

Missing Migrants in the United States: International Responsibility, The Search for Accountability and Legal Lacunae

A Report of the Boston University International Human Rights Clinic

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Missing Migrants in the United States: International Responsibility, The Search for Accountability and Legal Lacunae

I. Introduction

Since 1994, more than 10,000 people have died in their attempt to cross the US southern border.¹ The majority of deaths are related to exposure to the elements, and deaths due to environmental heat represent approximately 73 percent of migrant deaths in this area.² More people have died or gone missing while crossing the southwestern border of the United States than were killed in both the September 11th terrorist attacks and Hurricane Katrina combined.³ In fact, over 1,200 sets of human remains have been recovered over the past two decades in Arizona alone.⁴ For migrants crossing into the United States through the Arizona desert, 2020 was the deadliest year on record.⁵ Many individuals whose remains have been found have not been identified and are ‘missing.’⁶ Despite a lack of definitive data, based on the evidence of mass graves of unidentified migrants in South Texas and the testimony of family members, local medical examiners, and NGO workers, there is an ongoing and unaddressed tragedy of missing migrants at the U.S. Mexico Border.⁷

International legal obligations pertaining to the missing migrant crisis are grounded in the right to life, guaranteed in several instruments to which the United States is bound, including the Universal Declaration on Human Rights and International Covenant on Civil and Political Rights

¹ See Jonathan Moore, *Crossing Over: Enrique Morales, Founder of Border Angels Talks on the Border Crisis and How We Can Stop It*, LATINONE (July 14, 2014), <http://www.latinone.com/articles/6786/20140714/border-angels-reveals-the-truth-about-the-immigration-crisis-and-how-we-can-stop-it-reform-news-update.htm>.

² See KATHRYN HAMPTON, ZERO PROTECTION: HOW U.S. BORDER ENFORCEMENT HARMS MIGRANT SAFETY AND HEALTH 5 (2019), https://phr.org/wp-content/uploads/2019/08/PHR_Zero-Protection_How-US-Border-Enforcement-Harms-Migrant-Safety-and-Health_Jan-2019-8.pdf.

³ See Manny Fernandez, *A Path to America, Marked by More and More Bodies*, N.Y. TIMES (May 4, 2017), <https://www.nytimes.com/interactive/2017/05/04/us/texas-border-migrants-dead-bodies.html?mtrref=www.google.com&assetType=REGIWALL&mtrref=www.nytimes.com&assetType=REGIWA LL>.

⁴ Complaint for Declaratory and Injunctive Relief at 7, *No More Deaths v. United States Customs and Border Protection*, No. 21-cv-954 (S.D.N.Y. Feb. 3, 2021) (detailing information obtained from Colibri).

⁵ *Id.*

⁶ See e.g., NO MORE DEATHS, DISAPPEARED: HOW THE US BORDER ENFORCEMENT AGENCIES ARE FUELING A MISSING PERSONS CRISIS (2020), <http://www.thedisappearedreport.org/uploads/8/3/5/1/83515082/disappeared--introduction.pdf> (introducing a three-part report by No More Deaths exploring the Missing Migrant Crisis and detailing accounts from family members of the missing).

⁷ See Samuel Gilbert, ‘Treated like Trash’: *The Project Trying to Identify the Bodies of Migrants*, THE GUARDIAN (Jan. 12, 2020), <https://www.theguardian.com/us-news/2020/jan/12/operation-identification-texas-migrant-remains-identify> (last visited Apr. 15, 2021) (discussing the activities of Operation Identification, an NGO in Texas trying to identify migrant remains that have been buried in unmarked mass graves by county authorities).

(ICCPR). Article 2 of the ICCPR ensures that the rights enumerated in the treaty pertain to any individuals within the host State's territory or subject to its jurisdiction.⁸ Under the ICCPR, States Parties have a positive duty to protect against violations by their agents and by private persons or entities.⁹ Further, States Parties are obliged to refrain from engaging in conduct which results in the arbitrary deprivation of life.¹⁰ The right to life places additional duties on states whenever there are arbitrary deprivations of life, such as disappearances or deaths due to negligent or intentional state action, to engage in prompt and thorough search and rescue operations; investigate and identify unidentified remains; respectfully repatriate remains; and provide remedies for violations of the right to life.

Contrary to these binding obligations, the United States has a long history of designing and utilizing border "protection" policies with the explicit aim of increasing the danger and death rate associated with irregular migration. In 1994, the United States adopted a border patrol enforcement strategy termed "Prevention Through Deterrence" ("PTD"). As stated by the 1994 Prevention Through Deterrence memo, a document prepared by the U.S. Border Patrol and signed by Doris Meissner, Commissioner of the U.S. Immigration and Naturalization Service, setting forth a Border Patrol National Strategy Plan for 1994 and beyond, the intention behind the strategy was to reduce the number of irregular migrants crossing into the United States by forcing them over "more hostile terrain, less suited for crossing and more suited for enforcement."¹¹ Two decades of research has proved that the policy failed in deterring migration, "but has succeeded in shaping border crossing into a well-organized and violent social process."¹² Despite such a high death count on U.S. soil, and despite policies which directly lead to the arbitrary deprivation of life of irregular migrants, the United States government has

⁸ International Covenant on Civil and Political Rights, art. 2, 16 December 1966, 999 U.N.T.S. 171; *See also* UN Human Rights Committee (HRC), General Comment no. 31 [80], The Nature of the General Legal Obligations Imposed on States Parties to the Covenant, Eightieth Session, para. 3, UN Doc CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

⁹ *See* U.N. Human Rights Committee (HRC), General Comment No. 31, The Nature of the General Legal Obligations Imposed on States Parties to the Covenant, Eightieth Session, para. 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) ("[T]he positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of covenant rights.").

¹⁰ *See infra* discussion at Section III, Part 3(a).

¹¹ U.S. Border Patrol, *Border Patrol Strategic Plan 1994 and Beyond: National Strategy*, (July 1994) pg. 7 (on file with author). *See also* Chad C. Haddal, Cong. Rsch. Serv., RL32562, *Border Security: The Role of the U.S. Border Patrol 19* (2010), <https://fas.org/sgp/crs/homesecc/RL32562.pdf> (acknowledging that "the terrain and dangers involved with crossing may lead illegal migrants to become lost or incapacitated" and that there had been an increasing number of migrant deaths along the border after prevention through deterrence had been implemented); *Measuring Border Security: U.S. Border Patrol's New Strategic Plan and the Path Forward*, Hearing Before the Subcomm. on Border and Maritime Sec. of the H. Comm. on Homeland Sec., 112 Cong. 48 (2012) ("Available data about known migrant deaths along the Southwest Border suggests that mortality rates have risen and that border crossings have become more hazardous since the 'prevention through deterrence' policy went into effect in the 1990s.").

¹² THE UNDOCUMENTED MIGRATION PROJECT, <https://www.undocumentedmigrationproject.org/background1> (last visited May 14, 2021).

accepted little responsibility in addressing the crisis. This report builds on an urgent call from the families of migrants across the Central American region for a transnational response to the crisis of migrant disappearances and a recognition by the United States of its international and regional obligations to respect the right to life.

The United States must respond effectively to migrant disappearances under binding domestic, regional, and international legal obligations. This includes instituting uniform state or federal policies to (1) conduct prompt and thorough search and rescue missions for missing migrants; (2) investigate and identify migrant remains; (3) respectfully repatriate migrant remains; (4) and provide adequate remedies to victim's families. To fulfill these obligations and to comply with its duty to protect the right to life, the United States must end its policies which directly lead to migrant deaths and disappearances.

Further, migration and the disappearances that result are regional phenomena requiring regional solutions. The United States also has to comply with regional obligations to protect the right to life, which require the United States to coordinate with the Northern Triangle countries—Guatemala, Honduras, and El Salvador—and Mexico to ensure the proper functioning of Mexico's Mechanism of External Support for the Search and Investigation of Disappearance ("MAE").¹³ The MAE is a transnational mechanism established to allow families to access administrative and judicial institutions in Mexico to report the disappearance of a relative, launch an investigation, participate in criminal proceedings against alleged perpetrators of enforced disappearances, and obtain reparations for suffering caused by the disappearance.

This report is based on fieldwork and research conducted over the course of a year by the Boston University International Human Rights Clinic (IHRC).¹⁴ Interviews were conducted with non-governmental organizations in Arizona, California, New Mexico, and Texas, who have been at the forefront of addressing migrant disappearances.¹⁵

¹³ See Fundacion Para la Justicia y El Estado Democratico de Derecho (FJEDD) & Oficina En Washington para Asuntos Latinoamericanos (WOLA), *Guia Para el Uso del Mecanismo De Apoyo Exterior* (2017), <https://www.wola.org/wp-content/uploads/2017/04/Mecanismo-de-Apoyo-Exterior-Mexicano-MAE.pdf>.

¹⁴ The report builds on 5 years' worth of fieldwork and research conducted in Mexico, Honduras, Guatemala and El Salvador that culminated in a separate report on migrant disappearances across Central America and Mexico, cited below. Field interviews for the US research included meetings with non-governmental organizations who have been at the forefront of addressing the Migrant Crisis. In addition, recent publications by No More Deaths and the University of Texas at Austin's Strauss Center for International Security and Law provided valuable insights into the scope of the crisis.

¹⁵ Interviews were conducted with the Colibrí Center for Human Rights, Humane Borders, the South Texas Human Rights Center, ACLU of Arizona, ACLU of Texas, ACLU of New Mexico, and the Pima County Office of the Medical Examiner, among others. Further information was attained through the webinar, *Dead Along Our Southern Border: Immigration, Regulation, Forensic Anthropology, and Human Rights*, hosted by the University of New Mexico Latin American & Iberian Institute in February of 2021. Particularly valuable information was provided by: Kate Spradley of Operation Identification (OpID); Tessa Lee of the San Diego Medical Examiner's office; Heather Edgar of the New Mexico Office of Medical Investigator; and Bruce Anderson of the Pima County Office of the Medical Examiner.

Following the Introduction, a detailed Background in Section II sets out the discussion of root causes of irregular migration and the U.S.'s role in causing migrant deaths. Section III describes the international and regional legal frameworks governing this issue. Sections IV through VII focus more concretely on the issues of investigations of migrant deaths, identification of migrant remains, repatriation of remains, and appropriate remedies. Each section discusses the relevant United States federal and state laws, international and regional obligations, and the challenges and gaps in meeting those obligations. Section VIII sets out recommendations to address the crisis of migrant deaths and disappearances.

II. Background

On February 18, 2021 the U.S. Citizenship Act of 2021 was introduced in the House and Senate by Rep. Linda Sanchez and Senator Bob Menendez, respectively. One of the legislation's stated aims is to address "the root causes of migration from Central America" and ensure "that the United States remains a refuge for those fleeing persecution."¹⁶ While the stance is admirable, the U.S. has yet to take responsibility for over a century of intervention in Central America which has fostered the very conditions that drive Central American migration today. Policies implemented by the United States' government have contributed to push and pull factors that have driven undocumented migration for decades.¹⁷

Most migrants are forced to flee from the Northern Triangle as a result of push factors such as structural violence, organized criminal gangs, and poor living conditions.¹⁸ The Northern Triangle Countries are the most violent in Central America and have some of the highest recorded homicide rates in the world.¹⁹ In addition, the Northern Triangle countries experience

¹⁶ Briefing Room, *Fact Sheet: President Biden Sends Immigration Bill to Congress as Part of His Commitment to Modernize our Immigration System*, THE WHITE HOUSE (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-biden-sends-immigration-bill-to-congress-as-part-of-his-commitment-to-modernize-our-immigration-system/>.

¹⁷ See *Push or Pull Factors: What Drives Central American Migration to the U.S.?*, NATIONAL IMMIGRATION FORUM (July, 23, 2019), <https://immigrationforum.org/article/push-or-pull-factors-what-drives-central-american-migrants-to-the-u-s/#:~:text=Push%20%80%9D%20factors%20are%20conditions%20in,factors%20include%20violence%2C%20gender%20inequality%2C> ("Push' factors are conditions in migrants' home countries that make it difficult or even impossible to live there, while 'pull' factors are circumstances in the destination that make it a more attractive place to live.").

¹⁸ Silma Estrada, *Corrupción e impunidad, "verdaderas causas" de migración forzada en Honduras*, RADIO HRN, Aug. 31, 2015, <http://www.radiohrn.hn/l/noticias/corrupci%C3%B3n-e-impunidad-verdaderas-causas-demigraci%C3%B3n-forzada-en-honduras>. For further information on the current conditions of structural violence, organized crime, and living conditions in the Northern Triangle and Mexico, see BOSTON UNIVERSITY INTERNATIONAL HUMAN RIGHTS CLINIC, *DISAPPEARED MIGRANTS FROM CENTRAL AMERICA: TRANSNATIONAL RESPONSIBILITY, THE SEARCH FOR ANSWERS AND LEGAL LACUNAE*, at Section IV (2021), <https://www.bu.edu/law/files/2021/01/Migrant-Disappearances.pdf>.

¹⁹ See *Intentional Homicides* (per 100,000 people), THE WORLD BANK (2013), http://data.worldbank.org/indicator/VC.IHR.PSRC.P5/countries/1W?order=wbapi_data_value_2013%20wbapi_data_value%20wbapi_data_value-last&sort=desc&display=default.

high levels of gang activity, extortion, domestic violence, and lack of economic opportunity.²⁰ Weak political and law enforcement institutions and pervasive corruption perpetuates the instability and impunity in the region.²¹

The United States' "history of intervention is inextricable from the contemporary Central American crisis of internal and international displacement and migration."²² In 1904 Theodore Roosevelt declared the U.S.'s right to exercise "international police power" in Latin America.²³ Since then, and prior to it as well, the U.S. has engaged in dozens of military interventions and exploitative economic policies within the region.²⁴ These interventions have served to undermine democracy and economic stability in the region, contributing to the poverty and violence that drives people from the Northern Triangle and Mexico towards the United States.²⁵ At the same

²⁰ See *Intentional Homicides* (per 100,000 people), THE WORLD BANK (2013), http://data.worldbank.org/indicator/VC.IHR.PSRC.P5/countries/1W?order=wbapi_data_value_2013%20wbapi_data_value%20wbapi_data_value-last&sort=desc&display=default (last visited May 4, 2021). With 84 homicides per 100,000 people, Honduras had the highest number of recorded intentional homicides in the world in 2013. El Salvador was ranked third in the world, with 40 homicides per 100,000 people in 2013. *Id.* See *Intentional homicide, counts and rates per 100,000 population*, U.N. OFF. ON DRUGS AND CRIME, https://data.unodc.org/sys/rpt?reportfile=crime-statistics-homicide-count-data®ION=Americas®ION__label=Americas&SUBREGION=Central%20America&SUBREGION__label=Central+America&COUNTRY=__ALL&COUNTRY__label=All+%288%29&format=html&fullscreen=true&showtoc=true#state:0; see also OBSERVATORIO DE LA VIOLENCIA, *Boletín Nacional, Edición No.40, Febrero 2016, Enero - Diciembre 2015*, <http://www.iudpas.org/pdf/Boletines/Nacional/NEd40EneDic2015.pdf>.

Cristina Eguizábal, Matthew C. Ingram, Karise M. Curtis, Aaron Korhuis, Eric L. Olson, Nicholas Phillips, *Crime and Violence in Central America's Northern Triangle 1*, WOODROW WILSON CENTER REPORTS ON THE AMERICAS (2015). In 2018, over 48% of Honduras' population was living in poverty. *Data: Honduras*, THE WORLD BANK, <http://data.worldbank.org/country/honduras>. In 2018, over 26% of the population of El Salvador was living in poverty, *Data: El Salvador*, THE WORLD BANK, <http://data.worldbank.org/country/el-salvador>. In 2014, nearly 60% of the population of Guatemala was living in poverty, *Data: Guatemala*, THE WORLD BANK, <http://data.worldbank.org/country/guatemala>.

²¹ See Cristina Eguizábal, Matthew C. Ingram, Karise M. Curtis, Aaron Korhuis, Eric L. Olson, Nicholas Phillips, *Crime and Violence in Central America's Northern Triangle 2*, WOODROW WILSON CENTER REPORTS ON THE AMERICAS (2015).

²² *A Century of U.S. Intervention Created the Immigration Crisis*, Mark Tseng-Putterman (June 20, 2018), <https://medium.com/s/story/timeline-us-intervention-central-america-a9bea9ebc148>.

²³ See *Roosevelt Corollary to the Monroe Doctrine*, 1904, OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1899-1913/roosevelt-and-monroe-doctrine> (last visited May 14, 2021).

²⁴ See Noam Chomsky, *Patterns of Intervention*, in *Turning the Tide: US Intervention in Central America and the Struggle for Peace* 117 (1985) (providing a comprehensive overview of the ways in which the United States intervened in Central America during the Reagan years); see also Robert H. Holden, *The Real Diplomacy of Violence: United States Military Power in Central America, 1950-1990*, 15 INT'L HIST. REV. 221 (1993). For a comprehensive review of U.S. economic policies within Central America, see David M. Pletcher, *United States Relations with Latin America: Neighborliness and Exploitation*, 82 AM. HIST. REV. 39 (1977); see also Emma Smith, Scarlett Alysorth, Molly Garyantes, Francesca Duong & Medha Krishen, *U.S. Involvement in the Northern Triangle and its Effects on Immigration*, U. MICH. UNDERGRADUATE RES. J. (Winter 2020).

²⁵ See Rebecca Gordon, *The Current Migrant Crisis Was Created by US Foreign Policy, Not Trump*, THE NATION (Aug. 16, 2019), <https://www.thenation.com/article/archive/central-america-migrant-crisis-foreign-policy-trump/>; Julian Borger, *Fleeing a Hell the US Helped Create: Why Central Americans Journey North*, THE GUARDIAN (Dec. 19, 2018), <https://www.theguardian.com/us-news/2018/dec/19/central-america-migrants-us-foreign-policy>; see also Hector Perla Jr, *The Impact of CAFTA: Drugs, Gangs, and Immigration*, TELESUR (Mar. 1, 2016), <https://www.telesurenglish.net/opinion/The-Impact-of-CAFTA-Drugs-Gangs-and-Immigration-20160301-0008.html>; DeVahnte Mosley, *U.S. Government Intervention in Mexico and Latin America, Dignity for Migrants*,

time, the United States has contributed millions of dollars towards Mexico's southern border securitization, making the journey migrants take increasingly perilous.²⁶

Among the various policies creating push factors from Central America towards the United States is the Merida Initiative. In 2007, as a result of increasing rates of drug trafficking, Mexican President Felipe Calderon asked U.S. President George W. Bush for assistance in combatting drug and weapons trafficking, and the Merida Initiative was born. The Initiative, instituted in 2008 and modeled after Plan Colombia, is a security cooperation agreement between the United States and Mexico with the declared aim of combatting drug trafficking, transnational organized crime, and money laundering.²⁷ Between 2008 and 2019, the United States allocated over \$3.0 billion in aid to Mexico via the Merida initiative.²⁸ These funds have been utilized to institute comprehensive justice sector reforms in Mexico, train Mexican law enforcement, and establish several anti-corruption programs.²⁹

The Merida Initiative has been the framework for the majority of U.S. foreign aid to Mexico over the past decade.³⁰ However, since the Initiative began, violence and institutionalized corruption within Mexico have only worsened. The Mexican government, with the aid of the United States, focused their efforts and funding on arresting individual kingpins of organized crime, rather than a comprehensive approach to rooting out the organizations in their entirety. As the war on drugs intensified, Mexican criminal organizations looked for other ways to make revenue.³¹ They turned to extortion, kidnapping, auto theft, human smuggling, retail drug sales, and other illicit enterprises.³² Thus, the unprecedented spike in kidnappings and disappearances in Mexico can be traced to the consequences of the Merida Initiative.³³ Several human rights groups have

<http://dignityformigrants.com/past-present/devahnte-economic-factors/> (last visited May 4, 2021); Public Citizen, Failed Trade Policy & Immigration: Cause & Effect https://mkus3lurbh3lbztg254fzode-wpengine.netdna-ssl.com/wp-content/uploads/failed-trade-policy-and-immigration_4.pdf (last visited May 4, 2021).

²⁶ See Cong. Rsch. Serv., IF10215, Mexico's Immigration Control Efforts (2020)

<https://fas.org/sgp/crs/row/IF10215.pdf> ("Since FY 2014, the State Department has allocated over \$200 million in Merida Initiative funding to support Mexico's immigration control and border/port security efforts.")

²⁷ See *The Merida Initiative*, U.S. Embassy & Consulates in Mexico, <https://mx.usembassy.gov/our-relationship/policy-history/the-merida-initiative/> (last visited May 14, 2021). Plan Colombia was a United States foreign aid, military aid, and diplomatic initiative aimed at combatting the Colombian drug cartels and ending the Colombian armed conflict. For a general overview of the plan, see DANIEL MEJIA, PLAN COLOMBIA: AN ANALYSIS OF EFFECTIVENESS AND COSTS (2016), <https://www.brookings.edu/wp-content/uploads/2016/07/mejia-colombia-final-2.pdf>.

²⁸ CLARE RIBANDO SEELKE, CONG. RESEARCH SERV., IF10578, MEXICO: EVOLUTION OF THE MERIDA INITIATIVE, 2007-2020, at 1 (2021).

²⁹ *Id.*

³⁰ See generally *id.*

³¹ IOAN GRILLO, EL NARCO: INSIDE MEXICO'S CRIMINAL INSURGENCY 265 (2012). See also Anna Grace, *10 Years of the Merida Initiative: Violence and Corruption*, INSIGHT CRIME (Dec. 26, 2018), <https://insightcrime.org/news/analysis/merida-initiative-failings-violence-corruption/>.

³² KRISTIN FINKLEA & CLARE RIBANDO SEELKE, CONG. RESEARCH SERV., R41349, U.S. – MEXICAN SECURITY COOPERATION: THE MERIDA INITIATIVE AND BEYOND 9 (2017).

³³ Tim MacGabhann, *Mexico's Plan Merida on Trial*, TELESUR, Sept. 26, 2015,

<https://www.telesurenglish.net/opinion/Mexicos-Plan-Merida-on-Trial-20150926-0020.html>.

explicitly blamed the program for worsening Mexico's security and human rights situation.³⁴ As a result, individuals living within Mexico – and beyond – have been pushed to flee the violence and corruption, seeking sanctuary in the United States.

Closely related to Plan Merida is Plan Frontera Sur. In response to a surge in Central American migrants and families crossing the Mexico-Guatemalan border in 2014, Mexico initiated Plan Frontera Sur on July 7th, 2014.³⁵ The two main objectives of the program were “to protect migrants who enter Mexico” and “to manage the ports of entry in a way that promotes the security and prosperity of the region.”³⁶ Funding for Plan Frontera Sur came directly from the United States via Plan Merida, and represents just one iteration of the United States externalizing its border policies.³⁷

Plan Frontera Sur was conceived as an instrument to “foster development and reinforce border security while mitigating migrants’ vulnerability.”³⁸ However, according to the Washington Office on Latin America (“WOLA”), the Plan has greatly increased the danger associated with migration from the Northern Triangle and Mexico towards the United States.³⁹ The plan has

³⁴ *Id.* See also *México: Eventos de 2009*, HUM. RTS. WATCH, <https://www.hrw.org/es/world-report/2010/country-chapters/259138>; *La Iniciativa Mérida y la seguridad ciudadana en México y Centroamérica*, WASH. OFF. ON LATIN AM., Mar. 9, 2008, <https://www.wola.org/es/2008/03/la-iniciativa-merida-y-la-seguridad-ciudadana-en-mexico-y-centroamerica/>.

³⁵ http://dof.gob.mx/nota_detalle.php?codigo=5351463&fecha=08/07/2014. See also Christopher Wilson & Pedro Valenzuela, *Mexico’s Southern Border Strategy: Programa Frontera Sur*, WILSON CENTER: MEXICO INSTITUTE (July 11, 2014), https://www.wilsoncenter.org/sites/default/files/media/documents/publication/Mexico_Southern_Border_Strategy.pdf; See also Adam Isaacson, Maureen Meyer, Gabriela Morales, *Mexico’s Other Border: Security, Migration, and the Humanitarian Crisis at the line with Central America*, WASHINGTON OFFICE ON LATIN AMERICA (June 17, 2014), <https://www.wola.org/analysis/new-wola-report-on-mexicos-southern-border/>. See also LUIS A. ARRIOLA VEGA, ISSUE BRIEF: MEXICO’S NOT-SO-COMPREHENSIVE SOUTHERN BORDER PLAN (2016), https://scholarship.rice.edu/bitstream/handle/1911/92470/BI-Brief-080516-MEX_Border.pdf?sequence=1&isAllowed=y.

³⁶ Wilson, *supra* note 35, at 1. For a comprehensive discussion on the results of Plan Frontera Sur, see ADAM ISACSON, MAUREEN MEYER & HANNAH SMITH, MEXICO’S SOUTHERN BORDER: SECURITY, CENTRAL AMERICAN MIGRATION, AND U.S. POLICY, WASHINGTON OFFICE ON LATIN AMERICA (November 2015), https://www.wola.org/files/WOLA_Increased_Enforcement_at_Mexico's_Southern_Border_Nov2015.pdf.

³⁷ A report from the Congressional Research Service acknowledged that the U.S. government supported “the Mexican Government’s effort to secure its porous southern border” through Merida Initiative funds. See Clare R. Seelke, Cong. Rsch. Serv., R42917, Mexico and U.S. Relations 22 (2016) <http://fas.org/sgp/crs/row/R42917.pdf>. See also Alejandra Castillo, *Programa Frontera Sur: The Mexican Government’s Faulty Immigration Policy*, COUNCIL ON HEMISPHERIC AFFAIRS (Oct. 26, 2016), <https://www.coha.org/programa-frontera-sur-the-mexican-governments-faulty-immigration-policy/>. See also Muzaffar Chishti & Jessica Bolter, Migration Policy Institute, *Interlocking Set of Trump Administration Policies at the US-Mexico Border Bars Virtually all from Asylum* (Feb. 27, 2020), <https://www.migrationpolicy.org/article/interlocking-set-policies-us-mexico-border-bars-virtually-all-asylum>.

³⁸ Alfredo Arriola Vega, *Policy Adrift: Mexico’s Southern Border Program*, RICE UNIVERSITY’S BAKER INSTITUTE FOR PUBLIC POLICY 2 (June 2017), <https://www.bakerinstitute.org/media/files/files/fa7ac127/MEX-pub-FronteraSur-062317.pdf>. See also LUIS ALFREDO ARRIOLA VEGA, POLICY ADRIFT: MEXICO’S SOUTHERN BORDER PROGRAM 12 (2017), <https://www.bakerinstitute.org/media/files/files/fa7ac127/MEX-pub-FronteraSur-062317.pdf>.

