Press Release in very detailed terms; the State explains that the investigation was conducted by officials from DOJ's Civil Rights Division, the Federal Bureau of Investigation, and the US Department of Homeland Security's ("DHS") Office of the Inspector General, all of which concluded that *"Mr. Hernandez Rojas was noncompliant and physically assaultive toward CBP officers during processing on May 28, 2010. A thorough review by experienced federal prosecutors determined that the evidence was insufficient to pursue federal criminal civil rights charges or to prove, beyond a reasonable doubt, that any CBP personnel violated federal homicide statutes"*. It also holds that representatives of DOJ and DHS met with the victims and their representatives to inform them on the results of the investigation.

8. With regard to the civil lawsuit filed by the relatives of Mr. Hernandez in the US District Court for the Southern District of California, the State argues that a settlement was reached in the case between the US government and the Petitioners, under which the US Government granted one million dollars to the relatives of Mr. Hernandez Rojas, to settle the civil case. This Settlement was submitted by the parties to the Court, which consequently dismissed the whole case on May 30, 2017. The State holds that the settlement agreement and ensuing dismissal of Petitioners' case in the district court show that Petitioners have received adequate and effective remedies for the actions surrounding Mr. Hernandez's death. Asserting that the petition filed before the IACHR contains claims that effectively mirror those that were the matter of settlement before the US courts in the course of these civil proceedings, the State holds that the petition must be deemed inadmissible, because Petitioners expressly waived their right to bring claims before a reviewing forum, or to claim that the United States violated Mr. Hernandez's rights through the acts or omissions that were the subject-matter of said civil court proceedings. The State also alleges that nothing in the principles established by the American Declaration, or in the rules that govern the procedure before the IACHR, would suggest that the IACHR should intervene in a matter that has been voluntarily settled between a petitioner and the State.

VI. ANALYSIS OF EXHAUSTION OF DOMESTIC REMEDIES, OVERALL ADMISSIBILITY OF THE CLAIM *VIS-Á-VIS* THE REPARATIONS RECEIVED AT THE DOMESTIC LEVEL, AND TIMELINESS OF THE PETITION.

9. The IACHR observes that the fundamental claim in the instant case consists of the alleged torture and extrajudicial killing of victim; the lack of a proper investigation of the facts, and the lack of access to justice for his relatives, which allegedly resulted in the impunity of the perpetrators.

10. In this regard, the IACHR has consistently ruled that in cases of serious violations of the rights to life and physical integrity, such as in cases of possible torture followed by extrajudicial killing, the adequate domestic remedy that needs to be exhausted is the criminal investigation into the facts, aimed at identifying, prosecuting and punishing the perpetrators of such acts.⁴ In the present case, both parties have agreed that criminal investigations were conducted by the competent authorities, referred to federal prosecutors, and eventually closed by a decision of the DOJ made public on November 6, 2015. Moreover, the State does not argue the lack of exhaustion of domestic remedies. Thus, the IACHR concludes that the present petition complies with the requirement of exhaustion of domestic remedies as set forth in article 31 of its Rules of Procedure and 20(c) of its Statute. The IACHR also observes that the present petition was submitted on March 30th, 2016; thus, it was received within six months after the unilateral closure of the investigation by prosecutorial decision; therefore, the petition meets the requirement set forth in Article 32 of the Rules of Procedure.

11. As to the civil case, it came to an end when the parties reached a settlement agreement over the civil claims, thus effectively concluding such domestic remedies, as was expressly acknowledged by the State, as described above. In this regard the IACHR deems necessary to clarify that regardless of the nature and legal effects the said agreement could have under domestic law, access by the victims to the IACHR is an entirely different matter, one governed by international law. Therefore, a petition cannot be, in principle, dismissed in the admissibility stage solely on the basis of a settlement or agreement concluded before domestic courts. Furthermore, the Commission notes that the parties to the civil judicial proceedings before the US District Court for the Southern District of California were pursuing different claims, and seeking remedies of a different nature, through domestic procedures that are distinct from the international ones, and guided by a different body of law. Civil remedies are neither appropriate nor necessary to exhaust before resorting to the IACHR in cases where the violation of the right to life and torture is claimed, and the settlement reached between the parties, by its own terms –literally cited by the State- only applies to claims of a civil nature arising from the facts surrounding the death of Mr. Hernández; the criminal responsibility of the perpetrators of torture or extrajudicial killing is of a fundamentally different legal nature, as is in turn the international responsibility of the State for violation of its human rights obligations. It is the latter form of legal liability, that is, State responsibility under International Human Rights Law, that petitioners pursue through the current proceedings before the Inter-American Human Rights System. In this connection, the Commission will delve, during the merits stage of this case, into the issue of whether a settlement reached between the State and a victim of human rights violations in the course of domestic civil proceedings can possibly preclude such victim's access to international human rights review and protection, in the sense in which the State is arguing that it does; it will also examine whether the State's international human rights obligations can be waived, even retrospectively, by means of a settlement agreement such as this one, and conversely, whether the victims of human rights violations can relinquish their entitlement to full reparations or their right of petition before the Inter-American Human Rights System. For the purposes of the present admissibility stage, suffice it to reiterate the aforementioned distinction which the IACHR has pointed out between civil claims, criminal investigations, and State responsibility for acts of torture and extrajudicial execution, by virtue of which civil remedies need not be exhausted in cases where torture, extrajudicial killings or similar violations are claimed. The Commission therefore denies the State's request for a declaration of inadmissibility of this case under article 34 of its Rules of Procedure.