³⁹ ADAM ISACSON, MAUREEN MEYER, & HANNAH SMITH, INCREASED ENFORCEMENT AT MEXICO’S SOUTHERN BORDER: AN UPDATE ON SECURITY, MIGRATION, AND U.S. ASSISTANCE 2 (2015),

caused migrants to take new and dangerous routes, has resulted in excessive use of force by state officials, and crimes and abuses against migrants traveling through Mexico have continued to occur at alarming rates.⁴⁰

Plan Frontera Sur has increased the violence, mistreatment, and lack of due process in deportations of migrants from Mexico. Deportations of Central Americans from Mexico rose by nearly 70% in the first 13 months of the Plan.⁴¹ Human Rights Watch has “documented many cases of children who have tried to seek humanitarian protection in Mexico, have been met with detention, a lack of a meaningful opportunity to make their claims and been sent back to Central America” in violation of their right to due process and to asylum.⁴² Further, in just the first six months of 2015, Mexico’s National Commission on Human Rights logged 567 complaints of abuse by Mexican migration agents, which was a 39% increase from the previous 12-month period. Irregular migrants caught by authorities often end up in the largest migrant detention center in Latin America, where they wait to be bused back to their country of origin. Mexico also engages widely in arbitrary deportations without due process, and those who might qualify as asylum-seekers encounter life-threatening situations in their countries of origin as a result.⁴³

More worrying still, since Frontera Sur’s inception, there have been higher rates of death and disappearances of migrants traveling through Mexico. “The most salient critique about the CPSB [Plan Frontera Sur] is that the program has made the journey through Mexico more perilous for migrants because it has forced them to seek alternative routes, many of which are much more dangerous to traverse.”⁴⁴ WOLA has reported an uptick in human rights violations and abuses against migrants as they travel through Mexico, including robbery, kidnapping, sexual assault, disappearances, murder, and human trafficking.⁴⁵

Unfortunately, the push factors that have compounded the consequences of Plan Merida, especially that of violence, continue. In January of 2021, the Congressional Research Service

https://www.wola.org/files/WOLA_Increased_Enforcement_at_Mexico's_Southern_Border_Nov2015.pdf [hereinafter WOLA 2015 Report]. See also ADAM ISACSON, MAUREEN MEYER, & HANNAH SMITH, MEXICO’S SOUTHERN BORDER: SECURITY, CENTRAL AMERICAN MIGRATION, AND U.S. POLICY 3-4 (2017), <https://www.justice.gov/eoir/page/file/980081/download> [hereinafter WOLA 2017 Report].

⁴⁰ See WOLA 2015 Report, *supra* note 48, at 2, 22; WOLA 2017 Report, *supra* note 48, at 4, 13.

⁴¹ See Lorne Matalon, *The Costs Behind a Migrant Crisis: Tracking US Influence on Mexico’s Southern Border Plan*, FRONTERAS (June 7, 2016), <https://fronterasdesk.org/content/10325/costs-behind-migrant-crisis-tracking-us-influence-mexicos-southern-border-plan>. See Also John Holman, *Mexico’s ‘Invisible Wall,’ a Migrant Double Standard*, ALJAZEERA (Feb. 16, 2017), <https://www.aljazeera.com/features/2017/2/16/mexicos-invisible-wall-a-migrant-double-standard>.

⁴² *Id.* (quoting Clara Long, with Human Rights Watch in San Francisco).

⁴³ See ZIMENA SUAREZ, JOSE KNIPPEN, & MAUREEN MEYER, A TRAIN OF IMPUNITY: THOUSANDS OF MIGRANTS IN TRANSIT FACE ABUSES AMID MEXICO’S CRACKDOWN 10 (2016), <https://www.wola.org/wp-content/uploads/2016/09/A-Trail-of-Impunity-2016.pdf>.

⁴⁴ See Vega, *supra* note 36, at 3.

⁴⁵ See WOLA 2017 Report, *supra* note 48, at 15. See also Mexico: *Abuses Against Asylum Seekers at US Border*, HUMAN RIGHTS WATCH (Mar. 5, 2021), <https://www.hrw.org/news/2021/03/05/mexico-abuses-against-asylum-seekers-us-border#>.

noted that “homicides in Mexico have reached record levels in each of the last four years.”⁴⁶ Despite the U.S. Department of Homeland Security having recognized strong push factors, the United States continues to implement border enforcement regimes with the intended purpose of increasing the dangers associated with migrating to the United States.⁴⁷ The 1994 Prevention Through Deterrence memo explicitly states: “the prediction is that with traditional entry and smuggling routes disrupted, illegal traffic will be deterred, or forced over more hostile terrain, less suited for crossing and more suited for enforcement.”⁴⁸ The document recognizes that migrants crossing in the remote areas that Border Patrol pushes them towards will “find themselves in mortal danger.”⁴⁹ To further those ends, the United States has implemented dozens of policies, in addition to Mexico’s Plan Frontera Sur, which make legal migration and asylum applications tedious and difficult, and in some cases dangerous.

These policies include the Migrant Protection Protocols, Prompt Asylum Claim review, Humanitarian Asylum Review Process, Metering, and Asylum Transit Bans. Often referred to as the “Remain in Mexico program,” under the Migrant Protection Protocols, individuals who arrive at the southern border and request asylum are given notices to appear in immigration court and sent to Mexico to wait for their hearing. By forcing migrants to wait in Mexico, with little social support, and no protection, the United States directly places many migrants in danger and denies them access to due process.⁵⁰ More than 71,000 asylum seekers were sent to Mexico to await asylum hearings under the Remain in Mexico program.⁵¹ Between March 2020 and March 2021, the US carried out more than 400,000 migrant expulsions, including asylum seekers who were denied the chance to make their claims, under travel restrictions purportedly to prevent the spread of COVID-19.⁵²

In late October 2019, CBP began two pilot programs in El Paso: the Prompt Asylum Claim Review (PACR) program and the Humanitarian Asylum Review Process (HARP). Under these programs, individuals are not transferred to ICE detention but instead are locked in CBP short-term detention facilities throughout the entire “expedited removal process.”⁵³ Individuals put through the programs are given 30 minutes to an hour to contact a lawyer before the credible fear

⁴⁶ Clare Ribando Seelke, CONG. RESEARCH SERV., IF10578, Mexico: Evolution of the Merida Initiative, 2007-2020, at 1 (2021), <https://fas.org/sgp/crs/row/IF10578.pdf>.

⁴⁷ Ana Gonzalez-Barrera, Jens Manuel Krogstad, & Mark Hugo Lopez, *DHS: Violence, Poverty is Driving Children to Flee Central America to U.S.*, PEW RESEARCH CENTER (July 1, 2014), <https://www.pewresearch.org/fact-tank/2014/07/01/dhs-violence-poverty-is-driving-children-to-flee-central-america-to-u-s/>.

⁴⁸ U.S. Border Patrol, *Border Patrol Strategic Plan: 1994 and Beyond*, NATIONAL STRATEGY MEMO (1994) p. 7.

⁴⁹ *Id.* at 2.

⁵⁰ See AMERICAN IMMIGRATION COUNCIL, POLICIES AFFECTING ASYLUM SEEKERS AT THE BORDER 2-3 (2020) https://www.americanimmigrationcouncil.org/sites/default/files/research/policies_affecting_asylum_seekers_at_the_border.pdf; “We Can’t Help You Here”: US Returns of Asylum Seekers to Mexico, HUMAN RIGHTS WATCH (July 2, 2019), <https://www.hrw.org/report/2019/07/02/we-cant-help-you-here/us-returns-asylum-seekers-mexico>.

⁵¹ *Mexico: Abuses Against Asylum Seekers at US Border*, HUMAN RIGHTS WATCH (Mar. 5, 2021, 1:00AM), <https://www.hrw.org/news/2021/03/05/mexico-abuses-against-asylum-seekers-us-border>.

⁵² *Id.*

⁵³ AMERICAN IMMIGRATION COUNCIL, POLICIES AFFECTING ASYLUM SEEKERS, *supra* note 50, at 7.

interview and are not permitted any further phone calls outside of CBP detention. If they do not pass the credible fear interview, the immigration judge appeal occurs over the telephone.⁵⁴ Under “metering,” U.S. Customs and Border Protection limits the number of individuals who are permitted to access the asylum process each day at ports of entry across the border.⁵⁵ This is one of many tactics used by CBP officers to turn away asylum seekers.⁵⁶ Asylum Transit Bans act to ban asylum for any individuals who enter the United States after transiting through another country after leaving their home.⁵⁷

The above policies, despite claiming to reduce the dangers and abuses associated with migration and seeking asylum, have only served to contribute to those dangers and abuses. “[T]hese policies have not had any meaningful long-term effect despite the tremendous hardship they have created.”⁵⁸ Human Rights Watch has reported that asylum seekers sent to Mexico during the administration of former US president Donald Trump have suffered violence and extortion by Mexican police, immigration agents, and criminal groups.⁵⁹ As one activist put it, “the situation [the United States has] created at the border, with the stay in Mexico policy, . . . that is where mass graves are happening now. Because the place is basically lawless, and people are desperate, and people are being hammered by COVID, and it is being run by gangs. It’s one of those things there where the mass graves are being created by our policy, but they are not being created on our land.”⁶⁰

Despite these policies, which attempt to dissuade asylum seekers from coming to the United States, Border Patrol apprehension numbers have remained steady, and in some years have even increased.

⁵⁴ *Id.*

⁵⁵ *Id.* at 1.

⁵⁶ *Id.*

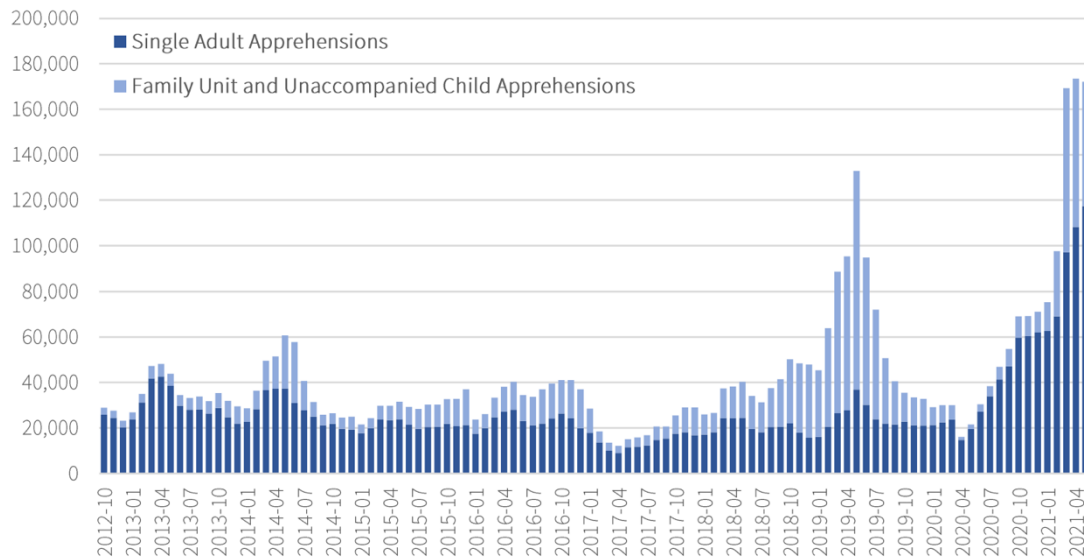
⁵⁷ *Id.* at 6.

⁵⁸ RISING BORDER ENCOUNTERS IN 2021: AN OVERVIEW AND ANALYSIS, AMERICAN IMMIGRATION COUNCIL 2 (June 2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/rising_border_encounters_in_2021_0.pdf (noting that the number of families and children encountered at the southern border peaked in 2019 despite the family separation policy having been implemented the previous year).

⁵⁹ *Mexico: Abuses Against Asylum Seekers at US Border*, *supra* note 51.

⁶⁰ Zoom Interview with Joachim Marjon, Immigrant Rights Attorney, ACLU of New Mexico in Albuquerque, NM (Dec. 16, 2020).

Figure 2: Border Patrol Apprehensions, October 2012 to May 2021, Single Adults vs. Families and Children



Source: U.S. Customs and Border Protection

In addition to the above discussed push factors, there are significant factors that pull migrants towards the United States.⁶¹ “Common pull factors include more economic and work opportunities, the possibility of being reunited with family members, and a better quality of life, including access to adequate education and health care.”⁶²

One consistent push-pull factor driving migration across the southern border has been the relationship between US capital and Latin American labor. The implementation of free trade agreements between the United States and its southern neighbors, namely the North American Free Trade Agreement (“NAFTA”) and the Dominican Republic-Central America Free Trade Agreement (“CAFTA-DR”) have intensified a unidirectional flow that has been driven by economic demand since the Bracero Program of the 1950s.⁶³ The United States, together with the

⁶¹ *Push or Pull Factors: What Drives Central American Migrants to the U.S.?*, NATIONAL IMMIGRATION FORUM (July 23, 2019), <https://immigrationforum.org/article/push-or-pull-factors-what-drives-central-american-migrants-to-the-u-s/>.

⁶² *Id.*

⁶³ See North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 (1993), <https://www.cbp.gov/trade/nafta> (establishing “a free trade zone in North America; it was signed in 1992 by Canada, Mexico, and the United States and took effect on Jan. 1, 1994”). See Dominican Republic-Central America Free Trade Agreement, C.R.-D.R.-El. Sal.-Guat.-Hond.-Nicar.-U.S., May 28, 2004, 43 I.L.M. 514 (2004), <https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta> (“The Dominican Republic-Central America FTA... is the first free trade agreement between the United States and a group of smaller developing economies: our Central American neighbors Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, as well as the Dominican Republic). See also Raul Delgado Wise & Humberto Marquez Covarrubias, *Capitalist Restructuring, Development and Labour Migration: the US Mexico Case*, 29 THIRD WORLD Q. 1359, 1361 (2009) (finding that 98 percent of Mexican migrants travel to the United States is for economic opportunity);

World Bank and the IMF, began to promote neoliberal structural adjustment policies in Mexico and the Northern Triangle Countries beginning in the 1970s.⁶⁴ Under NAFTA though, Mexican wage levels plummeted, while prices and poverty increased.⁶⁵ In response, the Mexican and Central American economies became increasingly oriented towards an exports sector sustained by a cheap labor force.⁶⁶

The need for cheap labor led to the growth of *maquiladoras*, factories located near the U.S.-Mexico border which operate under preferential tariff programs established and administered by the United States and Mexico. U.S. companies use these factories, capitalizing on a cheaper labor force and lax worker protection laws in Mexico, while receiving the benefits of doing business in the United States. When NAFTA was ratified in 1994, many tariffs that had previously applied to the maquiladoras ended, leading to a boom in the number of maquiladoras, and an increase in the need for cheap labor in Mexico. However, “four decades after welcoming foreign assembly plants and factories ... Mexico has seen only a trickle of its industrial and factory workers join the ranks of those who even slightly resemble a middle class.”⁶⁷ Instead, those workers are trapped in a cycle of poverty, many having earned the same wages for years. Unions have continually been repressed, preventing any effort by workers to improve conditions for the workers or to negotiate livable wages.⁶⁸ Due to the burgeoning *maquila* system, the Mexican economy has become increasingly reliant on the exportation of cheap labor to the United States and the remittances received from that migratory labor.⁶⁹ In the United States, wages, though low and often below minimum wage, are higher than what can be earned in the maquiladoras. Accordingly, NAFTA has prompted an out-migration of laborers seeking livable wages, from Mexico and other Northern Triangle countries where the *maquila* system is being replicated under CAFTA.

CAFTA, the free trade agreement between the U.S., five Central American countries and the Dominican Republic, has restructured the region’s economy, guaranteeing economic dependence on the United States through massive trade imbalances and the influx of American agricultural and industrial goods that weaken domestic industries.⁷⁰ “Under CAFTA, family farmers in the ”Northern Triangle” of Honduras, El Salvador and Guatemala ... have been inundated with a

The Bracero Program, UCLA Labor Center, <https://www.labor.ucla.edu/what-we-do/research-tools/the-bracero-program/> (last visited May 14, 2021).

⁶⁴ See *Id.* Wise at 1362.

⁶⁵ PUBLIC CITIZEN, THE NAFTA-CAFTA LEGACY: FAILED TRADE POLICY THAT DROVE MILLIONS FROM THEIR HOMES, at 2, https://www.citizen.org/wp-content/uploads/migration/nafta_factsheet_immigration_may.pdf (last visited May 14, 2021).

⁶⁶ See Wise, *supra* note 63, at 1363.

⁶⁷ Tim Johnson, *Mexico’s ‘Maquiladora’ Labor System Keeps Workers in Poverty*, MCCLATCHY DC BUREAU (June 17, 2012), <https://www.mcclatchydc.com/news/nation-world/world/article24730981.html>.

⁶⁸ See Daniel La Botx, *Manufacturing Poverty: The Maquiladorization of Mexico*, 24 INT’L J. OF HEALTH SERVICES 403, 407 (1994).

⁶⁹ See Wise, *supra* note 63, at 1363.

⁷⁰ *Id.* at 1367-8.

doubling of agricultural imports from U.S. agribusiness.”⁷¹ Those exports represent a small percentage of U.S. agricultural firms’ business but pose a dangerous threat to Central America’s small farmers, who lack the subsidies, technology and land to compete with the influx of US grain.⁷² Honduras has gone from being a net agricultural exporter to the United States in the six years prior to CAFTA to being a net importer from the US in the six years after CAFTA took effect.⁷³

Similarly, in the years prior to the neoliberal intervention in Mexico’s economy, the nation’s GDP expanded at an annual rate of 6.3 percent. By contrast, from 1983 to 2005 the rate fell 2.4 percent, with massive unemployment and underemployment.⁷⁴ Migration flows surged after the passage of NAFTA, mostly from Mexicans seeking jobs in the agriculture and manufacturing industries.⁷⁵

According to the research of a union-led delegation to Honduras, “the [free] trade system is systematically undermining democracy in the Latin American Nations Washington has sought to control for decades through commercial exploitation and political coercion.”⁷⁶ For example, prior to the passing of CAFTA, Honduras had minimum wage laws and protections for labor conditions. CAFTA resulted in the undermining of these laws, contributing to increased poverty and a dearth of economic opportunities.⁷⁷ Further, the removal of safe conditions of work have led to dangerous conditions in factories without protections for workers, and to an incredibly dangerous environment for women workers who have been killed and raped in high numbers in the maquiladora towns like San Pedro Sula.⁷⁸

The undermining of wage and labor conditions by the United States means that Central American and Mexican workers are unable to earn enough money to survive and support their families. These neoliberal trade policies have further combined to cause an uptick in crime and violence, as well as a dearth of employment opportunity within the region.⁷⁹ The policies thus

⁷¹ See Public Citizen, *supra* note 65, at 2.

⁷² See *Id.*

⁷³ See *Id.*

⁷⁴ See Wise, *supra* note 63, at 1365.

⁷⁵ See Tseng-Putterman, *supra* note 22.

⁷⁶ See Michelle Chen, *How US 'Free Trade' Policies Created the Central American Migration Crisis*, THE NATION (Feb. 6, 2015), <https://www.thenation.com/article/archive/how-us-free-trade-policies-created-central-american-migration-crisis/>.

⁷⁷ See AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO), TRADE, VIOLENCE AND MIGRATION: THE BROKEN PROMISES TO HONDURAN WORKERS 12-13 (2017), <https://aflcio.org/sites/default/files/2017-03/Honduras.PDF>.

⁷⁸ See H. Abell, *Endangering Women’s Health for Profit: Health and Safety in Mexico’s Maquiladoras*, 9 DEV. PRACT. 595 (1999), <https://pubmed.ncbi.nlm.nih.gov/12349430/#:~:text=These%20workplace%20hazards%20include%20toxic,and%20dangerously%20high%20production%20quotas>. See also AFL-CIO, *supra* note 70, at 17.

⁷⁹ See AFL-CIO, *supra* note 77, at 3.

drive migration to the United States where wages are higher and remittances can support a living wage and families back home, and where the risk of violence and abuse is significantly reduced.

By raising the barriers to legal migration, increasing the time associated with asylum applications, and placing migrants in danger in Mexico while they wait for claims to be heard, the United States drives migrants towards irregular avenues of migration. Thus, by forcing migrants to irregular pathways of entry, these policies function to push migrants towards more dangerous routes into the United States, increasing migrant disappearances and deaths along the Southwest Border.

III. International and Regional Legal Frameworks

This section describes the United States' international legal obligations for addressing the missing migrant crisis. It begins with an overview of relevant international human rights law, followed by a discussion of the regional human rights framework and the application of the Inter-American System of Human Rights to the U.S. That is followed by a description of the two main human rights violations underlying migrant disappearances—the right to life and enforced disappearances—and an analysis of the U.S. government's responsibility for those violations.

1. Overview of Applicable International Human Rights Law

a. International Human Rights Treaties Binding on the U.S.

To date, the U.S. has signed and ratified only three of the core human rights treaties. Those are the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination all Forms of Racial Discrimination (CERD), and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).⁸⁰ The U.S. is a party to the UN Charter, which provides for equal human rights for all people.⁸¹ The U.S. is also a signatory to the Universal Declaration on Human Rights (UDHR), many of whose guarantees have crystallized into customary international law (CIL).⁸²

The above treaties incorporate a range of legal obligations governing the U.S.' treatment of missing migrants and unidentified remains. The core of those legal obligations is the right to life in Article 3 of the UDHR and Article 6 of the ICCPR. A range of other rights, including equal

⁸⁰ International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171; International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, 660 U.N.T.S. 195, 212; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December, 1984, 1465 U.N.T.S. 85, 113.

⁸¹ U.N. CHARTER, art. 1, para 3.

⁸² Hurst Hannum, *The UDHR in National and International Law*, HEALTH HUM. RIGHTS 144. 148-9 (1998). <https://cdn2.sph.harvard.edu/wp-content/uploads/sites/125/2014/04/16-Hannum.pdf>. See Section C below for a discussion on customary international law in the United States.

protection under the law and the right to freedom from torture or cruel and unusual treatment, also regulate state behavior when addressing the missing migrant crisis.⁸³ The following sections of this report review these obligations in the context of U.S. federal and state laws and practices, examining whether the U.S. is meeting its obligations to missing migrants and their families under international law.

The U.S. government considers itself bound to apply a treaty after ratification, if it is ‘self-executing,’ or following the treaty’s incorporation in a U.S. statute. It should be noted that the U.S. government has qualified its ratification of certain treaties. Those qualifications include reservations, declarations, and understandings (RUDs) to both the ICCPR and the CAT.⁸⁴ Of particular importance to the subject of this report is the identical reservation made to both the ICCPR and the CAT on the scope of the meaning of “cruel, inhuman or degrading treatment or punishment.”⁸⁵ The U.S. clarifies that its understanding of the term extends protections no further than the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth and Fourteenth Amendments to the U.S. Constitution.⁸⁶

Despite its position in proffering RUDs, U.S. reservations to the ICCPR and the CAT are constrained by international law. According to the Vienna Convention on the Law of Treaties, which the U.S. views largely as a codification of CIL,⁸⁷ states may not enter reservations that are incompatible with the “object and purpose of the treaty.”⁸⁸ The object and purpose of the ICCPR is, for the purposes of reservations, determined by the Human Rights Committee (HRC), the treaty body overseeing the implementation of the ICCPR.⁸⁹ The Human Rights Committee, not

⁸³ See *supra* note 80 on equal protection see Article 2 of the ICCPR and Article 2 of the UDHR; see *supra* note 80 on torture see Article 5 of the UDHR, Article 7 of the ICCPR, and Articles 1 and 2 of the CAT.

⁸⁴ “‘Reservation’ means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.” See Art 2 (d) Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) 1155 U.N.T.S 331, *entered into force* 27 Jan. 1980.

⁸⁵ For the ICCPR see U.S. Reservations, Declarations, and Understandings, Int’l Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01. Res. 3. For the CAT see U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong. Rec. S17486-01. Res. 1.

⁸⁶ For reservations to the ICCPR see: U.S. reservations, declarations, and understandings, ICCPR 138 Con. Rec. S4781-01 (April 1992), <http://hrlibrary.umn.edu/usdocs/civilres.html>. For reservations to the CAT see: U.S. reservations, declarations, and understandings, Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, Cong. Rec. S17486-01 (1990). <http://hrlibrary.umn.edu/usdocs/tortres.html>

⁸⁷ *Vienna Convention on the Law of Treaties*, USDeptofState.gov, <https://2009-2017.state.gov/s/l/treaty/faqs/70139.htm> (last visited May 14, 2021).

⁸⁸ Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) 1155 U.N.T.S. 331, *entered into force* 27 Jan. 1980. Art. 19.

⁸⁹ This determination was made in the Human Rights Committee’s General Comment No. 24. See Hum. Rts. Comm., General Comment 24, Articles 11-14 Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. CCPR/C/21/Rev/1/Add.6 (1994). Additionally, the International Court of Justice has held that the traditional rules surrounding reservations are further restricted with treaties, like the Genocide Convention, that have a universal and fundamental subject. The ICCPR and CAT both fit that category. See *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, I.C.J. Rep. 1951 (May 28), p. 10.

State Parties, should therefore be the arbiter of whether a reservation violates the object and purpose of the ICCPR.

b. Treaties Signed but not Ratified

Though the U.S. has yet to fully ratify four of the core human rights treaties, it is prohibited from taking actions that violate their object and purpose. Article 18 of the Vienna Convention on the Law of Treaties enjoins states that have signed a treaty (but not yet ratified it) from engaging in acts which would “defeat the object and purpose of a treaty.”⁹⁰ As already mentioned, the Human Rights Committee, as the treaty body of ICCPR, is the authoritative body to decide when an action violates the treaty’s object and purpose.

c. Customary International Law

Customary international law (CIL) is another primary source of international obligations besides treaties. CIL stems from customary state practices that have, over time, crystallized into legally binding norms. The U.S. government maintains that CIL is binding on U.S. domestic law in a limited way, drawing on CIL as a “limited enclave” for rules. CIL does guide court interpretation of statutes, however, as U.S. courts do not construe congressional acts as violating CIL if any other possible construction is available.⁹¹

d. Nonbinding International Norms

There are two human rights treaties the U.S. government has neither signed nor ratified which are directly relevant to protections of migrants who disappear. Accordingly, the provisions in the International Convention for the Protection of All People from Enforced Disappearance (ICPPED) and the International Convention on the Protection of the Rights of All Migrant

⁹⁰ Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) 1155 U.N.T.S. 331, *entered into force* 27 Jan. 1980. Art. 18.

⁹¹ U.S. courts have consistently circumscribed the influence of CIL on domestic jurisprudence. In the *Paquete Habana* case, the Supreme Court held that CIL had influenced U.S. domestic law since the nation’s founding, but that courts should only turn to CIL norms after exhausting treaty law and decisions made by executive, legislative or judicial authorities. More recently, the Supreme Court held that CIL constitutes a “limited enclave” of substantive law from which federal courts may draw. When navigating between legislative norms and CIL, courts should apply the *Charming Betsy* doctrine, which provides that an act of Congress ought not to be construed to violate CIL if any other possible construction remains. The *Charming Betsy* doctrine limits the U.S.’ ability to object to developing CIL. According to the doctrine, Congress must explicitly reject a crystallizing norm for the U.S. to qualify as a persistent objector; otherwise, the U.S. will be presumed to have acceded to the norm. See *The Paquete Habana*, 157 U.S. 677 (1900); *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Murray v. The Charming Betsy*, 6 U.S. 64 (1804).

Workers and Members of Their Families (ICPRMW) are not binding on the U.S. even though they are enormously consequential for the subject of this report.⁹²

2. Overview of Regional Human Rights Law

e. Scope of Regional Obligations

The Inter-American System of Human Rights is the regional human rights system responsible for monitoring, promoting, and protecting human rights in the 35 countries of the Americas that are members of the Organization of American States (OAS). The primary human rights instruments in the Inter-American System of Human Rights are the American Declaration on the Rights and Duties of Man (“American Declaration”) and the American Convention on Human Rights (ACHR). The American Declaration guarantees several rights that directly pertain to the missing migrant crisis on the southern border. These include: the rights to life, liberty, and the security of person (Article 1); the right to the protection of family life (Articles 5 and 6); the right to health (Article 11); and the right to the benefits of culture (Article 13). The scope of these rights and their connection with the enforced disappearance of migrants are elaborated later in the report.

The Inter-American Commission on Human Rights (IACHR) has stated that the American Declaration is a binding instrument on all OAS member states, while the American Convention on Human Rights is binding only on those states that have ratified it. Thus, although the U.S. has not ratified the ACHR, the bodies of the Inter-American system view the U.S. as bound by the provisions of the American Declaration.⁹³ For example, the IACHR’s *Baby Boy v. the United States* decision assessed laws protecting abortion in the U.S. against the American Declaration, and found that they did not infringe on the Declaration’s right to life in Article 1.⁹⁴ Similarly, in an Advisory Memo solicited by U.S. members of Congress, the IACHR declared that the U.S. is legally bound by the American Declaration by virtue of its membership in the OAS and its

⁹² Also not directly binding on the U.S. government are the various decisions and interpretations flowing from quasi-judicial instruments including treaty bodies and international declarations. But while this accumulated body of “soft law” does not place direct obligations on the U.S. government, soft law remains persuasive for states, not least because the writings of treaty bodies and international experts are evidence of the crystallization of CIL.

⁹³ The U.S. ratified the Charter of the Organization of American States (“OAS Charter”) in 1948, at the same conference where it approved the passage of the American Declaration. Article 17 of the OAS Charter specifies that states must respect and guarantee individual human rights. The Inter-American Commission on Human Rights (IACHR), which became the “principal organ” of the OAS under the Charter, has consistently held that the reference to the rights of individuals in that Charter requires all Member States to treat the rights in the American Declaration as legally binding. This is because the American Declaration was the only human rights instrument for the region until the ACHR came into force in 1978. The legally binding language of Article 17 of the OAS Charter thus refers to the rights enshrined in the American Declaration. Consequently, the U.S. is, according to the IACHR, legally bound to uphold the rights in the American Declaration. The U.S. disputes this, arguing that the Declaration is not legally binding and that the U.S. is not bound to the ACHR because it never ratified it.

⁹⁴ See *Baby Boy v. United States*, Case 2141, Inter-Am. Comm’n H.R., Report No. 23/81, OEA/Ser.L/V/II.84, doc. 9 rev. 1, ¶¶ 14(a), 19(b) (1981).

ratification of the OAS Charter.⁹⁵ The U.S. government, however, continues to dispute that the U.S. is legally bound by the provisions of the American Declaration.⁹⁶

f. Other Regional Human Rights Treaties

The U.S. government signed but did not ratify the ACHR in 1977. As noted, a signature, even without ratification, precludes a state from acting in a manner that would defeat the object and purpose of that treaty.⁹⁷ The U.S. has neither signed nor ratified any of the other regional human rights treaties, including the Inter-American Convention on Forced Disappearance of Persons.⁹⁸

g. Regional Case Law (IACtHR)

The Inter-American Court of Human Rights (IACtHR or “the Court”) has jurisdiction over all cases concerning the interpretation and application of the ACHR.⁹⁹ The United States, however, has repeatedly refused to recognize the jurisdiction of the IACtHR.¹⁰⁰ By refusing to recognize the IACtHR’s jurisdiction, despite being a member of the OAS and a signatory to the American Declaration of the Rights and Duties of Man, the United States is thereby depriving victims of human rights violations of a potential venue to pursue claims and obtain redress for U.S. violations of human rights.

Since its creation in 1979, the IACtHR has developed an extensive body of jurisprudence on the State’s duty to uphold the right to life as well as state obligations to prevent, punish, and make reparations for enforced disappearances. Case law from the IACtHR is referenced throughout this report to demonstrate the legally relevant and authoritative, if not binding, interpretation of obligations under a treaty (the ACHR) that the US has signed but not ratified.

The jurisprudence of the Inter-American Court should matter to the U.S. for at least two reasons. First, the Court interprets rights under the American Convention. Due to its signature, the U.S. is obliged to comport with the object and purpose of that Convention. Second, and more

⁹⁵ IACHR Resolution No. 3/87 Case 9647, United States. (1987). Para 49.

<http://www.cidh.oas.org/annualrep/86.87eng/EUU9647.htm>

⁹⁶ Joseph Diab, United States Ratification of the American Convention on Human Rights, 2 *Duke Journal of Comparative & International Law* 323-344 (1992).

⁹⁷ See *supra* 90 Vienna Conv. on Law of Treaties, Art. 18.

⁹⁸ See e.g., *Inter-American Treaties: By Member States*, ORGANIZATION OF AMERICAN STATES, http://www.oas.org/en/sla/dil/inter_american_treaties_signatories_member_states_USA.asp (last accessed Sept. 2, 2021) (list of treaties that the United States has and has not signed and ratified).

⁹⁹ American Convention on Human Rights (San Jose, Costa Rica, 22 Nov. 1969), 9 I.L.M. 673 (1970), *entered into force* 18 July 1978, art. 62-3.

¹⁰⁰ See Michael Camilleri & Danielle Edmonds, *An Institution Worth Defending: The Inter-American Human Rights System in the Trump Era 2* (The Dialogue, Rule of Law Working Paper June 2017), http://www.thedialogue.org/wp-content/uploads/2017/06/IACHR-Working-Paper_Download-Resolution.pdf. See also Jo M. Pasqualucci, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* (2nd ed. 2012).

importantly, the Court’s extensive treatment of the issue of enforced disappearances is tied to growing international consensus on enforced disappearances.

In its very first case, *Velásquez-Rodríguez v. Honduras*, the IACtHR echoed the General Assembly of the OAS, of which the U.S. is a member, in condemning enforced disappearances as an “affront to the conscience of the hemisphere and ... a crime against humanity.”¹⁰¹ The Court also drew on the multiple UN General Assembly Resolutions and the Working Group on Enforced or Involuntary Disappearances in its opinion in the case.¹⁰² The Court’s reliance on a variety of international legal sources, rather than just the American Convention, suggests that its treatment of enforced disappearance is not regionally specific, but consistent with international norms.¹⁰³

In *Velásquez-Rodríguez*, the Court held that when the existence of a policy of disappearances, *supported or tolerated by the government*, has been shown, the disappearance of a particular individual may be proved through circumstantial or indirect evidence.¹⁰⁴ States have a responsibility to prevent enforced disappearances and respond to them when they occur.¹⁰⁵ The Court held that the “forced disappearance of human beings is a multiple and continuous violation” of human rights; thus, the violation persists until the victim is found.¹⁰⁶ Further, a violation of rights in the ACHR “can be established even if the identity of the individual perpetrator is unknown.”¹⁰⁷ This is crucial for holding a state accountable for a policy like Prevention Through Deterrence, which relies on the systematic compliance of immigration officials to accomplish an objective that results in a human rights violation, without ordering or committing individual acts that violate rights in of themselves.¹⁰⁸

h. The Mexican Mechanism of External Support for the Search and Investigation of Disappearance.

Mexico’s Mechanism of External Support for the Search and Investigation of Disappearance (“MAE”), is a transnational mechanism established to allow families to access administrative and judicial institutions in Mexico to report the disappearance of a relative, launch an investigation, participate in criminal proceedings against alleged perpetrators of enforced disappearances, and obtain reparations for suffering caused by the disappearance.¹⁰⁹ The MAE

¹⁰¹ I/A Court H.R., *Velásquez-Rodríguez case*, Judgement of July 29 1986, Series C, No. 4, para 152.

¹⁰² *Id.* at para 151-152.

¹⁰³ *Id.* at paras 151, 153.

¹⁰⁴ *Id.* at para 124.

¹⁰⁵ *Id.* at para. 179.

¹⁰⁶ *Id.* at para. 155.

¹⁰⁷ *Id.* at para 173.

¹⁰⁸ As mentioned **in note 68**, the U.S. does not consider itself subject to the Court’s jurisdiction. [correct supra cite]

¹⁰⁹ Acuerdo A/117/15 Por el que se Crea la Unidad de Investigación de Delitos para Personas Migrantes y el Mecanismo de Apoyo Exterior Mexicano de Búsqueda e Investigación y se Establecen sus Facultades y Organización, Diario Oficial de la Federación [DOF] 18-12-2015 (Mex.), formato HTML,

was established to implement rights recognized in several domestic laws in Mexico, primarily the General Law of Victims.¹¹⁰ Under this law, any individual, regardless of nationality or location, may access Mexico's administrative and judicial entities to search for a disappeared relative; report a disappearance--including an enforced disappearance; participate in the search, investigation, and criminal proceedings against complicit state actors; and participate in the identification and repatriation of remains. Through the MAE, victims of disappearances and their families have access to Mexican institutions in charge of investigating offenses committed against migrants in Mexico, can directly report cases and provide evidence in investigations and proceedings.¹¹¹

3. International Law and the Disappearance of Migrants

i. U.S. Accountability for Violations of the Right to Life

At the core of the obligations borne by the United States in relation to the missing migrant crisis is the right to life, which is guaranteed in Article 3 of the UDHR and Article 6 of the ICCPR. The United States must protect the right to life of all individuals within U.S. territory or "subject to [U.S.] jurisdiction," regardless of their citizenship status.¹¹² The ICCPR also requires States Parties to protect against violations by private persons or entities, not just entities of the State.¹¹³ In other words, the U.S. is required to protect all individuals' right to life, even when the threat is from non-governmental agents.

Importantly, the right to life "concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death."¹¹⁴ The HRC General Comment to Article 6 of the ICCPR states that deprivation of life involves an intentional or otherwise foreseeable and preventable life-terminating harm or injury, caused by an act or omission.¹¹⁵ Accordingly, "[t]he obligation of States Parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can

http://www.dof.gob.mx/nota_detalle.php?codigo=5420681&fecha=18/12/2015. For an in-depth discussion on the MAE, see BOSTON UNIVERSITY INTERNATIONAL HUMAN RIGHTS CLINIC, *DISAPPEARED MIGRANTS FROM CENTRAL AMERICA: TRANSNATIONAL RESPONSIBILITY, THE SEARCH FOR ANSWERS AND LEGAL LACUNAE* (2021), <https://www.bu.edu/law/files/2021/01/Migrant-Disappearances.pdf>.

¹¹⁰ Ley General de Víctimas, Diario Oficial de la Federación [DOF] DOF 09-01-2013, últimas reformas DOF 03-01-2017 (Mex.), http://www.diputados.gob.mx/LeyesBiblio/pdf/LGV_030117.pdf [*Ley General de Víctimas*].

¹¹¹ *Acuerdo A/117/15 MAE*, *supra* note 103.

¹¹² G.A. Res. 217 (III), Universal Declaration of Human Rights (Dec. 10, 1948), art. 3; International Covenant on Civil and Political Rights, art. 6, 16 December 1966, 999 U.N.T.S. 171.

¹¹³ See Hum. Rts. Comm., General Comment No. 31, The Nature of the General Legal Obligations Imposed on States Parties to the Covenant, Eightieth Session, para. 3, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

¹¹⁴ U.N. Hum. Rts. Comm., General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, para. 3, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019).

¹¹⁵ *Id.* at para 6.

result in loss of life.”¹¹⁶ Thus, to protect the right to life, states must refrain from engaging in conduct which might foreseeably result in the arbitrary deprivation of life.¹¹⁷

The high death rate of migrants at the United States–Mexico border demonstrates a failure on the part of the U.S. to meet its international legal obligations to protect the right to life. Specifically, the U.S. may be culpable for arbitrary and unlawful deaths of migrants at its borders due to its adoption and continued use of Prevention Through Deterrence, which it acknowledged would “force[] [migrants] over more hostile terrain,” and further that this hostile terrain is such that people “can find themselves in mortal danger.”¹¹⁸

In addition, other obligations flow from the right to life as guaranteed by the ICCPR, which require the United States to (1) conduct prompt and thorough search and rescue missions for missing migrants; (2) investigate and identify migrant remains; (3) respectfully repatriate migrant remains; (4) and provide adequate remedies to victim’s families. These obligations are discussed in detail in the remaining sections of this report.

j. U.S. Accountability for Enforced Disappearances

i. Enforced Disappearances in International Law

The crime of enforced disappearance is defined as the:

Arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person.¹¹⁹

Enforced disappearances are a compound crime, involving both an act and a failure to act, as well as an omission of information. The crime of enforced disappearance involves an array of human rights violations. Enforced disappearances violate the rights to life, to liberty, to an identity, to access to justice, and the prohibition against torture.¹²⁰ As noted above, the obligations triggered by an enforced disappearance are incorporated in a wide range of human

¹¹⁶ *Id.* at para 7.

¹¹⁷ *Id.*

¹¹⁸ U.S. Border Patrol, “Border Patrol Strategic Plan: 1994 and Beyond.” *National Strategy Memo* (1994) p. 7.

¹¹⁹ International Convention for the Protection of All Persons from Enforced Disappearance (20 Dec. 2006), U.N.G.A. Res. 61/177 *entered into force* (12 Jan. 2007) Art. 2.

¹²⁰ On the right to identity, see L. Avery, *A Return to Life: The Right to Identity and the Right to Identify Argentina’s ‘Living Disappeared,’* 27 HARV. WOMEN’S LAW JOURNAL 235, 259 (2004). On the right to family life see I.A. Court H.R. *Blake v. Guatemala*, 24 Judgement of Jan. 24, 1998, Series C. No. 36. *See also Tas v. Turkey*, no. 24396/94, ECHR 2018.

rights treaties, from the ICCPR and the UNCAT to CEDAW and the Universal Declaration, as well as in resolutions and declarations.¹²¹

International legal experts have labelled enforced disappearance as a “particularly heinous violation of human rights.”¹²² Enforced disappearances have been classified as a crime against humanity, a status that binds the US government to recognize the crime, despite the U.S.’ failure to ratify the treaties that explicitly prohibit enforced disappearances.¹²³ Further, the prohibition has been treated as *jus cogens*, which means that states are obliged to prevent their occurrence even if they are not party to a treaty that expressly forbids enforced disappearances.¹²⁴ U.S. courts have also found that the prohibition of enforced disappearance constitutes a *jus cogens* prohibition.¹²⁵ *Jus cogens* status means not only that the prohibition on enforced disappearance is binding on states that have not prohibited the crime through treaty law, but that states have an *erga omnes* duty to investigate and prosecute their occurrence.¹²⁶ An *erga omnes* obligation is an obligation that a state has to the community of states as a whole, such that any state has the right to complain of a breach to that norm, even if they are not directly involved.¹²⁷

ii. Disappearances at the Border

The definition of enforced disappearance outlined so far refers to an action that government authorities are responsible for, have taken part in, or knowingly allow. There are, however, other forms of disappearance that trigger varying degrees of government responsibility. *Forcible disappearances* occur when private, non-state actors are complicit in the disappearance and the government is not involved. *Non-forcible or nonenforced disappearances* occur without any human intervention, such as when a migrant succumbs to illness during transit. This last

¹²¹ See e.g., International Convention for the Protection of All Persons from Enforced Disappearance (20 Dec. 2006), U.N.G.A. Res. 61/177 entered into force (12 Jan. 2007); Organization of American States, *Inter-American Convention on Forced Disappearances of Persons*, 9 June 1994.

¹²² Office of the High Commissioner of Human Rights, *Fact Sheet No. 6 (Rev. 2), Enforced or Involuntary Disappearances*.

¹²³ See e.g., The General Assembly of the OAS which stated, in 1983, that enforced disappearance constitutes a crime against humanity and “an affront to the conscience of the hemisphere” OAS Resolution AG/RES.666 (XII-0/83 Doc. AG/RES.666 (XIII-)/83), para. 4. See also IACtHR 19 *Tradesmen v Colombia*, Merits Reparations and Costs, Judgment of 5 July 2004, Series C, No. 109, para. 142. Under the Rome Statute of the International Criminal Court, the crime of enforced disappearance is also categorized as a Crime Against Humanity when part of a widespread or systematic attack directed against a civilian population, with knowledge of the attack. See Rome Statute of the International Criminal Court Rome, 17 July 1998) UN Doc. A/CONF.183/9 of 17 July 1998, entered into force 1 July 2002, Art. 7 (i).

¹²⁴ See J. Sarkin, *Why the Prohibition of Enforced Disappearance Has Attained Jus Cogens Status in International Law*, NORDIC JOURNAL OF INTL LAW 81 (2012) 537-583. Article 53 of the Vienna Convention on the Law of Treaties, states that a *jus cogens* norm constitutes a “norm accepted and recognized by the international community of States as a whole as a norm from which no derogations are permitted.”

¹²⁵ *Xuncax v. Gramajo* 886 F. Supp. 162 (DMass 1995).

¹²⁶ B. Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*, 2nd ed. (Oxford University Press, 2003) p 56.

¹²⁷ *Erga Omnes Obligation*, *Oxford Reference* (3 ed. 2010).

category, “nonenforced disappearances,” would apply when a state has met all its international obligations towards migrants, refugees, and asylum seekers, but, through no fault of the state, an individual dies while migrating. Migrant disappearances at the southern border constitute enforced disappearances because of the critical role U.S. border policy plays in deliberately engineering and maintaining conditions designed to cause their deaths and disappearance. Prevention Through Deterrence foreseeably exposes migrants to mortal peril, and then provides no effective mechanisms to remedy that disappearance. As we show in this report, to comply with international legal requirements concerning enforced disappearances, quite aside from taking measures to prevent foreseeable migrant deaths, the U.S. government would need to implement a range of mechanisms addressing search and rescue, identification of remains, repatriation of remains, reparations for families, and accountability for individuals perpetrating the violations.

Migrants who die after crossing the U.S. border and whose bodies remain unidentified are victims of a double disappearance. Not only is their physical existence ended; their “civil inscription,”¹²⁸ or right to a definitive identity, is erased. The Working Group on Enforced Disappearances (WGEID) has stated that migrant disappearances that are “involuntary but direct consequences of the actions of the State... may not, strictly speaking, be enforced disappearances” but still trigger state responsibility.¹²⁹ The WGEID does not characterize involuntary disappearances resulting from state policy as enforced disappearance because the state or private actor is not depriving the individual directly of their liberty in a way that that leads directly to the disappearance. Instead, in the case of pushbacks at sea (in the Mediterranean) or the funneling of migration routes through the desert in the U.S., individuals disappear while trying to evade state authorities. The WGEID report makes it clear, however, that even though the state is not actively kidnapping or ‘disappearing’ migrants, it is still accountable for their deaths.¹³⁰

The second component of the crime of enforced disappearance, the refusal to acknowledge the whereabouts of the disappeared person, relates to the crime of “placing the victim outside the protection of law.”¹³¹ Prevention Through Deterrence places the responsibility for the crime of disappearances on the inhospitable desert terrain, in similar fashion as European states use

¹²⁸ Estela Schindel, *Deaths and Disappearances in Migration to Europe: Exploring the Uses of a Transnationalized Category*, 64 AMERICAN BEHAVIORAL SCIENTIST 391.

¹²⁹ The WGEID was established in 1980 by the UNHRC as a special procedure to engage with individuals, civil society, and states to resolve cases of enforced disappearances. Since the adoption by the UN General Assembly of the Declaration on the Protection of all Persons from Enforced Disappearances in 1992, the WGEID monitors compliance with the Declaration and assists governments with implementation; *see also* Working Group on Enforced or Involuntary Disappearances. (2017) *Report of the Working Group* (A/HRC/33/51).

¹³⁰ *See for example* Schindel [supra note?] p 398.

¹³¹ *Id.* p 400.

pushback strategies to deter migrants and then blame the Mediterranean for their disappearance and deaths.¹³²

iii. U.S. Accountability for Enforced Disappearances at the Border

The U.S. government is responsible for migrants who disappear on the Southern border due to its border policies, which this report collectively refers to as Prevention through Deterrence. This is so because it is these government policies which have deliberately and foreseeably led to the widespread, systematic disappearance of thousands of migrants. Both international and U.S. domestic law place responsibility on a state when there is a causal nexus between the implementation of a policy and the widespread deaths and disappearances that are the direct or indirect result.

Even as the U.S. government continues to deflect responsibility for disappeared migrants with terms like “smart border” controls, it has, in various documents recognized its own responsibility.¹³³ According to a Senate Committee Report, “under international law, responsibility for torture, summary execution, or disappearances extends beyond the person or persons who actually committed those acts—anyone with higher authority who authorized, tolerated or knowingly ignored those acts is liable for them.”¹³⁴

IV. Search and Rescue

4. International Legal Obligations

k. Treaty obligations

Article 2 of the ICCPR requires states to ensure that all the rights enumerated in the ICCPR protect all individuals within the host state’s territory and subject to its jurisdiction. International courts have consistently held that when a state violates the right to life in Article 6, it is required to investigate the circumstances of the killing.¹³⁵ The right to life is violated even in cases where agents of the state are not directly responsible for the death; individuals are entitled to state

¹³² *Id.* p. 401.

¹³³ Chris Rodrigo, *Privacy, Immigrant Rights Groups slam Biden’s ‘smart wall’ Proposal*, THEHILL.COM. <https://thehill.com/policy/technology/540494-immigrant-groups-slam-biden-smart-wall-bill-trumps-wall-by-another-name> (last visited May 14, 2021).

¹³⁴ S. Rep. No. 249, 102d Cong., 1st Sess. 9 (1991)

¹³⁵ See for example: Human Rights Committee, *Baboeram-Adhin v. Suriname* (Communication No. 146/1983) para 14.3 and para 16; Human Rights Committee *Sarma v. Sri Lanka* (Communication No. 950/2000).

protection from “acts or omissions that are intended or may be expected to cause their unnatural or premature death.”¹³⁶

International law has developed special categories for missing individuals.¹³⁷ International human rights law has elaborated the category of “enforced disappearances,” primarily codified by the International Covenant for the Protection of All Persons from Enforced Disappearances (ICPPED). While the conditions of armed conflict that would invoke International Humanitarian Law do not *per se* apply at the southern border, the term “enforced disappearances” pertains to missing migrants in the United States. Article 2 of the ICPPED defines enforced disappearances as “the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty.”¹³⁸ While the U.S. has not ratified the ICPPED, other human rights mechanisms have borrowed from that treaty’s nomenclature to enforce obligations that are incumbent on the United States. International law on enforced disappearances in the context of migration requires states to search for missing migrants even if the state is not an active participant in their disappearance.¹³⁹ This requirement stems from the right to truth, discussed in more detail in the repatriation section of this report.¹⁴⁰

1. Case law

Though the United States does not consider the jurisprudence of international human rights courts binding on non-States Parties to the human rights treaties, findings from those organs nevertheless demonstrate how the international community should interpret provisions of treaties to which the U.S. is a party.¹⁴¹ The Human Rights Committee has found that a state’s failure to provide information on the whereabouts of a missing person with his family violates Article 7 of the ICCPR, which prohibits cruel, inhuman or degrading treatment.¹⁴² Similarly, the UN Human Rights Committee has found that the anguish and stress caused by the uncertainty surrounding a disappearance constitute a violation of the ICCPR.¹⁴³ Finally, the Human Rights Chamber for

¹³⁶ Human Rights Committee, General Comment no. 36. (2018) Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. CCPR/C/GC/36 at para. 17.

¹³⁷ In international humanitarian law, the term “missing persons” refers to an individual who has disappeared in the course of an armed conflict. *See for example* INTL. COMMITTEE OF THE RED CROSS, GUIDING PRINCIPLES/MODEL LAW ON THE MISSING (2009) <https://www.icrc.org/en/document/guiding-principles-model-law-missing-model-law> at art 2.1

¹³⁸ International Convention for the Protection of All Persons from Enforced Disappearances. (Paris, Feb. 6, 2007) A/72/280, *entered into force* December 23, 2010, Art. 2.

¹³⁹ Working Group on Enforced or Involuntary Disappearance. “Report of the Working Group on Enforced Disappearances in the Context of Migration” A/HRC/36/36/Add.2 (2017) para 67.

¹⁴⁰ *Id.*

¹⁴¹ For an explanation on the U.S. government’s stance on international legal mechanisms, see the section of this report titled “International and Regional Legal Framework.”

¹⁴² *See* Human Rights Committee, *Aboussedra v. Libya*, (Communication no. 1751/2008) para 7.5.

¹⁴³ Human Rights Committee, *Quinteros v. Uruguay* (Communication No. 107/1981) para 14.

Bosnia and Herzegovina of the International Court for the Former Yugoslavia consistently held that states have an obligation to search for the whereabouts of missing persons.¹⁴⁴

5. Regional Legal Obligations

m. Treaty obligations

The American Convention on Human Rights provides for the rights to life, humane treatment, and juridical personality.¹⁴⁵ As with the ICCPR, those rights apply to all individuals subject to the state's jurisdiction, without distinction based on race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.¹⁴⁶ Article 1 of the American Declaration on the Rights and Duties of Man, to which the United States is a signatory, recognizes the right to life, liberty, and personal security.¹⁴⁷ Additionally, the Inter-American Convention on Forced Disappearance of Persons (CFDP) precedes and is more extensive than the more recent ICPPED. The CFDP goes further in its characterization of disappearances, however, prohibiting "the act of depriving a person or persons of his or their freedom, *in whatever way*."¹⁴⁸ Like the ICPPED, the CFDP tethers the concept of forced disappearance to an act of violence perpetrated with "the authorization, support, or acquiescence of the state."¹⁴⁹ This definition would cover disappearances caused by Prevention through Deterrence in the United States.

n. Case law

The Inter-American Court has determined that States are compelled to search for individuals where there is evidence that an enforced disappearance has taken place.¹⁵⁰ This obligation concerns the requirement that states notify family members of the status or whereabouts of the disappeared individual and is discussed in the following sections on identification and repatriation. The obligation to conduct a search for suspected victims of enforced disappearances implicates search and rescue missions. When local officials or CBP receive a report that a

¹⁴⁴ See *Matanovic v. Republica Srpska* CH/96/1, Bosnia and Herzegovina: Human Rights Chamber for Bosnia and Herzegovina, 13 Sep. 1996, para 64.2. While the ICTY has jurisdiction solely over states in the former Yugoslavia, its jurisprudence has been incorporated by international courts and tribunals to form customary international law. See Konderla, Joanna. "International Customary Law in the Jurisprudence of the ICTY and the ICTR." *Wroclaw Review of Law, Administration and Economics*. 2018.