⁴ See, inter alia: IACHR, Admissibility Report No. 181/18, Petition 300-09, Ronald Bullock, United States of America, December 26, 2018, at para. 16; Admissibility Report No. 72/18, Moises de Jesús Hernández Pinto and family, Guatemala, para. 10; Admissibility Report No. 78/16, Almir Muniz Da Silva, Brazil, para. 31; Admissibility Report No. 118/17, Carmen Luz Cuchimba Vallejo et al, Colombia, p. 8; Admissibility Report No. 156/17, Carlos Alfonso Fonseca Murillo, Ecuador, para. 13; Admissibility Report No. 44/19, Gerson Mendonça de Freitas Filho, Brazil, para. 9.

12. Notwithstanding the foregoing, the IACHR does not ignore the fact that an agreement was reached by the relatives of Mr. Hernandez Rojas, who are also victims in the present petition, and the competent authorities. In this regard, the Commission will assess in the merits stage of the present case to what extent the acceptance of said agreement constitutes a waiver given to the State to its obligations to investigate and punish the perpetrators of the death of Mr. Hernandez. The IACHR will also take into account the fact that the State has already advanced certain monetary compensation to the victims, taking into account also that monetary compensation is only one of the components of the full reparations to which victims are internationally entitled under the American Declaration and customary international law.

VII. ANALYSIS OF COLORABLE CLAIM

13. In the first place, the Commission considers it pertinent to reiterate that the American Declaration of the Rights and Duties of Man is a source of international legal obligations for the United States, and for the other States Parties to the OAS Charter that are not also parties to the American Convention on Human Rights; such international obligations stem from the human rights commitments undertaken by the States under the OAS Charter, which Member States have agreed are contained and defined in the American Declaration, as well as from the customary nature of the human rights protected by the Declaration's provisions, for which reason the IACHR has authority, under Articles 18 and 20 of its Statute, to receive and evaluate claims of violation of these obligations by States. It is therefore legally accurate to describe non-compliance by a State with the human rights guarantees contained in the American Declaration as a violation of the obligations imposed upon that State by international human rights law, thereby disproving the United States' assertion that the American Declaration creates no legally binding obligations.⁵

14. On the grounds of the above, petitioners claim that United States agents committed torture against Anastasio Hernandez Rojas and killed him as a result thereof, thus committing also an arbitrary deprivation of life through the excessive use of force against an unarmed detainee. They claim that the United States has failed to investigate and punish those responsible for the torture and execution of Mr. Hernandez, and that these actions have inflicted serious moral damages upon the members of his family, who have not been awarded the full reparations to which they are entitled. The State has focused on dismissing the legally binding nature of the American Declaration; and held that the case is inadmissible on account of the settlement agreement reached with petitioners in the course of the civil proceedings before the US District Court for the Southern District of California.

15. After assessing the position of the Parties, the IACHR observes that the claims submitted by the Petitioners are not manifestly groundless, and that *prima facie* they may constitute violations of the rights enshrined in Articles I (right to life, liberty and personal security); II (right to equality before the law); XVIII (right to a fair trial), XXV (right of protection from arbitrary arrest); and XXVI (right to due process of law) of the American Declaration in relation to Mr. Anastasio Hernandez Rojas. As well of Articles I (specifically with regard to the right to personal integrity), XVIII and XXVI of the American Declaration in relation to the relatives of Mr. Hernandez Rojas duly identified in the present report.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles I, II, XVIII, XXV and XXVI of the American Declaration of the Rights and Duties of Man.

2. To notify the parties of this decision; to continue with the analysis on the merits; and to publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 23rd day of the month of July, 2020. Antonia Urrejola, First Vice President; Flávia Piovesan, Second Vice President; Esmeralda E. Arosemena Bernal de Troitiño, and Stuardo Ralón Orellana, Commissioners.

⁵ IACHR. Admissibility Report No. 57/06, Hugo Armendariz, United States, at para. 30.