¹⁴⁵ ACHR articles 4, 5 and 6 respectively.

¹⁴⁶ ACHR Art. 1.

¹⁴⁷ Inter-American Commission on Human Rights (IACHR), *American Declaration of the Rights and Duties of Man*, 2 May 1948, Art. 1.

¹⁴⁸ Organization of American States, *Inter-American Convention on Forced Disappearances of Persons*, 9 June 1994, Art. 2.

¹⁴⁹ *Id.* Art. II

¹⁵⁰ *Velásquez Rodríguez* Case, para. 181; I/A. Ct. H.R. *Rochac Hernández & Others Case*, Judgement of Oct. 13, 2014, Series C. No. 285, and I/A Ct. H.R. *Rodríguez Vera & Others Case*, Judgement of Nov. 14, 2014, Series C, No. 287, para. 140.

migrant is missing in the southwest border region, it is likely, due to the harshness of the conditions and the reluctance of family members to report to government agents, that the individual is in mortal peril. As established, migrant disappearances in the desert occur because of intentional government policy. The state is effectively causing migrants to die and disappear. In situations where the state is or may be accountable, the Inter-American Court has held that the state is obliged to use all means at its disposal to investigate the crime or wrong, and must inform the relatives of the fate of the victims.¹⁵¹ The investigation requires searching for individuals who may be still alive, and rescuing them. The obligation to search is therefore linked to the state's obligation to provide answers to families of the disappeared.¹⁵² Thus, the Court has compelled states to “seek and find the mortal remains” of missing individuals.¹⁵³

6. Federal Law and Practice

U.S. Customs and Border Protection (CBP), the same federal agency tasked with detaining and deporting irregular migrants, is primarily responsible for search and rescue operations for missing migrants. CBP was incorporated within the Department of Homeland Security in 2003. Today's CBP consolidates a variety of tasks that were, prior to 2003, spread across disparate federal agencies.¹⁵⁴ Ranging from Animal and Plant Health Inspection to the regulation of migrant labor, those tasks became the mandate of a single federal agency whose stated objective is to maintain the integrity of U.S. boundaries and ports of entries.¹⁵⁵

With more than 60,000 employees, CBP is the largest law enforcement agency in the United States and among the largest in the world.¹⁵⁶ Roughly 16,731 employees are deployed to the US-Mexico border region.¹⁵⁷ Since its creation, CBP's budget has nearly tripled from \$5.9 billion in 2003 to \$18.2 billion in 2021.¹⁵⁸

¹⁵¹ I/A Court H.R., *Goiburú et al v. Paraguay*, Judgement of September 22, 2006, Series C, No. 153 para 172.

¹⁵² See for example *Case of the Pueblo Bello Massacre*, Judgement of January 31, 2006. Series C No. 140 paras. 270-273; *Case of the 19 Tradesmen*, Judgement of July 5, 2004. Series C No. 109, para 265; *Juan Humberto Sánchez case*, Judgement of June 7, 2003. Series C No. 99, para. 187.

¹⁵³ *Id.* *Goiburú* para 172.

¹⁵⁴ *CBP Throughout the Years*. CBP.GOV <https://www.cbp.gov/about/history> (May 14, 2021).

¹⁵⁵ *Id.*

¹⁵⁶ *About CBP*. CBP.GOV.

<https://www.cbp.gov/about#:~:text=With%20more%20than%2060%2C000%20employees,lawful%20international%20travel%20and%20trade>. (May 10, 2021).

¹⁵⁷ *The Cost of Immigration Enforcement and Border Security*. AMERICANIMMIGRATIONCOUNCIL.ORG, [https://www.americanimmigrationcouncil.org/research/the-cost-of-immigration-enforcement-and-border-security#:~:text=Since%202003%2C%20the%20budget%20of,FY%202021%20\(Figure%202\)](https://www.americanimmigrationcouncil.org/research/the-cost-of-immigration-enforcement-and-border-security#:~:text=Since%202003%2C%20the%20budget%20of,FY%202021%20(Figure%202)) (last visited May 14, 2021).

¹⁵⁸ *Fiscal Year 2021 Budget in Brief*. Homeland Security, https://www.dhs.gov/sites/default/files/publications/fy_2021_dhs_bib_web_version.pdf (last visited May 15, 2021).

CBP primarily engages in search and rescue operations through its Missing Migrants Program, whose stated objective is to assist migrants in distress.¹⁵⁹ It is difficult to ascertain the amount of resources CBP devotes to search and rescue operations for two reasons. First, CBP notoriously lacks transparency.¹⁶⁰ Second, it is difficult to assess what proportion of its budget CBP allocates to search and rescue efforts for missing migrants as opposed to border enforcement. CBP's itemized budget includes costs of objects such as a "Medium Lift Helicopter," that can be used for the dual purpose of rescuing and/or detaining irregular migrants.¹⁶¹ Similarly, CBP maintains rescue beacons as part of its "911 Location Marker Project" that double as emergency beacons for stranded migrants and as a monitoring network to aid landowners in reporting suspicious activity.¹⁶² Even the Border Patrol Search, Trauma, and Rescue team (BORSTAR) doubles as a rescue response team and law enforcement arm capable of conducting intelligence operations on "cross-border criminal activity."¹⁶³

According to CBP's records, it conducted over 1,400 life-saving search and rescue efforts in 2019 through its entities in charge of land and sea border control.¹⁶⁴ This provides little clarification, however, since CBP has historically not maintained data on the total number of migrants identified through search and rescue.¹⁶⁵ Indeed, non-profit organizations documenting CBP's response to distress calls report that CBP fails to respond to 63 percent of the emergency calls it receives.¹⁶⁶ Many of the calls CBP receives are passed on from local law enforcement.¹⁶⁷

The "Missing Persons and Unidentified Remains Act," passed in December 2020, marks Congress's most recent addition to a patchwork of federal policies that address the issue of search and rescue on the southern border. The Act primarily boosts efforts to identify remains; it

¹⁵⁹ *Missing Migrant Program Expands Life-Saving Efforts in the Rio Grande Valley*. CBP.GOV, <https://www.cbp.gov/newsroom/local-media-release/missing-migrant-program-expands-life-saving-efforts-rio-grande-valley> (last visited May 14, 2021).

¹⁶⁰ Shaw Drake, *CBP Wants to Destroy Records of Misconduct. We Can't Let Them*, ACLU.ORG, <https://www.aclu.org/news/immigrants-rights/cbp-wants-to-destroy-records-of-misconduct-we-cant-let-them/> (last visited May 14, 2021).

¹⁶¹ HOMELAND SECURITY 2021 BUDGET, Dept. of Homeland Security. p 26.

https://www.dhs.gov/sites/default/files/publications/fy_2021_dhs_bib_web_version.pdf

¹⁶² *Border Patrol's Rescue Beacons and 911 Locations Marker Project Continue to Save Lives*. CBP.gov, <https://www.cbp.gov/newsroom/local-media-release/border-patrol-s-rescue-beacons-and-911-location-marker-project-continue#> (last visited May 14, 2021).

¹⁶³ *U.S. Customs and Border Protection: Border Patrol Search, Trauma and Rescue (BORSTAR) Fact sheet*, CBP.GOV, <https://www.cbp.gov/sites/default/files/documents/Border%20Patrol%20Search%2C%20Trauma%2C%20and%20Rescue.pdf> (last visited May 14, 2021).

¹⁶⁴ *See supra* 161.

¹⁶⁵ Chad C. Haddal. *Border Security: The Role of the U.S. Border Patrol*. Congressional Research Service Report for Congress. August 11.

¹⁶⁶ *Left to Die: Border Patrol, Search and Rescue, and the Crisis of Disappearance*. NOMOREDEATHS.COM, http://www.thedisappearedreport.org/uploads/8/3/5/1/83515082/left_to_die_-_english.pdf (last visited May 10, 2021) pg 6.

¹⁶⁷ Interview with Eddie Canales, Director, South Texas Human Rights Center, Falfurrias, TX (Jan. 26, 2021).

contributes to search and rescue in a modest way by providing for no more than 170 9-1-1 Rescue beacons to be scattered across the border region to mitigate migrant deaths.¹⁶⁸

Aside from the migration context, the federal government has policies and procedures for handling missing persons cases. The National Crime Information Center (NCIC) maintains a database on national crime, and accepts reports based on categories of missing persons. One category, endangered persons, is reserved for individuals who are missing under circumstances indicating that their physical safety may be in danger.¹⁶⁹

7. State Law and Practice

Search and rescue operations in the U.S. are governed by state laws and local policies on missing persons. When they receive reports of missing persons suspected to be irregular migrants in the border region, however, state and local law enforcement typically refer them to CBP.¹⁷⁰ This burden-shifting occurs despite the fact that there is no basis for distinguishing between citizens and non-citizens with regard to missing persons in any state law.

o. Arizona

Arizona has no statewide legal framework governing search and rescue procedure for missing persons. Rather, missing persons cases are handled by local law enforcement offices. The Phoenix Police Department, for example, has created a “Missing and Unidentified Persons Unit” to handle such investigations.¹⁷¹ The Phoenix Police Department relies on NamUs, the National Missing and Unidentified Persons system operated by the federal government to track and record missing and unidentified persons.¹⁷² The police require missing persons reports to be filed within the jurisdiction where the person was last seen. Once a report is filed with a local officer, the police claim that a detective will be assigned to the case and will “likely contact the reporting person with a few days.”¹⁷³

¹⁶⁸ Missing Persons and Unidentified Remains Act of 2019, 6 U.S.C. § 40501 (2020).

¹⁶⁹ State and Federal Missing Persons Statutes, Texas Dept. of Public Safety (2018) pg 1. *See also* pg 2 for the list of individuals on whom the NCIC maintains records. The list includes individuals that: 1) have disabilities, 2) are missing under circumstances indicating they may be in physical danger 3) are missing after a catastrophe 4) are missing under circumstances indicating their disappearance may not have been voluntary 5) are under the age of 21 6) do not meet any of the above criteria but for whom there is a reasonable concern for their safety.

[file:///Users/jakepalmer/Downloads/2019-ncic-missing-person-and-unidentified-person-statistics%20\(1\).pdf](file:///Users/jakepalmer/Downloads/2019-ncic-missing-person-and-unidentified-person-statistics%20(1).pdf)

¹⁷⁰ Interview with Eddie Canales, *supra* note 167.

¹⁷¹ *Missing and Unidentified Persons Unit*, PHOENIX.GOV, <https://www.phoenix.gov/police/investigations/cold-case/missing-persons> (last visited May 15, 2021).

¹⁷² *Missing and Unidentified Persons Unit*, PHOENIX.GOV, <https://www.phoenix.gov/police/investigations/cold-case/missing-persons> (last visited May 13, 2021).

¹⁷³ *Missing Adults*, CITYOFPHOENIX.GOV, <https://www.phoenix.gov/police/investigations/cold-case/missing-persons/adults> (last visited May 14, 2021).

Non-profit organizations like No More Deaths also conduct search and rescue operations in Arizona. No More Deaths maintains a hotline for missing migrants that operates as an alternative to 911.¹⁷⁴ While the hotline is essential for migrants and their families who are wary of calling 911 and having their call turned over to CBP, No More Deaths does not have the capacity to conduct rapid searches.¹⁷⁵ Searches usually occur sometime the next day, once a group of volunteers (usually 5-10 people) can be organized.¹⁷⁶ No More Deaths publicizes the hotline at migrant shelters where family members of missing migrants might more readily learn where to call when their relatives disappear.¹⁷⁷ The searches are rarely successful in finding the missing individual.¹⁷⁸

p. California

In 2010, the California legislature directed law enforcement agencies to adopt policies to assist police officers with missing persons investigations.¹⁷⁹ The Commission on Peace Officer Standards and Training (POST) has compiled guidelines for law enforcement agencies across the state to follow.¹⁸⁰

The POST guidelines establish nine categories of missing persons. The majority of missing migrants would probably fall under the “lost” or “unknown” categories.¹⁸¹ Law enforcement agents have a duty to immediately assist anyone making a report of a missing person, and reports must be accepted regardless of jurisdiction.¹⁸² Officers receiving a report are required to fill out a “Standard Missing Person Reporting Form”¹⁸³ and follow a checklist to determine next steps. Which procedure applies depends on the demographic category in which the missing person falls; for instance, there are a slew of additional guidelines for missing children's cases.¹⁸⁴ All missing person cases must be entered into the state’s Department of Justice Missing Persons System within two hours, and authorities in the relevant jurisdiction must be notified.¹⁸⁵ The relevant jurisdiction is then required to pursue all investigative leads, including checking the

¹⁷⁴ Zoom Interview with Dillon Kim, Volunteer, No More Deaths in Medford, MA. (Feb. 18, 2021).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Cal. Penal Code, § 13519.07 (1985).

¹⁸⁰ The other categories are: catastrophic missing, dependent adult, parental/family abduction, runaway, stranger abduction, suspicious circumstances, voluntarily missing adult; *See Missing Persons Investigations: Guidelines & Curriculum*, POST.CA.GOV, https://post.ca.gov/Portals/0/post_docs/publications/Missing_Persons_Investigations.pdf (last visited May 12, 2021).

¹⁸¹ Missing Persons Investigations: Guidelines and Curriculum. *The Commission on Peace Officer Standards and Training* (2011) https://post.ca.gov/Portals/0/post_docs/publications/Missing_Persons_Investigations.pdf p. 11-12]

¹⁸² CA. Penal Code §§, 14210 (a) and 14205(a)

¹⁸³ CA. Penal Code § 13519.07(d)

¹⁸⁴ CA. Penal Code § 13519.07(b)

¹⁸⁵ *Id.*

local coroner's office and, in some cases, obtaining a voluntary sample of DNA from family members.¹⁸⁶

As with Arizona, much of the search and rescue missions for missing migrants are left in the hands of non-profit organizations. Representatives from Aguilas del Desierto travel to migrant shelters in Mexico to spread awareness of the difficulties of crossing the U.S. portion of the migrant corridor.¹⁸⁷ During the summer, Aguilas receives about 10 calls from missing or lost migrants per day. When Aguilas receives a call from migrants in the desert, they follow the procedure prescribed by CBP and local law enforcement. Aguilas then asks the migrants for their coordinates and passes those along to CBP. If CBP refuses to act, Aguilas can contact the given consulate and request that they ask CBP to respond to the disappearance. If no coordinates are given, Aguilas will undertake a search with a group of volunteers, frequently coordinating with CBP to ascertain permission to enter federal lands.¹⁸⁸

q. New Mexico

New Mexico's Search and Rescue Act, passed in 1978, aims to coordinate federal, state, and local government efforts in conducting search and rescue operations. The New Mexico State police has established a State Resource Officer in Santa Fe, the only paid search and rescue position in the state, to coordinate activities statewide. The Missing Persons Information and Reporting Act (also passed in 1978), establishes a "missing persons information clearinghouse" within the department of public safety.¹⁸⁹ Like other state clearinghouses, New Mexico's database shares information on missing persons with other states; provides a centralized file for information on missing persons and unidentified remains; and compiles statistics on missing persons within the state. Information from the clearinghouse should be made available to custodians or immediate family members of a missing person; the law draws no distinctions based on citizenship in this matter.¹⁹⁰

New Mexico's Missing Persons Reference Manual stipulates what information should be included in a missing person's report, such as identifying features or demographic descriptors. Within two hours of receiving a report, law enforcement officers are obliged to start an investigation, provide all information to the clearinghouse, and notify the department of public safety if the person is determined to be endangered (though this category likely does not apply to

¹⁸⁶ *Supra* at 181, Missing Persons Investigations Guidelines, p. 2-15.

¹⁸⁷ Zoom Interview with Vicente Rodriguez, Founder, Aguilas Del Desierto, conducted in Boston, MA. (Mar. 2, 2021).

¹⁸⁸ *Id.*

¹⁸⁹ *Missing Persons Reference Manual*, State of New Mexico, Dept. of Public Safety <https://www.nmlegis.gov/handouts/CCJ%20072612%20Item%200%20NMDPS%20Missing%20Persons%20Reference%20Manual.pdf> p 6.

¹⁹⁰ *Id.* at p 7.

missing migrants).¹⁹¹ All law enforcement agencies in New Mexico are required to enter information about **all** unidentified remains found in their jurisdiction into the clearinghouse and the national crime information center.¹⁹²

r. Texas

Texas maintains a Missing Persons Clearinghouse (MPCH) and Unidentified Persons/DNA Unit within its Department of Public Safety. The MPCH is the central repository for missing persons, including individuals from other states believed to be in Texas.¹⁹³ Texas law enforcement personnel receiving a report of a missing person must immediately enter the name of the person into NCIC (and by extension the MPCH) with all available identifying features. In 2001, the Texas legislature established the Missing Persons DNA Database at the University of North Texas. The database maintained by UNT includes information from any unidentified human remains or from reports of a high-risk missing person.¹⁹⁴ Texas also established an Unidentified Persons/DNA Unit in 2007 to assist law enforcement in entering identifying features into NCIC.¹⁹⁵

Texas law requires authorities to open an investigation immediately if the missing person is a child or has a mental illness, such as Alzheimer's. Otherwise, officers must start an investigation "with due diligence."¹⁹⁶

Like in Arizona and California, much of the effort for searching for missing migrants falls on non-profit organizations. The South Texas Human Rights Center (STHRC), in particular, takes on search and rescue operations because local law enforcement officials do not have the resources to conduct them.¹⁹⁷ Concerned families are referred to the STHRC by other organizations, including *Aguilas del Desierto*.¹⁹⁸ When STHRC receives a call, their response depends on the circumstances. If they have GPS coordinates and the situation is an emergency, STHRC refers the case to CBP, which usually conducts a rescue operation when it has GPS coordinates. If no GPS coordinates are available, STHRC will conduct a search themselves, working in conjunction with the individual's consulate (if known).¹⁹⁹

¹⁹¹ Section 29-15-7 of Missing Person reference manual (*supra* at 181). For the definition of an endangered person, see section 29-15-2. An endangered person is a missing person who: 1) is in imminent danger of causing harm to the person's self 2) is in imminent danger of causing harm to another 3) is in imminent danger of being harmed by another or who has been harmed by another or 4) has Alzheimer's disease or another degenerative brain disorder.

¹⁹² *Missing Persons Reference Manual*, § 29-15-7 paragraph C.

¹⁹³ *State and Federal Missing and Unidentified Persons Statutes*, Texas Dept. of Public Safety (2017) <https://www.dps.texas.gov/internetforms/Forms/MP-13.pdf> p. 2.

¹⁹⁴ Texas Code of Criminal Procedure § 63.052 (2017).

¹⁹⁵ *Id.* at 2.

¹⁹⁶ *Id.* at 12.

¹⁹⁷ Interview with Eddie Canales, *supra* note 167.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

8. Failures in State Law and Practice

Local law enforcement's routine practice of deferring to CBP when notified of a missing or stranded migrant is inconsistent with the obligations imposed by state laws in California, New Mexico, and Texas. Specifically, by transferring responsibility for a case onto CBP, knowing that CBP routinely fails to respond, local law enforcement is not ensuring a diligent search for missing individuals will be conducted for those who might be in danger. Referring the case to CBP should not constitute "due diligence," to borrow the Texas nomenclature, because of CBP's piecemeal and inadequate search and rescue efforts. As described above, the international legal standard on search and rescue imposes a duty on states to find and provide information to the families of the disappeared. CBP's policies tend to facilitate the disappearance of migrants, rather than assist in their rescue. As the largest law enforcement agency in the country with a massive budget, CBP should be taking far more aggressive measures to find and rescue missing migrants.

9. Recommendations

CBP and local law enforcement should expand their search and rescue operations and collaborate more closely with non-profit organizations already conducting such operations in the region. Prior to the Trump Administration, CBP's BORSTAR team regularly made a show of collaborating with non-profits like No More Deaths.²⁰⁰ That relationship has deteriorated as CBP's priorities focused on deportations and deterrence. To comply with international legal obligations, CBP should expand the network and search and rescue beacons in the border region, especially along routes that CBP knows are heavily trafficked by migrants. CBP should also collaborate with local law enforcement agencies to establish and maintain a hotline for missing migrants or their families and engage in search and rescue operations for missing migrants even when the exact coordinates are not known. Money earmarked to CBP for search and rescue operations should be allocated to local law enforcement, who should have a more robust capacity to engage in search and rescue operations. Local law enforcement officials should not be required to turn rescued migrants over to CBP, in an effort to separate immigration enforcement from the humanitarian mission of rescuing migrants. Under international law, CBP or local law enforcement is obligated to respond immediately to every call and notification that a person is missing with a search and rescue party equipped with a medical officer, food, water, and emergency relief equipment. CBP should also collaborate with NGOs working along the border to create a hotline for missing migrants who do not want to be picked up by CBP but are nevertheless in danger. This need not be run by CBP but could be subsidized by CBP. CBP should also assist organizations like No More Deaths with the placement and maintenance of

²⁰⁰ Interview with Eddie Canales, *supra* note 167.

water and supply stations in the desert region and give organizations like No More Death broader permissions to conduct search and rescue operations on federal land.

Finally, local law enforcement should fully comply with their state statutes governing missing persons. This means conducting search and rescue operations for individuals even if they are suspected of being irregular migrants. Local law enforcement should coordinate with non-profits to assist with search and rescue operations if the non-profits request their help.

V. Investigation & Identification of Migrant Remains

10. International Legal Obligations

Under international law, the obligation to investigate and identify unidentified remains flows largely from the right to life, articulated in Article 6 of the ICCPR and Article 3 of the UDHR.²⁰¹ “An important element of the protection afforded to the right to life by the [ICCPR] is the obligation on States parties, where they know or should have known of potentially unlawful deprivations of life, to investigate... such incidents.”²⁰² These investigations should be “aimed at ensuring that those responsible are brought to justice, at promoting accountability and preventing impunity, at avoiding denial of justice, and at drawing necessary lessons for revising practices and policies with a view to avoid repeated violations.”²⁰³ Investigations should be 1) prompt, 2) effective and thorough, 3) independent and impartial, and 4) transparent.²⁰⁴

More specifically, the HRC has stated that investigations should follow the standards set forth in the Minnesota Protocol on the Investigation of Potentially Unlawful Death.²⁰⁵ This Protocol sets common standards for states in accordance with international law for the investigation of a

²⁰¹ See, e.g., Hum. Rts. Comm., *Baboeram-Adhin v. Suriname* (Communication No. 146/1983) para 14.3 and para 16; Human Rights Committee, *Sarma v. Sri Lanka* (Communication No. 950/2000).

²⁰² Hum. Rts. Comm., General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, para. 27, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019).

²⁰³ *Id.*; See also Hum. Rts. Comm., General Comment No. 31, *supra* note 8, at paras. 15, 18. See, e.g., Hum. Rts. Comm., Commc’n No. 1436/2005, *Sathasivam v. Sri Lanka*, Views adopted on 8 July 2008, para. 6.4, UN Doc. CCPR/C/93/D/1436/2005 (finding Sri Lanka in violation of the ICCPR articles 6 and 7 for failing in its procedural obligations to properly investigate an unlawful death).

²⁰⁴ See Hum. Rts. Comm., General Comment No. 31, *supra* note 8, at para. 15. See also Hum. Rts. Comm., General Comment No. 36, *supra* note 104, at para 28; Comm. against Torture, Conclusion and Recommendations on Colombia, para. 9(a), U.N. Doc. CAT/C/CR/31/1 (2004). See e.g., Hum. Rts. Comm., Concluding Observations: Cameroon (2010), para. 15, U.N. Doc. CCPR/C/CMR/CO/4 (Aug. 4, 2010) (observing concerns that State investigations were inadequate as the State was not able to provide statistics on the number of reported cases of extrajudicial killings).

²⁰⁵ See *The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)*, Office of the U.N. High Commissioner for Human Rights, para. 25, (2017), <https://www.ohchr.org/Documents/Publications/MinnesotaProtocol.pdf> [hereinafter *The Minnesota Protocol*]; Hum. Rts. Comm., General Comment No. 36, *supra* note 114, para. 27, (“Investigations and prosecutions of potentially unlawful deprivations of life should be undertaken in accordance with relevant international standards, including the Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016).”).

potentially unlawful death or suspected enforced disappearance.²⁰⁶ The Minnesota Protocol requires that at minimum investigations should seek to identify the victims; recover and preserve all material probative evidence of the cause of death; identify possible witnesses; determine the cause, manner, place and time of death; and determine who was involved in the death.²⁰⁷ Where relevant, investigations should include an autopsy of the victim's body and an objective analysis of the clinical findings, including the cause of death.²⁰⁸

The Minnesota Protocol establishes that a state's duty to investigate potentially unlawful deaths is triggered when its agents know or should have known of a potentially unlawful death, including where there are reasonable allegations that a death might be unlawful.²⁰⁹ Potentially unlawful deaths include those situations where the death of an individual may have been caused by the acts or omissions of the state, its organs or agents. Potentially unlawful deaths include situations where death occurred as a result of the state failing to meet its obligations, such as when a State fails to exercise "due diligence" to protect individuals from foreseeable harm and loss of life.²¹⁰

The high death rate of migrants at the United States–Mexico border suggests a failure on the part of the US to meet its obligations to protect the right to life. Specifically, the U.S. may be culpable for arbitrary and unlawful deaths of migrants at its borders due to its adoption and continued use of Prevention Through Deterrence, which it has acknowledged would "force[] [migrants] over more hostile terrain," and that this hostile terrain is such that people "can find themselves in mortal danger."²¹¹ The deaths of all migrants directly caused by this policy is unlawful, triggering U.S. state responsibility including the obligation to thoroughly investigate.

11. Regional Legal Obligations

²⁰⁶ The Minnesota Protocol was drafted in conjunction with the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution in collaboration with the UN High Commissioner for Human Rights. A group of international forensics and legal experts convened in 2014 to update the Protocol. Since it was first drafted, it has been adopted by the Crime Prevention and Criminal Justice Branch of the UN Centre for Social Development and Humanitarian Affairs, and has been used by national, regional, and international courts, and commissions and committees such as the UN Human Rights Committee, the European and Inter-American Courts of Human Rights and the African Commission on Human and Peoples' Rights. Regional human rights courts have also referred to the Manual in reaching findings on the inadequacy of investigations into suspicious deaths. See, for example, European Court of Human Rights, *Nachova and other v. Bulgaria* (applications Nos. 43577/98 and 43579/98), 6 July 2005; European Court of Human Rights, *Finucane v. the United Kingdom*, application No. 29178/95, 1 July 2003 and 1 October 2003; Inter-American Court of Human Rights, *Gonzalez et al. v Mexico*, case No. 281/02, 16 November 2009.

²⁰⁷ *The Minnesota Protocol*, *supra* note 205, at para. 25.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at para. 15.

²¹⁰ See, e.g., Hum. Rts. Comm., General Comment No. 31, *supra* note 8, at para. 8.

²¹¹ U.S. Border Patrol, *Border Patrol Strategic Plan 1994 and Beyond: National Strategy*, (July, 1994) pg. 2, 7.

The obligation to conduct effective investigations comes from the right to life in regional law as well as international law.²¹² The American Convention on Human Rights specifically provides for the right to life for all individuals subject to a state's jurisdiction, without distinction based on race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.²¹³ Likewise, Article 1 of the American Declaration on the Rights and Duties of Man, to which the United States is a signatory, recognizes the right to life.²¹⁴ In interpreting the American Convention, the Inter-American Court of Human Rights has consistently held that the right to life triggers the state's responsibility to investigate any potentially unlawful death.²¹⁵ This obligation is triggered when the State knows or should know of a potentially unlawful death, including when there are reasonable allegations of a potentially unlawful death.²¹⁶

In the course of an investigation, officials must distinguish between natural and accidental deaths, and suicides and homicides.²¹⁷ Similar to international requirements, the Inter-American Court of Human Rights has held that investigations must be prompt, impartial, thorough, and independent.²¹⁸ Investigations must be in accordance with principles of due diligence, which includes basic essential procedures to conserve evidence, maintain the chain of custody of that evidence, and conduct an autopsy if it would contribute to the success of the investigation.²¹⁹ Both the Inter-American Court and Commission have referenced the Minnesota Protocol in establishing standards for investigations.²²⁰

1. U.S. Federal Law and Practice

²¹² Organization of American States, American Convention on Human Rights, art. 4, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

²¹³ *Id.* at art. 1.

²¹⁴ *Id.*

²¹⁵ In *Velásquez Rodríguez v. Honduras*, the Court found the Honduran government was obliged to investigate every situation involving a potential violation of the rights protected in the ACHR. *Velásquez Rodríguez v. Honduras*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, (July 29, 1988). *See also* *Garibaldi v. Brazil*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 203, para. 39, (Sept. 23, 2009).

²¹⁶ *Montero Aranguren v. Venezuela*, Merits, Reparations, and Costs, Judgment, INTER-AM. CT. H.R. (ser. C) No. 150, para. 79, (July 5, 2006). Additionally, officials with knowledge of potentially unlawful deaths must report to their superiors or proper authorities without delay. *See Anzualdo Castro v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 202, para. 134 (Sept. 22, 2009).

²¹⁷ *See Veliz Franco et. al. v. Guatemala*, Merits, Reparations, and Costs, Judgment, INTER-AM. CT. H.R., (ser. C) No. 277, para. 191 (May 19, 2014).

²¹⁸ *See Tibi v. Ecuador*, Merits, Reparations, and Costs, Judgment, INTER-AM. CT. H.R. (ser. C) No. 114, para. 159 (Sept. 7, 2004).

²¹⁹ *See Kawas-Fernández v. Honduras*, Merits, Reparations, and Costs, Judgment, INTER-AM. CT. H.R. (ser. C) No. 196, para. 102 (Apr. 3, 2009); *Rodríguez Vera et.al. v. Colombia*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 287, para 489 (Nov. 14, 2014).

²²⁰ *Zambrano Velez et. al. v. Ecuador*, Merits, Reparations, and Costs, Judgment, INTER-AM. CT. H.R. (ser. C) No. 166, para 121 (July 4, 2007).

From 1998 through 2019, the U.S. Border Patrol reported 7,805 migrant deaths on the border, most due to dehydration, drowning, and exposure to extreme heat or cold.²²¹ As noted previously, “[t]he actual number of dead is likely much higher than that, as the statistics only report those who have been positively identified by border patrol agents.”²²² While Border Patrol is the federal agency tasked with search and rescue of migrants, it is the local counties that are responsible for the processing and identification of migrant remains.²²³ In counties with high levels of migration and interaction with Border Patrol agents, locals may directly call the Border Patrol when they discover human remains.²²⁴ Border Patrol then directs local law enforcement authorities to process the available evidence and take custody of the remains.

No federal law dictates what state or local authorities should do with the bodies of migrants who die within the United States. As such, protocol for forensics and identification of remains differs state by state. Further, in practice there is no consistently used central repository for all reports of missing persons last seen crossing the U.S.-Mexico border. Recently, the National Missing and Unidentified Persons System (NamUS) has begun stepping into that role. Launched by the Department of Justice in 2009, NamUs is “a national information clearinghouse and resource center for missing, unidentified, and unclaimed person cases across the United States.”²²⁵ It is funded by the National Institute of Justice and managed through a cooperative agreement with the UNT Health Science Center in Fort Worth, Texas.²²⁶ As of November 2019, 18,563 missing person cases and 3,955 unidentified persons cases had been resolved through the use of NamUs.

²²¹ U.S. Border Patrol, *BP Southwest Border Sector Deaths FY98-FY19*, CBP.GOV, (Jan. 2020), https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Fiscal%20Year%20Southwest%20Border%20Sector%20Deaths%20%28FY%201998%20-%20FY%202019%29_0.pdf. See also Samuel N. Chambers, Ben McMahan & Coen C.W.G. Bongers, *Developing a Geospatial Measure of Change in Core Temperature for Migrating Persons in the Mexico-U.S. Border Region*, 35 SPATIAL AND SPATIO-TEMPORAL EPIDEMIOLOGY 100363 (2020), <https://doi.org/10.1016/j.sste.2020.100363> (demonstrating that the walk through the Arizona desert puts individuals at risk of dying from heat exposure or hypothermia).

²²² See Danilo Zak, *Bill Analysis: The Missing Persons and Unidentified Remains Act*, NATIONAL IMMIGRATION FORUM (Oct. 5, 2020), <https://immigrationforum.org/article/bill-analysis-the-missing-persons-and-unidentified-remains-act/>.

²²³ “When remains are found, about 50% of the time they are found by Border Patrol... who then call the cops. [It is the job of] the law enforcement who has jurisdiction to investigate the deaths.” Zoom interview with Dr. Greg Hess, Chief Medical Examiner, Pima County Office of the Medical Examiner in Tucson, AZ (Feb. 11, 2021). This assertion was reiterated by several other interviewees including Eddie Canales, Executive Director of the South Texas Human Rights Center and Tony Banegas, Executive Director of the Colibri Center.

²²⁴ Zoom interview with Dr. Greg Hess, *supra* note 223, (“if a random citizen finds human remains, they will contact the police who will redirect to the local law enforcement with jurisdiction.”). Dr. Hess went on to note that PCOME will cross-reference fingerprints of the migrant remains with the Border Patrol database, but that is the extent of Border Patrol’s involvement in the investigation into the death of the migrant.

²²⁵ NamUs, <https://www.namus.gov/> (last visited May 15, 2021).

²²⁶ *Id.*

Currently there are 20,245 active missing persons cases and 13,635 unidentified persons registered in the database.²²⁷

In 2018, NamUs 2.0 was launched, allowing family members of missing persons, victim advocates, media representatives, and other members of the general public to register and use the NamUs System. Registered public users may enter missing person cases or contribute relevant information to NamUs staff.²²⁸ Prior to this re-launch, NamUs could not accept missing person reports for most missing migrants, as a police tracking number was required to enter data into it, and most “U.S. police agencies usually will not take reports for missing foreign nationals.”²²⁹ Consequently, many missing migrants did not have profiles within the NamUs database that could be used for comparison. While public access to report missing persons is a vast improvement to the system, NamUs still relies on local jurisdictions to directly enter records for unidentified remains. Accordingly, “a family could report a missing person to an office in one state, while the body is found in another, and because local jurisdictions may not upload information on missing persons reports or on remains found into NamUs, there is no consistent way for these records to be connected.”²³⁰

Moreover, NamUs uses non-genetic information to make connections between unidentified remains and missing persons reports. However, because such a large number of the unidentified remains are highly decomposed or skeletal, many cases will only be resolved through DNA comparisons or other more involved forensic techniques. Through NamUs, the National Institute for Justice purports to provide support and technical assistance to state and local law enforcement agencies, including analytical support and data mining, forensic services (such as DNA, fingerprint coding and examination, dental examination and coding, and anthropological assessments), technology upgrades, user training, and victim services. In addition, the NIJ, through NamUs, provides funding and support for the University of North Texas Center for Human Identification’s (“UNTCHI’s”) Missing Persons Unit to perform DNA testing. UNTCHI “is the primary institution in Texas and the USA for identifying human remains with DNA and anthropological analysis.”²³¹ UNTCHI is a recognized International Organization for

²²⁷ *Unidentified Persons Search*, NAMUS, <https://www.namus.gov/UnidentifiedPersons/Search> (last visited May 15, 2021).

²²⁸ *NamUs Registration*, NAMUS, <https://www.namus.gov/Registration> (“Professional users include law enforcement officers, medical examiners, coroners, missing person clearinghouse personnel, and other allied professionals. Professional User registration requires sponsorship from a criminal justice agency, and once vetted, the user will be granted heightened permissions within the NamUs system... to access secure information, manage agency cases, and network with other criminal justice professionals.”).

²²⁹ Robin Reineke, *Lost in the System: Unidentified Bodies on the Border*, NACLA (June 25, 2013), <https://nacla.org/article/lost-system-unidentified-bodies-border>.

²³⁰ *Id.*

²³¹ Bruce Budowle, Magdalena M. Bus, Melody A. Josserand & Dixie L. Peters, *A Standalone Humanitarian DNA Identification Database System to Increase Identification of Human Remains of Foreign Nationals*, 134 INT’L. J. OF LEGAL MEDICINE 2039, 2041 (2020).

Standardization accredited Combined DNA Index System (“CODIS”) laboratory, and one of a small number of laboratories capable of developing and uploading DNA profiles to CODIS.²³²

CODIS, the Combined DNA Identification System, is a series of databases funded and managed by the Federal Bureau of Investigation (FBI), which contains DNA from missing and unidentified people and criminal investigations. Unfortunately, the system is not yet structured in a way that enables widespread use to identify migrant remains at the border. This is largely due to the fact that CODIS lacks DNA family reference samples for many of the missing.²³³ “[W]hile DNA samples are submitted to CODIS from unidentified human remains, CODIS lacks the many [family reference samples, or FRS] necessary to generate genetic associations that will lead to positive identification.”²³⁴ In addition, few labs within the United States are accredited to upload unidentified human remains DNA profiles into CODIS.

Another DNA database involved in the identification of migrant remains is that of the Equipo Argentino de Antropología Forense (“EAAF”).²³⁵ EAAF collects family reference samples in migrant sending communities in Honduras, El Salvador, the Mexican states of Chiapas and Oaxaca, and along the U.S.-Mexico border. The EAAF uses Bode Cellmark Forensics, a private lab in Virginia, to process and analyze its samples. Unfortunately, these family reference samples do not meet the eligibility requirements for inclusion into CODIS.²³⁶

Accordingly, “[t]he EAAF has FRS from families of the missing and CODIS has DNA samples from unidentified human remains. However, due to policy restrictions within the United States federal system, it is currently not possible to conduct large-scale DNA cross-referencing.”²³⁷ To address this divide, UNTCHI has created the Humanitarian DNA Identification Database (“HDID”), which enables family reference sample DNA profiles from non-US citizens to be compared with the DNA profiles from unidentified human remains within its local database system and CODIS.²³⁸ HDID launched in 2020, and data on its efficacy--whether it has indeed resulted in increased identification of migrant remains-- is not yet available.

²³² NAMUS OVERVIEW BOOKLET 12,

<https://www.namus.gov/content/downloads/publications/NamUsOverviewBooklet.pdf> (last visited May 15, 2021).

²³³ This is either because the families live outside the United States, “or because they do not feel comfortable providing a DNA sample in the presence of law enforcement.” See Katherine M. Spradley, Nicholas P. Herrmann, Courtney B. Siegert & Chloe P. McDanel, *Identifying Migrant Remains in South Texas: Policy and Practice*, 4 FORENSIC SCI RES 60, 60 (2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6427566/>.

²³⁴ *Id.* at 64.

²³⁵ *Identificación de migrantes*, EAAF, <http://eaaf.org/campana-de-identificacion-latam-eeuu/> (last visited May 15, 2021).

²³⁶ See Budowle, *supra* note 211, at 2041.

²³⁷ Spradley, *supra* note 233, at 65 (“If the DNA profiles from both systems were routinely cross-referenced on a large scale, hundreds if not thousands of individuals could be identified and repatriated to their families.”).

²³⁸ For an in-depth discussion on the Humanitarian DNA Identification Database, see Budowle, *supra* note 211, at 2041.

In an effort to resolve many of the gaps in reporting and use of national databases to identify remains, the Missing Persons and Unidentified Remains Act (“MPURA”), was signed into law on December 31, 2020.²³⁹ MPURA creates grants for humanitarian and state actors to report and identify missing persons and unidentified remains, including migrant border crossers, while also providing funding and resources for additional rescue beacons to be placed along the border.²⁴⁰

Applicants may use funds to pay for the transportation, processing, identification, and reporting of missing persons and unidentified remains, specifically including those of migrants. Funds may also be used to establish and expand programs to improve reporting of unidentified persons, hire and maintain additional DNA case analysts, technicians, fingerprint examiners, forensic odontologists and forensic anthropologists, and to procure and maintain equipment associated with the identification of remains.²⁴¹ “Nonprofit organizations that have working collaborative agreements with State and county forensic offices, including medical examiners, coroners, and justices of the peace, for entry of data into CODIS or ... NamUs... or both” are among the eligible entities that may apply for funding.²⁴² This language, however, indicates that the nonprofits must already have a collaborative agreement and already be permitted to enter data into CODIS or NamUs before being eligible for funding. The Act also provides additional direct funding to NamUs, “for the operationalization, maintenance, and expansion of the National Missing and Unidentified Persons System (NamUs) for the purpose of carrying out this Act.”²⁴³

Under MPURA, the Attorney General, Customs and Border Protection, and the Government Accountability Office would each be required to submit annual reports on use of grant funding and on programs implemented to save migrant lives and identify the dead.²⁴⁴ The Act also requires each jurisdiction to report missing persons and deceased individuals whose remains have been found to both the National Crime Information Center (NCIC) and NamUs.

2. State Law and Practice

Once local law enforcement agencies take control of human remains found in their jurisdiction, what happens to the migrant’s remains completely depends on the procedures followed in each state, and at times, in each county.

a. Arizona

²³⁹ Missing Persons and Unidentified Remains Act of 2019, Pub. L. No. 116-277, 134 Stat. 3368 (2020).

²⁴⁰ Section 202 of the Missing Persons and Unidentified Remains Act (“The Attorney General may award grants to eligible entities ... to enable [them] to improve the transportation, processing, identification, and reporting of missing persons and unidentified remains, including migrants.”).

²⁴¹ *Id.* at Section 205.

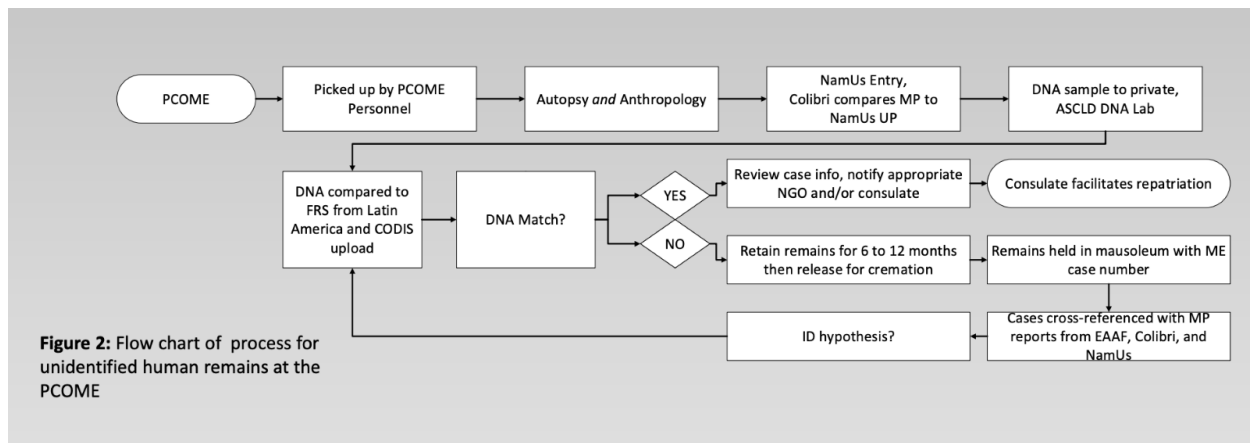
²⁴² *Id.* at Section 202.

²⁴³ *Id.* at Section 102.

²⁴⁴ *Id.* at Sections 4 and 5.

An Arizona state statute provides for a medical examiner (ME) system for each county.²⁴⁵ However, Arizona has no specific state laws pertaining to unidentified human remains, and the Arizona Revised Statutes Annotated is silent on what medical examiners are required to do with migrant remains.²⁴⁶ “The only place in the Arizona statute that talks about unidentified remains is that if someone finds a deceased person, they are required to report it to someone, and that someone is supposed to report it to the medical examiner’s office.”²⁴⁷ Specifically, the Arizona Revised Statutes Annotated states that “any person having knowledge of the occurrence of the death of a human being ... shall promptly notify the nearest peace officer of all information.”²⁴⁸ The peace officer is then required to make or cause to be made an investigation of the facts and circumstances surrounding the death, and report results to the medical examiner.²⁴⁹

While the medical examiner must take charge of the body, “there’s no legal requirement to [identify the person].”²⁵⁰ The medical examiner “may” authorize forensic pathologists to perform examinations and autopsies.²⁵¹ To that end, the ME makes a determination about whether or not the “public interest” requires an external examination, autopsy, or other special investigation.²⁵² The “public interest” requirement is subjective and is at the discretion of the medical examiner.²⁵³ Local authorities are not required to identify unidentified remains, and any effort to do so is entirely voluntary.



²⁴⁵ KATHERINE SPRADLEY, ROBIN REINEKE, MERCEDES DORETTI & BRUCE ANDERSON, DEATH ALONG THE US/MEXICO BORDER: A COMPARATIVE VIEW OF POLICY AND PRACTICE IN ARIZONA AND TEXAS (2016).

²⁴⁶ See Spradley, *supra* note 233, at 61.

²⁴⁷ Zoom interview with Dr. Greg Hess, *supra* note 223.

²⁴⁸ ARIZ. REV. STAT. ANN. S 11-593(A) (2016).

²⁴⁹ *Id.*

²⁵⁰ Zoom interview with Dr. Greg Hess, *supra* note 223.

²⁵¹ ARIZ. REV. STAT. ANN. S 11-594 (2017).

²⁵² ARIZ. REV. STAT. ANN. S 11-597(G) (2014).

²⁵³ Zoom interview with Dr. Greg Hess, *supra* note 223.

Image source: Katherine Spradley et al., Death Along the US/Mexico Border: A Comparative View of Policy and Practice in Arizona and Texas, Las Vegas (NV): American Academy of Forensic Sciences (2016).

The state of Arizona comprises about 91% public land, making searching for human remains more accessible to authorities and humanitarian organizations alike.²⁵⁴ Border Patrol agents find about half of the bodies discovered in the county, while others are typically discovered by local residents and ranchers.²⁵⁵ If Border Patrol agents come across the remains of a migrant while doing rounds in the field, they report it to local law enforcement agencies first. In practice, after a local law enforcement official conducts a brief investigation of the area and determines that the remains are likely those of “undocumented border crossers”²⁵⁶, the Pima County Office of the Medical Examiner (PCOME) receives the remains and starts an investigation to identify the body or determines if there isn’t enough information to do so. PCOME provides ME services for five counties, in which 95% of undocumented migrant deaths in Arizona are located.²⁵⁷ As of January 2021, Pima County of Arizona received over 3,500 migrant remains and had identified about two-thirds of those individuals.²⁵⁸ In 2020, the second highest year in total remains recovered and sent to PCOME, 220 remains were recovered.²⁵⁹

PCOME elects to conduct both autopsies and anthropology exams on unidentified human remains in order to identify them. If fingerprints are obtained from the remains, they are sent to Border Patrol to compare against their database, Ident. If the person has been apprehended before, the fingerprints should be in that database, which provides PCOME with a name. Names alone are not determinative as they may or may not be the individual's legal name.²⁶⁰ Sometimes Ident provides a photograph of the apprehended individual as well, which may be shown to family members to help with identification. In all cases, identifying information of the individual is cross referenced with missing person (MP) reports in NamUS and at the Colibri Center for Human Rights.²⁶¹

The “odds of identifying someone ... is directly proportional to the conditions of the remains when they come in.”²⁶² If remains are found quickly and have not severely decomposed, they can

²⁵⁴ See Jessica Villagomez, *What Happens when Migrants Die in the Arizona Desert?*, PBS NEWS HOUR (Oct. 22, 2018), <https://www.pbs.org/newshour/nation/what-happens-when-migrants-die-in-the-arizona-desert>.

²⁵⁵ Zoom interview with Dr. Greg Hess, *supra* note 223.

²⁵⁶ *Id.*

²⁵⁷ Spradley, *supra* note 224.

²⁵⁸ Bruce Anderson, Forensic Anthropologist, Pima County Office of the Medical Examiner, Remarks at *Identifying the Dead Along Our Southern Border: Immigration, Regulation, Forensic Anthropology, and Human Rights* at the University of New Mexico Latin American & Iberian Institute (Feb. 25, 2021).

²⁵⁹ Zoom interview with Dr. Greg Hess, *supra* note 223.

²⁶⁰ *Id.*

²⁶¹ The Colibri Center archives MP reports from the US, Mexico, and Central America from families searching for loved ones who were last known to be alive while crossing the border. See *Missing Migrant Program*, COLIBRI CENTER, <https://colibricenter.org/about/programs/> (last visited May 15, 2021).

²⁶² Zoom interview with Dr. Greg Hess, *supra* note 223.

provide a lot of data to use for cross-referencing.²⁶³ When decomposed remains are found, PCOME will take DNA samples to attempt identification. DNA samples are cross-referenced with CODIS to try and find a direct match, and cross-referenced with family samples collected by EAAF. If a DNA match is found with EAAF, both PCOME and EAAF review it and if they agree, they will cooperate with the appropriate consulate to facilitate the repatriation.²⁶⁴ Similarly, if any other database produces a potential match, the appropriate consulate will be contacted and facilitate the confirmation and repatriation process.²⁶⁵

When PCOME cannot identify the remains, it retains them. PCOME has run the indigent remains program in Pima county since 2018, allowing the office to retain the remains for potential future identification.²⁶⁶ Prior to 2018, the indigent remains program was handled by Arizona’s public fiduciary, and unidentified remains were cremated and kept in a column burial at the Collin County Cemetery. With the recent change, if it is possible to identify remains at a later time, families can receive and bury their loved one’s actual remains, rather than ashes.²⁶⁷

b. *California*

Medical death investigations in California are county- based, and the system provides for coroners and medical examiners.²⁶⁸ California has strict and extensive laws dictating procedures for investigating deaths and for identification of remains.²⁶⁹ “It shall be the duty of the coroner to inquire into and determine the circumstances, manner, and cause of all violent, sudden, or unusual deaths; unattended deaths; deaths where the deceased has not been attended by either a physician or a registered nurse...deaths due to drowning, fire, hanging, gunshot, stabbing, cutting, exposure, starvation...”²⁷⁰ Migrants who perish while crossing the border fall squarely into those last three categories. Law enforcement officials investigating the death of an unidentified person are required to report the death to the DOJ no later than 10 days after the date the body was discovered.²⁷¹

Upon being informed of a death, the coroner “may immediately proceed to where the body lies, examine the body, make identification, make inquiry into the circumstances, manner and means of death, and, as circumstances warrant, order its removal for further investigation.”²⁷² The

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ CAL. GOV’T CODE § 24010 (West 2021).

²⁶⁹ Tessa Lee, Medical Examiner’s Investigator, San Diego County Medical Examiner’s Office, Remarks at *Identifying the Dead Along Our Southern Border: Immigration, Regulation, Forensic Anthropology, and Human Rights* at the University of New Mexico Latin American & Iberian Institute (Feb. 25, 2021).

²⁷⁰ CAL. GOV’T CODE § 27491 (West 2021).

²⁷¹ CAL. GOV’T CODE § 27521.1 (West 2021).

²⁷² CAL. GOV’T. CODE § 27491.2 (West 2021).

postmortem exam or autopsy conducted by the coroner may involve taking fingerprints and palm prints, conducting a dental exam, collecting tissues and hair samples, taking frontal and lateral facial photos, noting and photographing scars, marks, tattoos, etc., and documenting the location of the remains.²⁷³ For unidentified human remains, however, appropriate samples of tissue and bone should be taken before the body or human remains are cremated or buried.²⁷⁴

The California "Missing or Unidentified Persons" bill was signed by the governor on September 18th, 2014.²⁷⁵ The Law requires that a qualified forensic dentist carry out a dental examination as part of any postmortem examination of unidentified human remains. It also requires that tissue samples and jaw bones of remains be retained for future identification efforts. These steps are supposed to be taken before any unidentified remains are cremated or buried. As with most border states, many counties lack sufficient resources and are under pressure to complete processing of too many bodies in a short time and end up not fulfilling many of the requirements.²⁷⁶

The San Diego Medical Examiner receives about a dozen migrant remains each year. Most of the remains thought to be migrants are found relatively quickly, many having died due to exposure or falling from the border wall.²⁷⁷ Because the majority of the bodies are in relatively good condition, the ME can obtain fingerprints from them fairly easily.²⁷⁸ Once the ME takes fingerprints, it will work closely with the Mexican consulate to identify those individuals. ME Staff report that identifications happen rather rapidly, because the Mexican consulate is able to "put feelers out and get missing persons information quickly."²⁷⁹ The Mexican consulates receive reports of missing persons directly from families and forward that information to the ME office to facilitate identification. When DNA analysis is needed, the ME office works with the California state department of justice to conduct DNA comparisons. Experts claim that turnaround time is rapid, usually within 3 months.²⁸⁰

²⁷³ CAL. GOV'T CODE § 27521 (West 2021).

²⁷⁴ *Id.*

²⁷⁵ 2014 CAL. STAT. 93.

²⁷⁶ See Matthew Ormseth & Soumya Karlamangla, *Some L.A. County Mortuaries and Funeral Homes Simply Have No More Room for the Dead*, L.A. TIMES (Dec. 30, 2020), <https://www.latimes.com/california/story/2020-12-30/mortuaries-funeral-homes-overwhelmed-covid-19-deaths>; *He Took on the NFL. Now He's After California's 'Primitive' Sheriff-coroner system*, THE SACRAMENTO BEE (Mar. 16, 2018), <https://www.sacbee.com/opinion/california-forum/article205101964.html> ("Pathologists are in such short supply in the Central Valley ... that smaller counties, such as Tuolumne, are working with larger counties to outsource their autopsies.").

²⁷⁷ Tessa Lee, *Medical Examiner's Investigator, San Diego County Medical Examiner's Office, Remarks at Identifying the Dead Along Our Southern Border: Immigration, Regulation, Forensic Anthropology, and Human Rights* at the University of New Mexico Latin American & Iberian Institute (Feb. 25, 2021).

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

c. New Mexico

New Mexico has a centralized medical death investigation system, housed by the University of New Mexico School of Medicine in Albuquerque.²⁸¹ The centralized office is known as the Office of the Medical Investigator (“OMI”).²⁸² OMI directs all investigative activities statewide with trained and certified Field Deputy Medical Investigators (“FDMI”) conducting field investigations.²⁸³ Each county in New Mexico has FDMI’s who conduct investigations at the scene of death to collect information used to determine jurisdiction, possible cause and manner of death, pronounce death, and take custody of the body to ready for transport to the Albuquerque office.²⁸⁴ The FDMIs then present the results of their investigations to Deputy Medical Investigators who make the ultimate decision regarding jurisdiction and the need for further medicolegal investigation.²⁸⁵

The law requires that deaths occurring in particular circumstances be reported to OMI for investigation, regardless of where the initial event leading to the death occurred. These include any sudden or unexpected deaths, deaths unattended by a physician, and deaths directly or indirectly attributable to environmental exposure not otherwise specified.²⁸⁶ State statute also requires that if the cause of death is unclear, the medical investigator “shall order an autopsy performed by a qualified pathologist certified by the state board of medical examiners who shall record every fact found in the examination tending to show the identity and condition of the body and the time, manner and cause of death.”²⁸⁷

New Mexico does have laws pertaining specifically to unidentified remains. Law enforcement must “enter information about all unidentified human remains found in their jurisdiction into the clearinghouse and the national crime information center unidentified person file, including all available identifying features of the human remains and a description of the clothing found on the human remains.”²⁸⁸ The clearinghouse “shall cross-check and attempt to match unidentified human remains with descriptions of missing persons.”²⁸⁹ When a possible match between unidentified remains and a missing person description is found, the clearinghouse notifies law

²⁸¹ N.M. STAT. ANN. § 24-11-3 (2021).

²⁸² N.M. STAT. ANN. § 24-11-1 (2021).

²⁸³ *Investigations*, OFFICE OF THE MEDICAL INVESTIGATOR, <https://hsc.unm.edu/omi/investigations/>.

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ N.M. CODE R. § 7.3.2 (LexisNexis 2021).

²⁸⁷ N.M. STAT. ANN. § 24-11-7 (2021).

²⁸⁸ N.M. STAT § 29-15-7(C) (2021).

²⁸⁹ N.M. STAT § 29-15-9 (A) (2021). If the entry into the national crime information center file results in an automatic entry of the information into the clearinghouse, law enforcement is not required to directly enter that information into the state missing persons clearinghouse. § 29-15-7(C).

enforcement agencies, which “shall make arrangements for positive identification”²⁹⁰ and “notify the office of the state medical investigator.”²⁹¹

New Mexico has also passed a DNA Identification Act, establishing a missing persons DNA identification system consisting of DNA indexes from unidentified persons, unidentified human remains, and known reference samples for missing persons.²⁹² The system facilitates the use of DNA records in the identification and location of missing and unidentified persons or human remains.²⁹³ The remains brought to OMI in Albuquerque arrive in a variety of conditions. As such, identification techniques vary according to the state of decomposition.

In practice though, the New Mexico Medical Examiner receives less than 20 unidentified individuals suspected of being migrants a year.²⁹⁴ This is likely because New Mexico has “less economic draw than other states” for migrants, and because the border with Mexico is much smaller than that of any other border state.²⁹⁵ Because migrant remains encountered in New Mexico typically originate in Northern Mexico, OMI has established relationships with the Mexican consulate office in El Paso to share information and identify the remains.²⁹⁶

OMI frequently encounters cases of non-migrant unidentified remains, however, and has an established process of using forensics examination to identify them.²⁹⁷ According to OMI staff members, when they suspect remains to be those of migrants, they treat such remains in the same manner as any other unidentified individual’s body.²⁹⁸ OMI will conduct forensic anthropologic, forensic odontologist, radiologist consultation, and DNA identification procedures as necessary.²⁹⁹ Because of time delays in analyzing DNA samples OMI will try to process identifications in other ways, such as dental comparisons, before DNA matching. According to OMI staff, “it could easily be a year between submitting a sample and receiving a result.”³⁰⁰ When DNA testing is needed, OMI will send samples to UNTCHI and CODIS for processing and comparison.

There is no legislation dictating what happens to the bodies of remains that cannot be identified. Typically, under New Mexico law, when a person dies and is unclaimed, the remains become the

²⁹⁰ N.M. STAT § 29-15-7(B).

²⁹¹ N.M. STAT § 29-15-9 (C).

²⁹² N.M. STAT § 29-16-2 (C) (2018).

²⁹³ N.M. STAT § 29-16-2 (D) (2018).

²⁹⁴ Heather J. H. Edgar, Forensic Anthropologist, New Mexico Office of the Medical Investigator, Remarks at *Identifying the Dead Along Our Southern Border: Immigration, Regulation, Forensic Anthropology, and Human Rights* at the University of New Mexico Latin American & Iberian Institute (Feb. 25, 2021).

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.* Due to the open area, federally owned land, and tribal land, there are many opportunities for people to go missing in New Mexico.

²⁹⁸ See *supra* note 294.

²⁹⁹ *Id.*

³⁰⁰ *Id.*

responsibility of the county of last residence. “The county shall ensure that the body is buried or cremated no later than thirty days after a determination has been made that the body has not been claimed, but no less than two weeks after death.”³⁰¹ Cremated remains must be retained and stored for at least two years “in a manner that allows for identification of the remains.”³⁰² After the two-year waiting period ends, the ashes are scattered in the outdoors.³⁰³ In practice, OMI does retain the remains of unidentified bodies and continues to try to identify them.³⁰⁴

d. *Texas*

“In Texas, efforts to identify remains of presumed migrants are decentralized due to the vast expanse of the state.”³⁰⁵ Texas has 254 counties, only 14 of which have medical examiner offices; of these, only one is located on the U.S. - Mexico border: Webb County.³⁰⁶ Texas has a combination Medical Examiner and Justice of the Peace (“JP”) system. The county justice of the peace is an elected judge who holds various duties within a county. In addition to the Medical Examiner in Webb County, there are two contracted forensic pathologists serving Hidalgo and Cameron Counties.³⁰⁷

As with the other border states, state law guides the actions of each actor involved in processing unidentified remains in Texas. However, practices between counties are not standardized.³⁰⁸ “All Texas law enforcement agencies are required to enter information about all unidentified bodies into the clearinghouse and national crime information center unidentified persons file.”³⁰⁹ The clearinghouse shall cross-check and attempt to match unidentified bodies with missing children or missing persons.³¹⁰ When the clearinghouse discovers a possible match, the appropriate law enforcement agencies “shall make arrangements for positive identification and complete and close out the investigation with notification to the clearinghouse.”³¹¹

³⁰¹ N.M. STAT. ANN. § 24-12A-3 (2021).

³⁰² *Id.*

³⁰³ See Staci Matlock, *County Acts as Kin when the Dead Go Unclaimed*, SANTE FE NEW MEXICAN (Nov. 20, 2011), https://www.santafenewmexican.com/news/local_news/county-acts-as-kin-when-the-dead-go-unclaimed/article_ef8c49b6-6461-5231-ab56-e9eb0fff4596.html.

³⁰⁴ See T.J. Wilham, *OMI Has Hundreds of Remains, and Linking Bodies to Cases is no Easy Task*, ALBUQUERQUE JOURNAL (Nov. 13, 2005), <https://www.abqjournal.com/news/state/407681nm11-13-05.htm>.

³⁰⁵ Timothy P. Gocha, Katherine M. Spradley & Ryan Strand, *Bodies in Limbo: Issues in Identification and Repatriation of Migrant Remains in South Texas*, in SOCIOPOLITICS OF MIGRANT DEATH AND REPATRIATION 143-156 (2018).

³⁰⁶ *Id.*; see also STEPHANIE LEUTERT, SAM LEE & VICTORIA ROSSI, *MIGRANT DEATHS IN SOUTH TEXAS* 27 (2020). That office serves ten of the surrounding counties in addition to Webb County. When identifying remains, other counties in the region must use private pathologists or must send them to medical examiners in other counties. *Id.*

³⁰⁷ JPs are not required to have a medical background or medical knowledge. See Leutert, *supra* note 306, at 25.

³⁰⁸ See *Id.* at 23.

³⁰⁹ TEX. CODE CRIM. PROC. art. 63.009(c) (West 2021).

³¹⁰ TEX. CODE CRIM. PROC. art. 63.014. (West 2021)

³¹¹ TEX. CODE CRIM. PROC. art. 63.014(b) (West 2021).

In cases of migrant deaths, Texas statute mandates that a Justice of the Peace conduct an investigation in order to determine if an unlawful act was committed.³¹² A physician “acting on request” of a JP or other law enforcement entity, “shall collect samples from unidentified human remains.”³¹³ When a JP or Physician elects to collect DNA samples, those samples must be submitted to the University of North Texas Center for Human Identification (UNTCHI) for analysis and inclusion into their missing persons DNA database and CODIS.³¹⁴

In practice, actors including sheriffs’ offices, JPs, funeral homes, medical examiners, forensic anthropologists, and consulates all play a role in documenting the deaths, requesting autopsies and investigative tests, transporting the bodies, and submitting DNA samples.³¹⁵

³¹² Justices of the peace are required to carry out inquests when: the person dies an unnatural death from a cause other than legally-authorized execution; the body or a body part of a person is found; and the cause or circumstances of death are unknown. These include when the person is unidentified; circumstances indicate that the death may have been caused by unlawful means; or the person dies without having been attended by a physician. TEX. CODE CRIM. PROC. Art. 49.04 (West 2021).

³¹³ TEX. CODE CRIM. PROC. Art. 63.056 (West 2021).

³¹⁴ TEX. CODE CRIM. PROC. Art. 63.052(a) (West 2021).

³¹⁵ See Leutert, *supra* note 306, at 23.

Graphic 1: Migrant Death Processing in South Texas

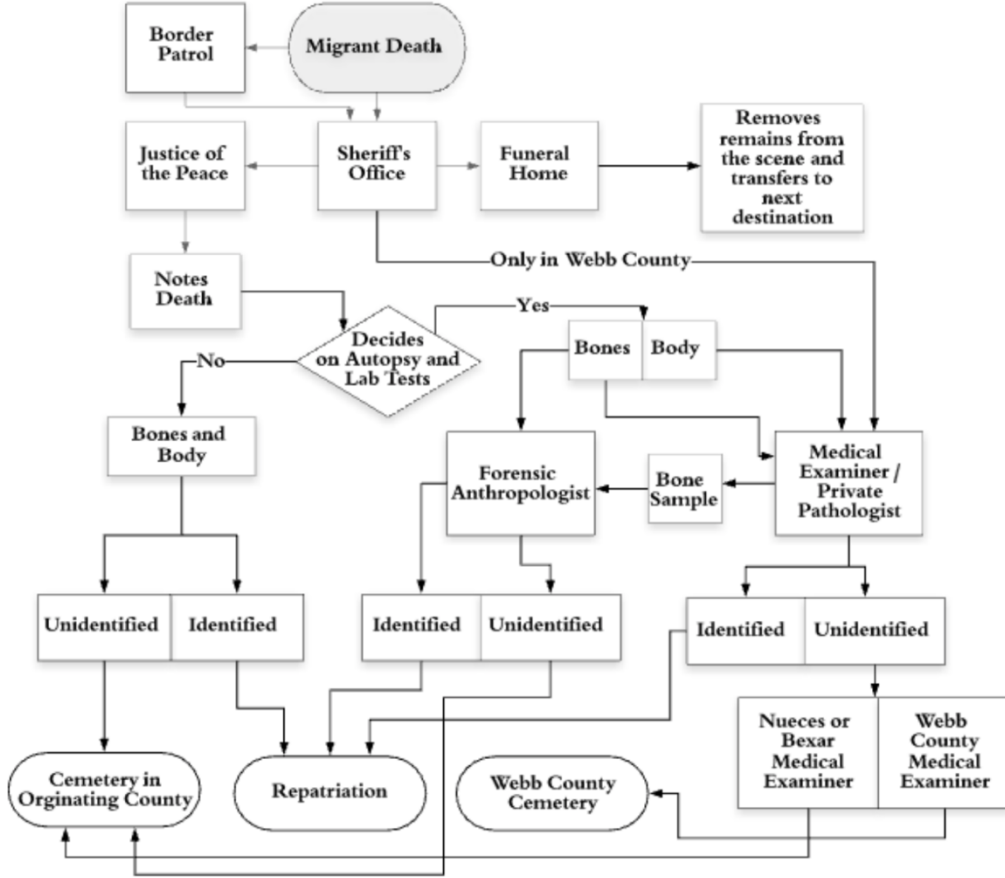


Image source: STEPHANIE LEUTERT, SAM LEE & VICTORIA ROSSI, MIGRANT DEATHS IN SOUTH TEXAS 23 (2020).

When Border Patrol agents locate human remains, they contact the corresponding sheriff's office of the county in which the remains were found.³¹⁶ The working relationship between border patrol and sheriffs' offices vary from county to county, depending on the county's location, the frequency of migrant deaths, available sheriff office personnel, and personal connections.³¹⁷

i. Sheriff Offices

Sheriffs' offices must respond to reports of the discovery of human remains within their territory.³¹⁸ They are also responsible for notifying other county officials, such as the appropriate

³¹⁶ See Leutert, *supra* note 306, at 23.

³¹⁷ For example, in Brooks County, since the agency has more resources and personnel to respond, sheriffs' offices route 9-11 calls from migrants in distress to border patrol. See *id.*

³¹⁸ See Leutert, *supra* note 306, at 24.

justice of the peace and a funeral home, to physically remove the remains from the scene.³¹⁹ The individuals who attend the scene typically complete an incident report with information such as the names of individuals interviewed or involved, the date, the location of the remains, and a narrative of relevant facts.³²⁰ “More detailed reports might include GPS coordinates of the body’s location and transcripts of dispatch calls.”³²¹

ii. Justice of the Peace

The JP records the time of death for the death certificate at the scene, and decides whether to order a full or partial autopsy to determine the nature of the death.³²² If the JP believes that the cause and manner of death are evident beyond a reasonable doubt, s/he has the discretion to forego an autopsy and send the body directly to a funeral home.³²³ If the deceased individual is unidentified, then the JP has the discretion to order lab tests from a forensic pathologist to determine the deceased person’s identity. In those cases where the remains have fully decomposed, the office “may” seek the help of a forensic anthropologist to aid in identification efforts.³²⁴ There is no requirement to undertake efforts to identify the remains.

iii. Funeral Homes

The initial role of funeral homes called to the scene is to remove the body and transport it to its next destination.³²⁵ The next destination depends on whether the JP has decided to order an autopsy or additional tests to aid in identification. If the JP has decided to order additional tests, the funeral home staff transports the remains to the local medical examiner’s office or to a forensic anthropologist. If the JP decides not to order an autopsy or laboratory tests, even if the decedent is unidentified, the remains are sent directly to a funeral home.³²⁶

Funeral homes must store the remains in refrigeration for at least ten days before burial.³²⁷ Funeral homes do not have the legal authority to identify bodies, only medical examiners, justices of the peace, or other medical-legal authorities such as death investigators, may do so.³²⁸ The homes may, however, post death notices in local papers to notify the public of the found

³¹⁹ *See id.*

³²⁰ *See id.*

³²¹ *See id.* at 24.

³²² *See id.* at 25.

³²³ TEX. CODE CRIM PROC. art. 49.10(a) (West 2021).

³²⁴ *Id.*

³²⁵ In Webb County, the Office of the Medical Examiner removes the body from the scene. *See Leutert, supra* note 306, at 25.

³²⁶ *Id.* at 26.

³²⁷ TEX. HEALTH & SAFETY CODE ANN. § 711.002(a-1) (West 2021).

³²⁸ *See Leutert, supra* note 306, at 26.

remains, in an attempt to locate the family.³²⁹ If no one claims the remains during the ten-day waiting period, then the home arranges for an indigent burial.³³⁰

There are conflicting statutes regarding cremation of unidentified remains. The Texas Code of Criminal Procedure explicitly states that it is illegal to cremate unidentified bodies.³³¹ However, in the absence of next of kin or legal executors, the Texas Health & Safety Code grants JPs the right to control disposition of the body, including the right to cremate.³³²

iv. Medical Examiner Offices

The Medical Examiner takes fingerprints and dental records, x-rays of identifiable and unique fractures, notes unique tattoos, and looks for other data points to use in identification.³³³ This data is checked against the Border Patrol's biometrics database. Some Medical Examiners upload case data into NamUs. If neither option produces an identification, then the Medical Examiner may elect to take a DNA sample from the body. For some counties, taking DNA from an unidentified body is a standard operating procedure. For others, it is simply an option to pursue if the office has the funds and wherewithal to do so.³³⁴

v. Forensic Anthropologists

“If the remains have fully skeletonized, the [JP] may choose to send them directly to a forensic anthropologist.”³³⁵ Forensic Anthropologists typically carry out DNA analysis and other in-depth laboratory tests.³³⁶ There are three forensic anthropology actors that assist with processing of migrant remains in South Texas: the UNTCHI, the Argentine Forensic Anthropology Team (EAAF), and the Forensic Anthropology Center at Texas State University (“FACTS”). Many of the forensic labs in Texas send DNA to UNTCHI to upload into CODIS.³³⁷ Wait times for DNA comparisons typically are within the 18-month range.³³⁸ If the anthropologist or medical

³²⁹ *See id.*

³³⁰ Some homes report that cost of burial may exceed what the county pays them. *See id.* at 26.

³³¹ TEX. CODE OF CRIM. PROC. ANN. § 49.09 (West 2021) (“If the body of a deceased person is unidentified, a person may not cremate or direct the cremation of the body under this article.”).

³³² Crematoriums may also accept unidentified remains if commissioners, courts, or other county officials such as justices of the peace, authorize the cremation. TEX. HEALTH & SAFETY CODE ANN. S 716.101 (West 2021).

³³³ *See* Leutert, *supra* note 306, at 28.

³³⁴ *Id.*

³³⁵ *Id.* at 28.

³³⁶ *Id.*

³³⁷ For example, FACTS will either rely on UNTCHI for data analysis, unless it has an identification hypothesis. In that case, they will send the DNA to Bode Cellmark in Virginia for entry into EAAF's database. *See* Leutert, *supra* note 306, at 28.

³³⁸ Kate Spradley, Forensic Anthropologist, Operation Identification, Remarks at *Identifying the Dead Along Our Southern Border: Immigration, Regulation, Forensic Anthropology, and Human Rights* at the University of New Mexico Latin American & Iberian Institute (Feb. 25, 2021).

examiner's office believes they have a likely match they may reach out directly to EAAF for a family comparison, in addition to sending the DNA to UNTCHI for inclusion into CODIS.³³⁹

3. Gaps and Failures of International & U.S. Law and Practice in Addressing Migrant Deaths & Disappearances

“An important element of the protection afforded to the right to life by the [ICCPR] is the obligation on States Parties, where they know or should have known of potentially unlawful deprivations of life, to investigate... such incidents.”³⁴⁰ Investigations should be 1) prompt, 2) effective and thorough, 3) independent and impartial, and 4) transparent.³⁴¹ Where relevant, they should include an autopsy of the victim's body and objective analysis of the clinical findings, including the cause of death.³⁴² More specifically, the HRC has stated that investigations should follow the standards set forth within the Minnesota Protocol on the Investigation of Potentially Unlawful Death.³⁴³ Investigations should therefore, at a minimum, seek to identify the victims, recover and preserve all material probative evidence of the cause of death, identify possible witnesses, determine the cause, manner, place, and time of death, and determine who was involved in the death.³⁴⁴

The table below details more specifically what practices are required by the Minnesota Protocol and by each US State law, and whether those required practices are implemented. Following the table is an in-depth analysis of each state's current gaps in legislation and whether they are in accordance with international obligations.

Overall, the United States is not meeting its international obligations. That families have difficulty contacting relevant authorities and obtaining information on their missing loved ones demonstrates that US investigation policies into potentially unlawful deprivations of life are not effective or thorough, nor are the investigations transparent.³⁴⁵ In addition, the differing statistics in the number of perished migrants at the border points to inefficiencies and inadequacies in U.S.

³³⁹ See Leutert, *supra* note 306, at 28.

³⁴⁰ Hum. Rts. Comm., General Comment No. 36, *supra* note 212, at para. 27.

³⁴¹ See *supra* note 183, and accompanying text.

³⁴² See *Minnesota Protocol*, *supra* note 184, at para 25; See *Kawas-Fernández v. Honduras*, Merits, Reparations, and Costs, Judgment, INTER-AM. CT. H.R. (ser. C) No. 196, para. 102 (Apr. 3, 2009); *Rodriguez Vera et.al. v Colombia*, Merits, Reparations, and Costs, Judgment, INTER-AM. CT. H.R. (ser. C) No. 287, para 489 (Nov. 14, 2014).

³⁴³ Human Rights Committee, General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the right to life, para. 27, UN Doc. CCPR/C/GC/36 (2018) (“Investigations and prosecutions of potentially unlawful deprivations of life should be undertaken in accordance with relevant international standards, including the Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016).”).

³⁴⁴ See *Minnesota Protocol*, *supra* note 205, at 7.

³⁴⁵ See e.g., Alexandra King, ‘No Olvidado’: These Americans Find and Bury Missing Migrants, CNN, (Dec. 2019), <https://www.cnn.com/interactive/2019/12/us/no-olvidado-missing-migrants-border/> (Detailing the inefficiencies in remains identification and investigation at the border and the practice of scattering migrant ashes at sea); NO MORE DEATHS, LEFT TO DIE: BORDER PATROL, SEARCH AND RESCUE, & THE CRISIS OF DISAPPEARANCES (2020), http://www.thedisappearedreport.org/uploads/8/3/5/1/83515082/left_to_die_-_english.pdf (describing the difficulty families have in obtaining information on their loved ones or reaching Border Patrol for search and rescue efforts).

investigations, which result in violations of the ICCPR and the American Declaration on Human Rights. Further, many state statutes are silent on instructing local authorities to investigate these potentially unlawful deprivations of life. These statutes therefore fail to comply with the ICCPR, which requires investigations into potentially unlawful deprivations of life when the state knows or should have known of those deprivations.³⁴⁶

| | <u>International Legal Standard</u> | <u>Arizona</u> | <u>California</u> | <u>New Mexico</u> | <u>Texas</u> |
|-----------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------|----------------------------------|------------------------------------------------------------------------|----------------------------------------------------------------------------------------|
| <u>Investigate the Manner & Circumstances of Death</u> | Required: Right to life triggers State responsibility to investigate potentially unlawful death & determine circumstances of death. | Required: Arizona Revised Statute 11-597 Done in practice | Required: Cal. Gov't. Code 27491 | Required: N.M. Code R. § 7.3.2 | Required: Texas Code of Criminal Procedure § 49.04 |
| <u>Report to State Missing Person Clearinghouse or Similar entity</u> | | No legislation mandating Done in practice by PCOME | Required: CA Penal code 14208 | Required: N.M Stat § 29-15-7(C) | Required: Tx Crim Pro Art. 63.009(c) & Tx Crim Pro. 49.04(d) |
| <u>Report to NamUs</u> | | No legislation mandating Done in practice by PCOME | Required: CA Penal Code 14209 | No legislation mandating Required to submit to NCIC: 29-15-7(C) | No legislation mandating Required to submit to NCIC: Tx Crim Pro Art. 63.009(c) |

³⁴⁶ *Supra* notes 316-318 and accompanying text.

| | | | | | |
|---------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------|-----------------------------------------------------|-------------------------------------|--------------------------------------------------------------------------------------------|
| <u>Conduct Autopsy</u> | Highly recommended; A decision not to undertake an autopsy should be justified in writing & subject to judicial review. | Discretionary: Az Revised Stats. Ann. § 11-594 Done in practice by PCOME | Discretionary: Cal. Gov't Code 27521(a) | Required: N.M. Stat. Ann. § 24-11-7 | Discretionary: Tx. Crim Pro Art. 49.10 (a) & Tx. Code Crim Pro Art. 49.25(a) |
| <u>Conduct Forensic Identification Procedures</u> | Highly recommended; In potentially unlawful death, identification must be confirmed whenever possible by means including scientifically reliable methods of identification such as fingerprints, dental examination, & DNA analysis. ³⁴⁷ | Discretionary: Az Revised Stats. Ann. § 11-594 Done in practice by PCOME | Discretionary: Cal. Gov't Code 27521(a) | Required: N.M. Stat § 29-16-6 (D) | Discretionary: Tx. Crim Pro Art. 49.10 (k) & Tx. Code Crim Pro Art. 49.25(a) |
| <u>Collect DNA for Identification</u> | Highly recommended; In potentially unlawful death, identification must be confirmed whenever possible by means including scientifically reliable methods of identification such as fingerprints, | No legislation mandating Done in practice by PCOME | Discretionary: Discretionary: Cal. Gov't Code 27521 | Required: N.M. Stat § 29-16-6 (D) | Discretionary: Tx. Code Crim Pro. Art. 63.056(a) |

³⁴⁷ See *Minnesota Protocol*, *supra* note 205, at 22.

| | | | | | |
|-----------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| | dental examination, & DNA analysis. | | | | |
| <u>Burial & Cremation Processes</u> | As a component of accountability and remedy, family members of victims of unlawful death have the right to reparation which includes access to relevant information about the circumstances, location and condition of the remains in addition to the assistance in the recovery, identification and reburial of the bodies in accordance with the expression or presumed wish of the victims or the cultural practices of the families and communities. | Unidentified remains are transferred to county fiduciary for indigent funeral burial: AZ St. 11-600 In practice, PCOME retains bodies for future identification efforts. | Body may not be cremated until jaws or other tissue samples are retained for future use: Cal. Gov't Code 27521 (e) | The body of an unclaimed decedent or indigent person may be cremated upon the order of the county official responsible for ensuring disposition of the body: N.M. Stat § 24-12A-3 In practice, OMI retains bodies for future identification efforts. | In absence of next of kin or legal executors, Texas Health & Safety code grants Justices of the peace the right to control disposition of the body, including the right to cremate |

a. *Arizona*

i. Gaps in State Law & Practice

Though the state of Arizona —spearheaded by PCOME— arguably has the most comprehensive practical and ethical approach to the identification and investigation of unidentified migrant remains, state legislation contains several gaps. Arizona has no state missing persons clearinghouse, which could provide a valuable central repository for reports of missing persons within the state. Further, there is no legislation mandating the reporting of missing persons and unidentified remains to NamUs, which likewise could provide a central repository for both

reports of missing persons as well as reports of unidentified human remains within the country. If such reporting were mandated, cross references between reports and entities across the country would be much more efficient and effective, as fewer remains would fall through the cracks of differing jurisdictions and differing local practices.

In addition, the conducting of autopsies and forensic identification procedures are discretionary, indicating that medical examiners could simply choose not to undertake efforts to identify remains if they deem that it is not in the public interest, a purely subjective decision made by the examiner. There is no legislation whatsoever on the collection of DNA for identification purposes--a glaring oversight given that the skeletal state of many remains leaves DNA identification methods the only viable option.

Despite the gaps in state law, it should be noted that PCOME has been praised for pioneering the most effective system of unidentified migrant remains identification in the country. And many experts believe the system and protocols developed by PCOME should be standardized across the region.³⁴⁸

ii. Failures under International & Regional law

The practice of identification must meet humanitarian, human rights, and other social and cultural needs.³⁴⁹ In potentially unlawful deaths, any identification by visual recognition—which often is not possible given the state of remains when they are discovered— “must be confirmed whenever possible by using other means, including scientifically reliable methods of identification such as fingerprints, dental examination and DNA Analysis.”³⁵⁰ Accordingly, that Arizona does not mandate such efforts “whenever possible” constitutes a failure under international law by not meeting the requirements mandated by the Minnesota Protocol, endorsed by the HRC as a requirement under the ICCPR in relation to the right to life.

b. *California*

i. Gaps in State Law & Practice

California, despite not having a high volume of unidentified migrant remains to identify, has comprehensive state legislation guiding its practice. Its gaps primarily stem from the fact that the conducting of autopsies, forensic identification procedures, and the collecting of DNA for identification efforts, are all discretionary. Such practices should be mandated to facilitate positive identifications of migrant remains. Though it should be noted that California’s

³⁴⁸ Kate Spradley, Forensic Anthropologist, Operation Identification, Remarks at *Identifying the Dead Along Our Southern Border: Immigration, Regulation, Forensic Anthropology, and Human Rights* at the University of New Mexico Latin American & Iberian Institute (Feb. 25, 2021).

³⁴⁹ See *Minnesota Protocol*, *supra* note 205, at 22.

³⁵⁰ *Id.* at 120.

Unidentified Persons Law does require retention of tissue samples and jaw bones so that identification efforts can continue even after cremation or burial of remains. This is good practice that could be extended to other jurisdictions.

In fact, due to the low volume of remains found within the state, forensic identification procedures are typically conducted to facilitate identification and repatriation of remains.

ii. Failures under International & Regional law

In potentially unlawful deaths, any identification by visual recognition—which often is not possible given the state of remains when they are discovered— “must be confirmed whenever possible by using other means, including scientifically reliable methods of identification such as fingerprints, dental examination and DNA Analysis.”³⁵¹ Accordingly, as with Arizona, California’s failure to mandate such efforts “whenever possible” fails to conform with international law.

As a component of the right to a remedy for violations of human rights, and as mandated by the ICCPR, and IASC guidelines, the United States must assist the families of missing migrants in the recovery, identification and reburial of the bodies of their family members. These procedures must be in accordance with the expression or presumed wish of the victims, or the cultural practices of the families and communities.³⁵² By allowing the bodies of migrants to be cremated without consultation with families, in violation of the cultural and religious practice of most Central American and Mexican communities, California is violating the obligation to provide effective remedies as specified by Article 9(5) of the ICCPR and elaborated on by HRC General Comment 31 and the UN Principles on Remedy and Reparation.³⁵³

c. *New Mexico*

i. Gaps in State Law & Practice

New Mexico has fairly comprehensive state legislation to facilitate identifications. This is because the state as a whole processes unidentified remains with some frequency. The gap in New Mexico’s policies pertains to the lack of legislation mandating the reporting of missing persons and unidentified remains to NamUs, which could provide a central repository for both

³⁵¹ *Id.* at 120.

³⁵² See Hum. Rts. Comm., General Comment No. 31, *supra* note 8, at para 16 (“the committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.”). See also G.A. Res. 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Principles 22(b), (c), (e), (h), (Mar. 21, 2006).

³⁵³ See Hum. Rts. Comm., General Comment No. 31, *supra* note 8, at para 16; G.A. Res. 60/147 (Mar. 21, 2006).

reports of missing persons as well as reports of unidentified human remains. If such reporting were mandated, cross-references between reports and entities across the country would be more efficient and effective.

ii. Failures under International & Regional law

On paper, New Mexico currently is meeting its obligations to investigate under international law. More information is needed to determine whether in practice New Mexico authorities fully implement their international obligations.

d. *Texas*

i. Gaps in State Law & Practice

Texas, unfortunately, lives up to its reputation as the Wild West. Its legislation on identification of unidentified remains leaves many gaps and inefficiencies, resulting in differing practices from county to county. Though Texas requires an investigation into the manner and circumstances of death for unidentified migrant remains, the course the investigation takes and the quality of that investigation remain discretionary insofar as the conducting of autopsies, forensic identification procedures, and collection of DNA. Identification efforts are all discretionary choices made by the justice of the peace in each county. There is no uniformity in the subjective decision of each justice of the peace, a non-medical entity, to decide whether such efforts are necessary.

Further, there is no legislation mandating the reporting of missing persons and unidentified remains to NamUs. As with New Mexico, this means Texas does not contribute to a central repository for reports of missing persons and unidentified human remains within the country. This gap makes cross-referencing of reports across the country less efficient and effective.

ii. Failures under International & Regional law

As stated previously, in potentially unlawful death, any identification by visual recognition—which often is not possible given the state of remains when they are discovered— “must be confirmed whenever possible.”³⁵⁴ Similar to California, because Texas does not mandate such efforts “whenever possible,” the absence of these efforts constitutes a failure to meet the requirements mandated by the Minnesota Protocol.

Further, whatever the method of identification employed, “a methodical and holistic approach, involving the appropriate experts, with complete and detailed documentation, is always necessary.”³⁵⁵ As such, given that the Justice of the Peace is not a medical expert, Texas is

³⁵⁴ See *Minnesota Protocol*, *supra* note 205, at 22.

³⁵⁵ *Id.* at 120.

arguably failing to meet the requirements mandated by the Minnesota Protocol and thus not in compliance with the obligations set forth by the ICCPR in relation to the right to life.

In the absence of next of kin or legal executors, the Texas Health and Safety Code grants the Justices of the Peace the right to control the disposition of the body, including the right to cremate. Despite state requirements that records be kept of the disposition of such remains, there have been dozens of mass graves found of migrants who were buried without record and without any attempts at identification.³⁵⁶ As a component of the right to a remedy for violations of human rights, and as mandated by the ICCPR, and IASC guidelines, the United States must assist the families of missing migrants in the recovery, identification and reburial of the bodies of their family members in accordance with the expression or presumed wish of the victims, or the cultural practices of the families and communities. By allowing the bodies of migrants to be cremated without consultation with families, in violation of the cultural and religious practice of most Central American and Mexican communities, Texas is violating the obligation to provide effective remedies as specified by Article 9(5) of the ICCPR, as elaborated by HRC General Comment 31 and the UN Principles on Remedy and Reparation.³⁵⁷

VI. Repatriation of Remains

1. International Legal Obligations

The obligation to repatriate remains is grounded primarily in human rights protections for the family unit. International law recognizes the universal, fundamental importance of burial rights, and protects the rights of relatives of the dead and missing. Article 16(3) of the Universal Declaration of Human Rights identifies the family as the “natural and fundamental group unit of society” and urges states to protect it.³⁵⁸ The ICCPR affirms the primacy of the family and transforms the UDHR’s suggestion into a legally binding mandate on states; Article 23 guarantees that the family is “entitled to protection by society and the State.” States have an obligation, furthermore, to provide individuals with information about their relatives who died on the given state’s territory, even when those relatives are not citizens of the state.³⁵⁹

³⁵⁶ See *Operation Identification*, TEXAS STATE: FORENSIC ANTHROPOLOGY CENTER, <https://www.txstate.edu/anthropology/facts/outreach/opid.html> (last visited May 15, 2021) (“[D]ue to the high volume of deaths and lack of county resources, most counties were overwhelmed and began to bury the undocumented migrants, most without proper analysis or collection of DNA samples, without documenting the location of burial leaving little chance that these individuals will ever be returned to their families.”).

³⁵⁷ See Hum. Rts. Comm., General Comment No. 31, *supra* note 8, at para 16; G.A. Res. 60/147 (Mar. 21, 2006).

³⁵⁸ Universal Declaration of Human Rights (10 Dec. 1948), U.N.G.A Res. 217 A (III) 1948, art. 16.

³⁵⁹ Article 2 of the ICCPR ensures that all enumerated rights are guaranteed for individuals within the territory of the State party. The ICJ has held that the Article 2 of the ICCPR covers both individuals present in the State’s territory and subject to the state’s jurisdiction *and* individuals outside the territory but subject to the state’s jurisdiction. See

The importance that human rights law attaches to the family bears directly on the missing migrant crisis. Under the ICCPR, states have the legal obligation to the families of the disappeared to take several steps, including: notifying and providing information to the relatives of the dead;³⁶⁰ facilitating the return of remains to the next-of-kin upon request;³⁶¹ disposing of the remains in a dignified and respectful manner when the return of the remains is not requested;³⁶² recording the location of burial; and respecting and maintaining gravesites.³⁶³ International law also requires states to make reparations to the families of victims of human rights abuses.

a. *Notify and Inform Relatives*

International human rights law provides for family members' right to know the truth regarding their missing loved ones.³⁶⁴ Family members have the "imprescriptible right to know the truth about circumstances in which violations took place and, in the event of death or disappearance, the victim's fate."³⁶⁵

While the right to truth was initially based on Articles 23 and 33 of the Additional Protocol to the Four Geneva Conventions of 1949, and therefore applicable only during armed conflicts, the right has gradually expanded to cover myriad serious human rights violations, including extrajudicial executions, torture, and enforced disappearances.³⁶⁶ The right to the truth is well-developed in contexts such as the migrant disappearance crisis, where states routinely fail to provide information about violations to families seeking the truth about the victim's status.³⁶⁷ For example, the right to truth applies in cases of enforced disappearance or where a state acts with impunity, such that its agents are unaccountable.³⁶⁸

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. Advisory Opinion, I.C.J. Rep. 2004 (July 9).

³⁶⁰ UNGA 68/165 (2014); *See also* United Nations High Commissioner on Human Rights, "Promotion and Protection of Human Rights: Study on the Right to the Truth" (2006) E/CN.4/2006/91.

³⁶¹ Inter-Agency Standing Committee 2006, *Protecting Persons Affected by Natural Disasters: IASC Operational Guidelines on Human Rights and Natural Disasters.* Brookings-Bern Project on Internal Displacement.

³⁶² *Id.*

³⁶³ *Id.* at 3.9.

³⁶⁴ *See* G.A. Res. 165, U.N. GAOR, 68th Sess., U.N. Doc. A/Res/68/165 (2014); *See also* United Nations High Commissioner on Human Rights, "Promotion and Protection of Human Rights: Study on the Right to the Truth" (2006) at *supra* note 360.

³⁶⁵ "Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity," OHCHR E/CN.4/2005/102/Add.1, at principle 4.

³⁶⁶ International Committee of the Red Cross, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 Arts. 23 and 33; UNHRC Right to Truth. Para 8.

³⁶⁷ *See for example:* Declaration on the Protection of All Persons from Enforced Disappearance (18 Dec. 1992) U.N.G.A. Res. 47/133 art. 13 para 4; first report of the Working Group on Enforced or Involuntary Disappearances, E/CN.4/1435 para 187.

³⁶⁸ Human Rights Committee, 56th Sess., "Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant," CCPR/C/79/Add. 63 para 25.

The expansion of the right to truth in international human rights demonstrates that the right applies not just because a violation is severe—as is the case with a crime against humanity—but because the nature of the violation renders answers frequently inaccessible to the victim’s family. The remedy of the right to truth for the victim’s family addresses the double-violation involved in certain human rights abuses: the harm itself, followed by the refusal to disclose the scope of that harm. Thus, the Human Rights Committee has held that a state acting with impunity in violating the right to life in Article 6 of the ICCPR has the responsibility to “allow victims of human rights violations to find out the truth about those acts, to know who the perpetrators of such acts are and to obtain appropriate compensation.”³⁶⁹

The right to truth includes the “full and complete truth as to events that transpired” leading to the violation, as well as the fate and whereabouts of the victim.³⁷⁰ The state’s fulfillment of the right to truth is a form of reparation for a human rights abuse.³⁷¹ In the context of enforced disappearances, elements of the right to truth include: 1) the obligation to investigate the fate and whereabouts of the missing, 2) the obligation to communicate the results of the investigation to interested parties, 3) the obligation to provide full access to archives, 4) the obligation to protect witnesses, relatives and participants in the investigation.³⁷² Thus, reparations are merely a small portion of a right that encompasses a broad range of state obligations.

Increasingly, the failure to notify the victim’s family members has been identified as a form of inhuman and degrading treatment.³⁷³ By practicing or permitting enforced disappearances, therefore, states violate the prohibition on torture or cruel, inhuman or degrading treatment, a *jus cogens* or peremptory norm of international law.³⁷⁴

b. Repatriating Remains

International human rights law’s recognition of the importance of the family triggers the positive obligation on states to respectfully repatriate a victim’s remains. International courts have held that laws protecting family life and privacy, such as may be found in the ICCPR,³⁷⁵ ACHR,³⁷⁶

³⁶⁹ *Id.* at para. 25.

³⁷⁰ Report of the Office of the United Nations High Commissioner for Human Rights “Study on the Right to Truth” UN Doc. E/CN.4/2006/91 (2006) paras 57-59.

³⁷¹ See Committee Against Torture, *General Comment No. 3*, at paras. 16 and 17.

³⁷² Special Procedures Advisory, “General Comment on the Right to Truth in Relation to Enforced Disappearance, Working Group on Enforced or Involuntary Disappearances, Geneva (22 July 2010) at para. 5.

³⁷³ Declaration on the Protection of All Persons from Enforced Disappearance, at art. 1(2). *See also*: Human Rights Committee, *Aboussedra v. Libya* (Communication no. 1751/2008): rights of victim’s wife and children under art 7 of ICCPR had been violated as result of anguish and distress of limited knowledge they had of his circumstances.

³⁷⁴ The prohibition against torture is also set forth in Article 7 of the ICCPR and Article 2 of the UNCAT.

³⁷⁵ See ICCPR at Article 17.

³⁷⁶ See ACHR at Article 11.

and ECHR,³⁷⁷ prohibit excessive delays in the restitution of a body after an autopsy.³⁷⁸ The requirements to return a victim's body to the family apply in cases of human rights violations and during natural disasters.³⁷⁹ This last point is relevant for the missing migrant crisis at the Southern Border, as the United States is keen to deflect blame for the widespread death onto natural elements. Even if the U.S. government were not responsible for creating the conditions in which thousands of migrants die crossing the desert every year, it would still bear responsibility for returning their remains.³⁸⁰

c. Disposing of the Remains

International law protecting the family life and privacy, mentioned in the section above, also protects how remains of victims of human rights abuses should be treated if they cannot be repatriated.³⁸¹ If repatriation of remains is impossible, the state is required to dispose of the remains in a dignified and respectful manner.³⁸² Cremation should be avoided because it forecloses the possibility of future identification.³⁸³ Burials should be conducted in a manner respecting the dignity and privacy of the dead and living family members, and local religious and cultural practices should be considered.³⁸⁴

d. Recording the Location of the Burial, Respecting and Maintaining Gravesites

If repatriation is unavailable, the state should inform family members of the location of the gravesite.³⁸⁵ Family members should be able to access the graves and be given the opportunity to erect memorials and conduct religious ceremonies.³⁸⁶

2. Regional Legal Obligations

The Inter-American System of Human Rights has even more robust protections for families of victims of human rights abuses than the general guarantees of international law. The crime of enforced disappearances has stalked the Americas with “exceptional intensity” in the last few decades, leading the Inter-American Commission and Court to develop an extensive body of

³⁷⁷ See *supra* note 373.

³⁷⁸ Panullo and Forte v France, ECtHR Appl. No. 37794/97 2001 paras 35-36. Zorica Jovanović v Serbia no. 21794/08 2013.

³⁷⁹ See *supra* note 361.

³⁸⁰ Working Group on Enforced and Involuntary Disappearances. “Report of the Working Group on Enforced or Involuntary Disappearances in the Context of Migration.” A/HRC/36/39/Add.2. para. 67.

³⁸¹ See *supra* note 361 at D.3.5.

³⁸² *Id.*

³⁸³ *Id.* at 3.5. 3.6. and D. 3.7

³⁸⁴ *Id.*

³⁸⁵ *Id.* at 3.9.

³⁸⁶ *Id.*

jurisprudence dealing with the right to truth, reparations for victims' families, and the repatriation or return of bodies.³⁸⁷

a. *Notify and Inform Relatives*

The Inter-American Court has consistently held that in cases of enforced disappearances, States are required to inform the relatives of the disappeared.³⁸⁸ Withholding this information constitutes cruel and inhuman treatment for the victim's relatives.³⁸⁹ The right to truth is ubiquitous in the case law of the Inter-American Court, even outside the contexts of enforced disappearances. For example, the Court has upheld the right to truth as a right "subsumed in the right of the victim or his next of kin to obtain clarification of the facts relating to the violations" of the right to a fair trial and juridical personality.³⁹⁰ The right to truth is critical not only for the sake of family rights, as with international law more generally, but also for the good of the social body. The Court has written that "the right to know the truth represents a necessary effect for it is important that a society knows the truth about the facts of serious human rights violations."³⁹¹ Grave crimes, in other words, assume a public character that cannot be confined merely to the victim's next of kin; redress is owed to the society as a whole. The right to truth in this context has two elements: 1) knowing what happened to victim and 2) knowing the whereabouts of the victim's mortal remains.³⁹² The State is required to provide both pieces of information.³⁹³ The Inter-American Court goes even further than the WGEID, moreover, in requiring states to allow family members to participate in investigations.³⁹⁴

b. *Repatriation of Remains*

For the Inter-American Court, returning a victim's remains to their loved ones is crucial for the dignity of the dead and the well-being of the victim's relatives.³⁹⁵ The Court has consistently ordered states to locate the remains of disappeared victims, transfer them to the families, and

³⁸⁷ I/A Court of H.R., *Velásquez Rodríguez v. Honduras*, Judgement of July 29, 1986, Series C, No. 4, para. 149.

³⁸⁸ See for example Inter-American Court Cases: *Velásquez-Rodríguez* para 158; *Rochac Hernández and Others case* Judgement of 14 Oct. 2014, Series C, No. 285; *Rodríguez Vera and Others Case*, Judgement of 14 Nov., 2014, Series C, No. 287 para. 140. From *Velásquez Rodríguez v. Honduras*, para 181: "the state is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains."

³⁸⁹ I/A Ct. H.R., *Trujillo Oroza case*, Judgement of 27 Feb. 2002, Series C, No. 92, para. 114.

³⁹⁰ I/A Ct. H.R. *Bámaca Velásquez Case*, Judgement of 22 Feb. 2002, Series C, No. 91 para. 200-201.

³⁹¹ I/A Ct. H.R., *Anzualdo Castro v Peru* Judgement of 22 Sep. 2009, Series C, No. 202, para. 118, 119, 168.

³⁹² *Bámaca* at para. 76 *supra* note 390.

³⁹³ See I/A Ct. H.R. *Cantoral Benavides Case*, Judgement of 18 Aug. 2000, Series C, No. 69. Reparations note 5 para. 69 on knowing what happened to the victim. On knowledge of the whereabouts of remains, see *Castillo Páez case*, Judgment of 3 Nov. 1997, Series C, No. 34 para. 90.

³⁹⁴ I/A Court of H.R. *Case of Rosendo Cantú et al v. Mexico*, Judgement of August 31, 2010, Series C. No. 216, para. 176.

³⁹⁵ Inter-American Court of Human Rights, *Case of Neira-Alegria et al. v. Peru*, (1996) judgement on reparations and costs para 69.

bury the remains at state's expense.³⁹⁶ The Court even ordered Guatemala to institute a national exhumations program at the scene of hundreds of massacres.³⁹⁷

3. **Federal Practice**

The United States government plays almost no role in the haphazard process of repatriating the bodies of deceased migrants. When CBP discovers the body of an individual they suspect to be an irregular migrant, they refer the case to local authorities—either Justices of the Peace or Medical Examiner offices, depending on the state.³⁹⁸ The remains are then routed through a network of state administrative officials, NGOs, and foreign consulates to be either repatriated or buried in the United States.³⁹⁹

4. **State Practice**

a. Arizona

In Arizona, roughly 50 percent of remains of irregular migrants are found by CBP, which then calls local law enforcement.⁴⁰⁰ The other 50 percent are discovered by ordinary people: hikers, NGOs, hunters and others.⁴⁰¹ After receiving unidentified remains from across the southern region of the state, the Pima County Office of the Medical Examiner (PCOME) conducts an autopsy and anthropological examination. Case information is entered in NamUS, and DNA samples are submitted to a private laboratory.⁴⁰²

If the PCOME is able to ascertain identifying information from the remains, it cross-references that information with NamUS and the Colibrí Center for Human Rights.⁴⁰³ If the identifying information matches missing persons' data held by either NamUS or Colibrí, the PCOME will interface with either the relevant consulate or the Argentine Forensic Anthropology Team (EAAF) to contact families of the deceased.

Roughly 21 percent of missing migrants in Arizona are from Central American countries while nearly 75 percent are from Mexico.⁴⁰⁴ Consulates from those countries maintain contact with the PCOME to facilitate the repatriation of remains. But consulate resources are limited, and some

³⁹⁶ I/A Ct. H.R., *Neira*, n. 29 (1996), op para. 4; *Caballero*, n. 31 (1997), para.66.4; *Street Children*, n. 77 (2001), para. 123.6; *Durand*, n. 89 (2001), para. 45.4 (d).

³⁹⁷ *Bámaca*, n.91 (2002), paras. 83, 106.4.

³⁹⁸ Interview with Eddie Canales, *supra* note 167.

³⁹⁹ *Id.*

⁴⁰⁰ Zoom interview with Dr. Greg Hess, *supra* note 223.

⁴⁰¹ *Id.*

⁴⁰² Robin Reineke and Kate Spradley et al, "Death Along the US/Mexico Border: A Comparative View of Policy and Practice in Arizona and Texas." PowerPoint Presentation. <https://gato-docs.its.txstate.edu/jcr:3460b265-0ef7-4fac-9826-724ed434eadd/Final%20AAFS%20Spradley%20et%20al.%202016.pdf>

⁴⁰³ *Id.* p 2.

⁴⁰⁴ Zoom Interview with Tony Banegas, President, Colibrí Center, in Tucson, AZ (Nov. 9, 2021).

consulates are more capable of repatriating remains than others.⁴⁰⁵ The PCOME collaborates with the EAAF to assist consulates in liaising with families in remote areas; the EAAF maintains memoranda of understanding with governments, allowing them to conduct their work.⁴⁰⁶

The odds of identifying remains are directly proportionate to the condition those remains are in when they arrive at the PCOME.⁴⁰⁷ When unable to identify remains or locate the families of the deceased, the PCOME places the remains in a large archive. After a period of time in the archive, if the remains are still unidentified, they are interred; PCOME runs the Indigent Internment Program in Pima County, unlike most counties which rely on a Public Fiduciary.⁴⁰⁸ Because it runs the internment program, PCOME is able to avoid cremation, which is the most cost-effective way to dispose of remains. Interring the remains is the better option for eventual repatriation as it allows for future disinterment and the family's choice of burial.

b. California

In California the majority of irregular migrants disappear either in San Diego or Imperial Counties.⁴⁰⁹ The San Diego Office of the Medical Examiner usually encounters about a dozen border deaths per year and identifies them relatively quickly.⁴¹⁰ The majority of the deceased are from Mexico, so the Medical Examiner Office maintains a close relationship with the local Mexican consulate.⁴¹¹ Some consulates subsidize repatriation costs for families who can prove that they are financially disadvantaged and cannot cover the cost.⁴¹²

Deaths in Imperial County are more difficult to trace. Many remains discovered in Imperial County are buried in local cemeteries or cremated.⁴¹³ As of 2016, roughly 240 unidentified individuals were buried in the pauper's section of the Terrace Park cemetery, which opened in 1994 shortly after California implemented its version of Prevention Through Deterrence, Operation Gatekeeper.⁴¹⁴ Upon receiving remains and attempting to identify the victim, the coroner's office holds the unidentified remains for 30 days in case it hears from family

⁴⁰⁵ Zoom interview with Dr. Greg Hess, *supra* note 223.

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.*

⁴⁰⁹ Interview with Vicente Rodriguez, *supra* note 187.

⁴¹⁰ Tessa Lee, Medical Examiner's Investigator, San Diego County Medical Examiner's Office, Remarks at *Identifying the Dead Along Our Southern Border: Immigration, Regulation, Forensic Anthropology, and Human Rights* at the University of New Mexico Latin American & Iberian Institute (Feb. 25, 2021).

⁴¹¹ *Id.*

⁴¹² In 2004 the Mexican Congress provided consulates with funds for subsidizing repatriations. That funding is extremely limited, however. In 2005, for example, the Los Angeles consulate helped 216 families with repatriation costs. This number includes all Mexicans in the area, not just unidentified migrant remains. Adrián Félix "Posthumous Transnationalism: Postmortem Repatriation from the United States to Mexico." *Latin American Research Review*, Vol. 46 No. 3 (2001). P 166.

⁴¹³ Tatiana Sanchez, *Dirt Lot Holds Remains of Deadly migrant Crossings*, CHICAGOTRIBUNE.COM (June 12, 2016) <https://www.chicagotribune.com/sdut-unidentified-migrants-holtville-cemetery-2016jun12-story.html>

⁴¹⁴ *Id.*

members.⁴¹⁵ The majority of unidentified remains are cremated at one of two local mortuaries at the cost of about \$645. Cremating saves the County about \$860 per person.⁴¹⁶ The public administrator stores the cremated remains for a year; if they are not claimed in that time, they are scattered at sea.⁴¹⁷

c. New Mexico

The single Medical Examiner Office that handles all cases of unidentified remains across the state is located in Albuquerque and collaborates with consulates in El Paso to repatriate remains.⁴¹⁸ Because unidentified remains destined for repatriation are routed through consulates in El Paso, the repatriation procedure resembles that of Texas, described below. Under New Mexico Law, counties hosting unclaimed and unidentified remains bury or cremate the remains within 30 days after “a determination has been made that the body has not been claimed, but no less than two weeks after death.”⁴¹⁹ Cremated remains are retained and stored for at least two years in case of identification; after two years, the ashes are scattered.⁴²⁰ Local counties are not always notified when remains are scattered in their jurisdiction.⁴²¹

d. Texas

The Texas Code of Criminal Procedure requires that DNA from all unidentified remains be collected and submitted for analysis.⁴²² Once a body is identified, consular representatives should, in theory, collaborate with funeral homes to repatriate remains.⁴²³ The process rarely functions smoothly, however. For a variety of reasons discussed in previous sections, including the extent of private land in Texas and decentralized system of Justices of the Peace, unidentified remains rarely reach the repatriation stage. A 2007 court ordered Justices of the Peace in Brooks County to stop sending unidentified remains to the Nueces County Medical Examiner’s Office for examination.⁴²⁴ Instead, bodies were sent to a local funeral home with no forensic

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*

⁴¹⁷ *Id.*

⁴¹⁸ *See, supra* note 294.

⁴¹⁹ N.M. Stat. Ann. 24-12A-3.

⁴²⁰ Staci Matlock, *County Acts as Kin When the Dead Go Unclaimed*, SANTA FE NEW MEXICAN (Nov. 20, 2011), https://www.santafenewmexican.com/news/local_news/county-acts-as-kin-when-the-dead-go-unclaimed/article_ef8c49b6-6461-5231-ab56-e9eb0fff4596.html

⁴²¹ *Id.*

⁴²² John Carlos Frey, *Graves of Shame*, TEXASOBSERVER.COM, (July 6, 2015), <https://www.texasobserver.org/illegal-mass-graves-of-migrant-remains-found-in-south-texas/>

⁴²³ Timothy Gocha, Kate Spradley, and Ryan Strand. “Bodies in Limbo: Issues in Identification and Repatriation of Migrant Remains in South Texas” in *Sociopolitics of Migrant Death and Repatriation* 143 (2018) p. 146.

⁴²⁴ *Id.* at p. 148

pathologist. If, as was often the case, the funeral home failed to make an identification, bodies were sent back to Brooks County for burial in the Sacred Heart Cemetery in Falfurrias.⁴²⁵

Beginning in 2013, Baylor University and the University of Indianapolis began excavating unidentified remains in Sacred Heart Cemetery. The anthropologists working for the universities began to construct biological profiles from the remains.⁴²⁶ Since 2013, a non-profit organization called Operation Identification (OpID) has facilitated the identification and repatriation of unidentified remains found near the South Texas border. OpID collaborates with a variety of NGOs including the South Texas Human Rights Center (STHRC), the Argentine Forensic Anthropology Team (EAAF), the Colibrí Center for Human Rights, and the Forensic Border Coalition. Once remains are identified with a moderate degree of certainty, OpID reaches out to consulates to see if a missing person's report was filed that would match the identification.⁴²⁷ Data from the STHRC shows that roughly 40 percent of missing migrants in Texas are from Mexico, with 42 percent from Central American countries including El Salvador, Guatemala, and Honduras.⁴²⁸ Consulates from those countries are limited by a lack of funding and high turnover rate.⁴²⁹ If enough information is available to produce an identification, OpID coordinates with the Justice of the Peace to make the formal legal identification.

Once the Justice of the Peace signs the death certificate, the family of the deceased communicates with the consular office to choose a funeral home to handle the repatriation process.⁴³⁰ The funeral home changes the name on the original death certificate from “unknown remains” to the individual’s name by submitting a death certificate amendment form to the Texas Health and Human Services Vital Statistics Unit.⁴³¹ Funeral homes can charge exorbitant fees—some in the region of \$300—to fill out the form.⁴³² Even when a funeral home agrees to submit the form, the process for amending a death certificate can be opaque and drawn out.⁴³³ The repatriation process requires the collaboration of the family of the deceased, two funeral homes (the home chosen and the home that initially processed the deceased), the consulate, and the Vital Statistics Unit, all facilitated by NGOs like OpID and EAAF; no wonder, then, that the repatriation process frequently breaks down.

5. **Gaps and Failures of International & U.S. Law and Practice in Addressing Migrant Deaths & Disappearances**

⁴²⁵ *Id.*

⁴²⁶ *Id.* at p. 149.

⁴²⁷ *Id.* at p. 151

⁴²⁸ Interview with Eddie Canales, *supra* note 167.

⁴²⁹ *Id.* at p. 151.

⁴³⁰ *Id.*

⁴³¹ *Id.* at 152.

⁴³² *Id.*

⁴³³ *Id.* 153.

| | International Legal Standard | Arizona | California | New Mexico | Texas |
|--------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------|
| Notify and Inform Relatives | Inform families on 1) what happened to victim and 2) whereabouts of mortal remains | NGOs like EAAF and Colibri collaborate with PCOME to identify families of deceased migrants | | | NGOs like STHRC work with consulates to identify families of deceased migrants |
| Repatriate Remains | Repatriate identified and matched remains, even if it requires exhumation | Coalition of NGOs works with PCOME and consulates to repatriate identified and cross-referenced remains | Many remains found in San Diego County are identified and repatriated. | Repatriation process funneled through El Paso consulates. | Some remains repatriated through network of Universities, NGOs, and consulates |
| Dispose of Remains Respectfully | If repatriation impossible for lack of identification, bury remains in dignified and private manner. Do not cremate. | Remains kept in PCOME archive and then interred in county cemetery since 2018. Prior to 2018, remains cremated. | Imperial County remains, less frequently identified, held by Coroner for up to 30 days. Then usually cremated and scattered in the ocean. | Remains are buried or cremated within 30 days of not being claimed. Cremated remains are stored for two years, then scattered in nature. | Most unidentified remains buried in local county cemeteries, often in unmarked graves |
| Record the Location of Burial and Maintain Gravesites | If repatriation unavailable, inform family members of location of grave site. | | | | |

Federal and state governments in the border region routinely fail to comply with their obligations to the remains of disappeared migrants. None of the states have a universal protocol in place to notify relatives or repatriate remains.⁴³⁴ Only certain counties have procedures that ensure the respectful disposal of remains, and no states ensure that the remains can be visited by family members.⁴³⁵

5. Recommendations

⁴³⁴ See discussion *supra* Part IV.4.

⁴³⁵ *Id.*

a. Arizona

The PCOME leads the way in the identification of missing migrants but state officials should do more to facilitate the repatriation of remains. State officials, either through the PCOME or through local law enforcement, should be required to oversee and coordinate between the PCOME, Colibrí Center, and local consulates to ensure prompt and accurate notification to relatives and prompt, complete and respectful means of repatriation of remains.

b. California

San Diego County does identify the majority of migrant remains and carries out repatriations in many cases. Imperial County should be given the necessary resources to ensure that they can achieve the same goals. Remains found in Imperial County should be processed by forensic anthropologists. If no DNA matches are discovered and no next of kin identified, remains should be kept for a period of time (6 months to a year) by the county officials. If no one claims the remains, they should be disposed of in a respectful manner, not cremated. Graves should be clearly marked to enable exhumation for further investigations.

c. New Mexico

New Mexico should develop regional offices capable of conducting forensic investigations into unidentified remains. Those remains should be held until a match is found. If no match is found within a year, remains should be buried respectfully, not cremated, in a clearly marked cemetery.

d. Texas

Texas should standardize its process for investigating and repatriating remains across counties. County and state officials should collaborate with NGO's and university teams to ensure that consulates are notified when an identification is made, and the remains can be respectfully repatriated, and families promptly notified in a dignified way. If no family members are found, remains should be buried in clearly marked graves.

e. Federal Government

The federal government should subsidize the process of repatriation of remains. The Mexican External Support Mechanism (MAE by its Spanish acronym) ensures that consulates will work across national borders to repatriate the remains of disappeared migrants. The U.S. government must formally agree to adopt the MAE at all levels of government, and implement obligations to ensure its effective functioning. CBP should collaborate with consulates to ensure that remains are repatriated in a swift, respectful manner. The U.S. government should subsidize the repatriation process, particularly as its policies are driving the migrant disappearances. The U.S.

government should also provide funding for states to build well-marked cemeteries that allow unidentified remains to be respectfully interred.

VII. Remedies

1. International Legal Obligations

a. Duty to Provide a Remedy

The right to an effective remedy and reparations for victims of human rights violations is found in numerous international instruments. In particular, Article 8 of the Universal Declaration of Human Rights, Article 2 of the International Covenant on Civil and Political Rights, and Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The right to a remedy and reparation is further confirmed in practice.⁴³⁶

The UN Principles on Reparation define “victim” in such a way as to encompass both direct and indirect victims. Specifically, “[w]here appropriate, and in accordance with domestic law, the term ‘victim’ also includes the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent revictimization.”⁴³⁷ Similarly, Article 24 of the International Convention for the Protection of all persons from Enforced Disappearances defines victims as “the disappeared person and any person who has suffered harm as a direct result of an enforced disappearance.”⁴³⁸ This definition is consistent with the Mexico Ley de Víctimas and the MAE. It also reflects international jurisprudence, particularly in the cases of deaths and enforced disappearances.

The working group on Enforced or Involuntary Disappearances has confirmed that “reparations programs should use a wide and comprehensive definition of ‘victim’ and should not distinguish between direct and indirect victims. A comprehensive definition should recognize that family members of the disappeared are also victims because they endure unique forms of suffering as a direct result of the disappearance.”⁴³⁹

In 2005, on the basis of the coherent set of principles pertaining to remedy and reparations that have emerged from international human rights jurisprudence, treaties, and bodies, the General Assembly of the UN proclaimed the Basic Principles and Guidelines on the Right to a Remedy

⁴³⁶ Office of the High Commissioner for Human Rights, Rule-of-Law Tools for Post-Conflict States, Reparations programmes, at 8, U.N. Doc. HR/PUB/08/1 (2008), <http://www.ohchr.org/Documents/Publications/ReparationsProgrammes.pdf>.

⁴³⁷ G.A. Res. 60/147, para. 8, (Mar. 21, 2006).

⁴³⁸ International Convention for the Protection of All Persons from Enforced Disappearance, art. 24, 20 December 2010, 2716 U.N.T.S. 3.

⁴³⁹ Working Group on Enforced Disappearances, General Comment on Women Affected by Enforced Disappearances, para. 38, U.N. Doc. A/HRC/WGEID/98/82 (2012).

and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.⁴⁴⁰ It should be noted that international law obliges states to provide remedies and reparation for all human rights violations and abuses, not just gross violations.⁴⁴¹ The UN Principles on Reparation recognized this and, to avoid misunderstanding, included the following phrase in Principle 26 on non-derogation: “it is understood that the present principles and guidelines are without prejudice to the right to a remedy and reparation for victims of all violations of international human rights and international humanitarian law.”⁴⁴²

As articulated within the Principles, remedies for violations of international human rights law must provide victims with: (a) equal and effective access to justice; (b) adequate, effective and prompt reparation for harm suffered; (c) access to relevant information concerning violations and reparation mechanisms.⁴⁴³

i. Access to Justice

“A victim of a gross violation of international human rights law... shall have equal access to an effective judicial remedy as provided for under international law.”⁴⁴⁴ Other remedies should include access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law.

In order to secure the right to access to justice and fair and impartial proceedings in domestic law, states should: disseminate information about available remedies for violations; take measures to minimize the inconvenience to victims and their representatives; protect against unlawful interference with their privacy; provide proper assistance to victims seeking access to justice; and make available all appropriate legal, diplomatic and consular means to ensure that victims can obtain remedies for violations. States should further develop procedures to allow groups of victims to present reparations claims and receive reparations.

An adequate, effective and prompt remedy for violations should include all available and appropriate international processes in which a person may have legal standing and should be without prejudice to any other domestic remedies.

ii. Reparation for Harm suffered

⁴⁴⁰ The principles identify mechanisms, modalities, procedures, and methods for the implementation of existing legal obligations under international human rights law. *See* G.A. Res. 60/147, at 3, (Mar. 21, 2006).

⁴⁴¹ G.A. Res. 60/147, para. 2(c), 3(c), (Mar. 21, 2006).

⁴⁴² G.A. Res. 60/147, para. 26, (Mar. 21, 2006). In other words, there are no circumstances in which this right may be denied or undermined, much less be the subject of state derogation.

⁴⁴³ G.A. Res. 60/147, para. 11, (Mar. 21, 2006).

⁴⁴⁴ G.A. Res. 60/147, para. 12, (Mar. 21, 2006).

Victims of international human rights law should, as appropriate and proportional to the gravity of the violation, be provided with full and effective reparation, including: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.⁴⁴⁵ These elements are guaranteed in Article 9(5) of the ICCPR, and Article 14 of CAT, both of which the United States is bound to uphold.⁴⁴⁶ Critically, states must always act immediately to halt violations once discovered.⁴⁴⁷ Monetary reparation should be proportional to the gravity of the violations and the harm suffered.⁴⁴⁸

While restitution and compensation involve “monetary reparation for physical or mental suffering ... satisfaction is a different, non-financial form of reparation for moral damage or damage to the dignity or reputation of an individual.”⁴⁴⁹ Importantly, satisfaction should include verification of the facts and full and public disclosure of the truth.⁴⁵⁰ To achieve that end, states must search for the whereabouts of the disappeared, the bodies of those killed, and provide assistance in the recovery, identification and reburial of the bodies in accordance with the cultural practices of the victim.⁴⁵¹ In addition, the United States must issue a public apology, acknowledging the facts as truth and accepting responsibility for the occurrence.⁴⁵² These aspects of satisfaction are intrinsically linked to the right to an investigation and the right to truth. Satisfaction also mandates that states review and reform laws contributing to or allowing violations of international human rights law to continue, and create measures promoting the observance of international standards and ethical norms by public servants.⁴⁵³

⁴⁴⁵ See G.A. Res. 60/147, para. 18, (Mar. 21, 2006). See also Comm. Against Torture, General Comment No. 3, Implementation of article 14 by States parties, para 2, UN Doc CAT/C/GC/3 (Dec. 13, 2012) (“The Committee considers that the term ‘redress’ in article 14 encompasses the concepts of ‘effective remedy’ and ‘reparation’. The comprehensive reparative concept therefore entails restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.”); G.A. Res. 56/83, Responsibility of States for Internationally Wrongful Acts, art. 34, (Jan. 28, 2002) (“Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.”).

⁴⁴⁶ See Hum. Rts. Comm., General Comment No. 31, *supra* note 8, at para. 16 (“the committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.”).

⁴⁴⁷ Int’l Comm’n of Jurists, The Right to a Remedy and Reparation for Gross Human Rights Violations: A Practitioner’s at 137 (citing ILC, Commentary to the Article 30) (“[C]essation ... must always be complied with.”).

⁴⁴⁸ See G.A. Res. 60/147, para. 15, (Mar. 21, 2006) (“In accordance with its domestic laws and international legal obligations, a state shall provide reparations to victims for acts or omissions which can be attributed to the state and constitute gross violations of international human rights law.”).

⁴⁴⁹ *Supra* note 448.

⁴⁵⁰ G.A. Res. 60/147, para. 22, (Mar. 21, 2006).

⁴⁵¹ *Id.*

⁴⁵² “[I]nclusion of an accurate account of the violations that occurred in international human rights and humanitarian law training and in educational materials at all levels” must also be part of the process. *Id.*

⁴⁵³ G.A. Res. 60/147, para. 24(a), (Mar. 21, 2006). In its commentary on Article 30 of the Articles on State Responsibility for Internationally Wrongful Acts, the International Law Commission explained that cessation of the violation of an international obligation and guarantees of non-repetition are “aspects of the restoration and repair of the legal relationship affected by the breach.” See ILC, *Commentary: Draft articles on responsibility of States for*

States should establish national programs for reparations and other assistance to victims in situations where the parties liable for the harm suffered are unable or unwilling to meet their obligations. States should further provide effective mechanisms under their domestic laws to enforce judgements for reparations.

iii. Access to relevant information concerning violations and reparation mechanisms

States should develop ways to inform the general public and victims of human rights violations “of the rights and remedies addressed by these Basic Principles and Guidelines and of all available legal, medical, psychological, social, administrative and all other services to which victims may have a right of access.”⁴⁵⁴

Further, victims are entitled to “seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law... and to learn the truth in regard to these violations.”⁴⁵⁵

2. Regional Obligations

Regional conventions, particularly Article 25 of the American Convention on Human Rights, also include provisions regarding the right to a remedy for victims of violations of human rights.⁴⁵⁶ Article 25 asserts that every person has the right to prompt and effective recourse to a competent court or tribunal to protect against acts that violate fundamental rights under the Convention.⁴⁵⁷

Legal remedies in the American human rights system are achieved via the Inter-American Court of Human Rights. Article 63.1 of the American Convention grants the Inter-American Court the discretion to award reparations for breaches of the Convention.⁴⁵⁸ Accordingly, the Court may (1) ensure the enjoyment of rights or freedoms, (2) remedy consequences of violations, and (3) award fair compensation. This latter category includes restitution, compensation, rehabilitation,

Internationally Wrongful Acts, (2001) II(2) Y.B. Int'l. L. Comm'n 26, 88. *See also* G.A. Res. 60/147, para. 22, (Mar. 21, 2006); Hum. Rts. Comm., General Comment No. 31, *supra* note 8, at para. 16.

⁴⁵⁴ *See* G.A. Res. 60/147, para. 24, (Mar. 21, 2006).

⁴⁵⁵ *Id.*

⁴⁵⁶ Organization of American States, American Convention on Human Rights, art. 25, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

⁴⁵⁷ State Parties must ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; develop the possibilities of judicial remedy; and ensure that the competent authorities shall enforce such remedies when granted. *Id.*

⁴⁵⁸ *Id.* at art. 63.1.

satisfaction, and guarantees of non-repetition.⁴⁵⁹ The Court has consistently awarded monetary damages for survivors and family members for both economic loss and pain and suffering.⁴⁶⁰

In *Velásquez Rodríguez v. Honduras*, the Inter-American Court of Human Rights held that states may be held responsible for acts perpetrated by private individuals when they fail to comply with the duty to ensure the protection of human rights.⁴⁶¹ Accordingly, in situations where a state is not directly responsible for a violation of human rights but has failed to exercise due diligence in protecting those rights, the American Convention on Human Rights places responsibility on the state to provide a remedy.

Since that pioneering decision, the Inter-American Court of Human Rights has expanded international judicial remedies for human rights violations, including awarding compensatory damages, various measures of restitution, rehabilitation, satisfaction and guarantees of non-repetition.⁴⁶² Remedies also include the right to know the truth, as truth is a public interest that belongs to society as a whole.⁴⁶³

Importantly, since 1998, the Court has ordered States to investigate, prosecute and punish persons responsible for human rights violations as part of the requirement that victims be granted satisfaction and guarantees of non-repetition.⁴⁶⁴ These obligations are incumbent on the United States, and the results of such investigations must be made public.⁴⁶⁵

3. U.S. Federal Law & Practice

For victims of human rights violations perpetrated by the United States, access to a remedy can be difficult. One potential avenue is through Alien Tort Statute claims.⁴⁶⁶ The Alien Tort Statute, (“ATS”) incorporated in the Judiciary Act of 1789, provides district courts of the United States

⁴⁵⁹ Garrido v. Argentina, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 39, para 41, (1998).

⁴⁶⁰ See *id.* at para 43.

⁴⁶¹ Velásques Rodríguez v. Honduras, Merits, Reparations, and Costs, Judgment, INTER-AM. CT. H.R. (ser. C) No. 4, (July 29, 1988).

⁴⁶² See Douglass Cassel, *The Expanding Scope and Impact of Reparations Awarded by the Inter-American Court of Human Rights*, 7 REVISTA DO INSTITUTO BRASILEIRO DE DIREITOS HUMANOS 91, 100 (2006), <https://www.corteidh.or.cr/tablas/r28153.pdf>. The Inter-American Court awards all three kinds of remedies specified by the UN’s Basic Principles and Guidelines on the Right to a Remedy and Reparation] and all four basic forms of reparations, as well as most of the particular forms of reparation suggested in the Basic Principles. *Id.* at 92.

⁴⁶³ Bamaca Velásquez v. Guatemala, Merits, Reparations, and Costs, Judgment, INTER-AM. CT. H.R. (ser. C) No. 70, para. 197 (2000); see also Rochela Massacre v. Colombia, Merits, Reparations, and Costs, Judgment, INTER-AM. CT. H.R. (ser. C) No. 163, para. 195 (May 11, 2007).

⁴⁶⁴ *Id.*

⁴⁶⁵ Urrutia v. Guatemala, Merits, Reparations, and Costs, Judgment, INTER-AM. CT. H.R. (ser. C) No. 103, paras. 117, 125-6 (Nov. 27, 2003).

⁴⁶⁶ 28 U.S.C. § 1350 (2018).

with the power to hear and decide cases involving torts committed in violation of international law.⁴⁶⁷

In the absence of a US treaty that provides controlling law, victims can rely on “the law of nations” to identify acts giving rise to the lawsuit.⁴⁶⁸ In *Filartiga v. Pena-Irala*,⁴⁶⁹ the “law of nations” was understood to be customary international law. Accordingly, causes of action can arise under wrongful death statutes, the UN Charter, the Universal Declaration on Human Rights, the UN Declaration Against Torture, the American Declaration of the Rights and Duties of Man, and other Declarations, documents and practices that constitute the customary international law of human rights.

In *Sosa v. Alvarez-Machain*, the Court refined its holding in *Filartiga*, finding that a claim under the ATS must be based on a universally recognized rule of international law that places specific obligations on international parties. It also found that a plaintiff may not sue the US under the Federal Tort Claims Act for tortious conduct allegedly planned and directed in the United States but carried out in a foreign country. U.S. Courts have found that torture and extrajudicial killings; cruel, inhuman and degrading treatment; and prolonged arbitrary detention all constitute international human rights norms that can be brought as claims under the ATS.

However, since *Filartiga*, ATS claims against individual U.S. Government officials have typically been dismissed due to restrictions under the Westfall Act. The Act makes federal employees immune from tort liability for any negligent or wrongful acts or omissions they commit within the scope of their employment.⁴⁷⁰ If a federal employee was determined by the Attorney General to be acting within the scope of his employment, the Westfall Act requires that the lawsuit be against the United States as a whole, and is then considered under the Federal Tort Claims Act (“FTCA”), rather than the ATS.⁴⁷¹ The FTCA is highly complex, permitting only certain types of lawsuits to proceed under the doctrine of sovereign immunity. The vast majority of claims against the US government are barred by sovereign immunity.

Under the FTCA, a tort claim must be submitted to the appropriate federal agency within two years after the claim accrues, which is a barrier for families who had continued to hope that their loved one was simply missing and waited for several years to hear from them. Further, though federal courts have jurisdiction over FTCA claims, they apply the law of the state “where the act

⁴⁶⁷ *Id.* (providing federal courts with “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”).

⁴⁶⁸ *Id.*

⁴⁶⁹ 577 F. Supp. 860 (E.D.N.Y. 1984) (involving a tort action against a Paraguayan citizen alleging torture and murder of plaintiff’s brother in Paraguay). The case paved the way for many subsequent suits to compensate victims for violations of international law.

⁴⁷⁰ 28 U.S.C. S 2679 (2018).

⁴⁷¹ 28 U.S.C. 1346 (2018).

or omission occurred,”⁴⁷² which is a further limitation on which claims can be brought. The FTCA also bars claims based on discretionary government functions and a number of intentional torts.⁴⁷³ These limitations effectively prevent families of victims from pursuing negligence or other kinds of claims against US government authorities.

Although the FTCA allows claims for intentional torts committed by “investigative or law enforcement officers,” it is unlikely that families of missing migrants can pinpoint a single agent as responsible for the death of their loved one, when it is US policies as a whole that are the cause of the deaths of the vast majority of migrants.

4. Gaps and Failures of International & U.S. Law in Providing Remedies

The right to life, articulated in Article 6 of the ICCPR and Article 3 of the UDHR, obliges the United States to provide migrant victims of deaths and disappearances at the United States-Mexico border with remedies for violating that fundamental right.⁴⁷⁴

General Comment 31 to the ICCPR further elaborates that the obligations under Article 2 of the ICCPR entail a positive obligation on the state to protect against violations by private persons or entities, and not just agents of the state.⁴⁷⁵ The requirement for effective protection means the state must make remedies available when violations occur, taking into account “the special vulnerability of certain categories of persons.”⁴⁷⁶ The Human Rights Committee has pointed out the particular need for states parties to establish appropriate judicial and administrative mechanisms to allow claims of rights violations under domestic law.

The U.S. policies that violate the right to life of migrants who perish at the border require it to take responsibility for their inevitable consequences. The U.S. must provide the victims and their families of these deadly policies with remedies. The U.S. government is responsible for migrants who die or disappear at the Southern border due to its Prevention Through Deterrence border policies. It is these very government policies which have deliberately and foreseeably led to the widespread, systematic disappearance of thousands of migrants. Both international and U.S. domestic law place responsibility on a state when there is a causal nexus between the implementation of a policy and the widespread deaths and disappearances that are the direct or indirect result. “The obligation of States parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life.”⁴⁷⁷ As

⁴⁷² *Id.* at (b)(1).

⁴⁷³ 28 U.S.C. 2680(a), (h) (2018).

⁴⁷⁴ International Convention for the Protection of All Persons from Enforced Disappearance, art. 2, 20 December 2010, 2716 U.N.T.S. 3.

⁴⁷⁵ See Hum. Rts. Comm., General Comment No. 31, *supra* note 8, at para. 8.

⁴⁷⁶ *Id.* at para. 15

⁴⁷⁷ See Hum. Rts. Comm., General Comment No. 36, *supra* note 114, at para. 7.

such, the U.S. must provide effective remedies which adequately provide access to justice, access to reparations, and truth.

Both international and regional law provide that victims of human rights violations, which includes the families of direct victims, must be afforded (1) access to Justice; (2) reparations for harm suffered; and (3) access to relevant information concerning violations and reparation mechanisms.

a. Access to Justice

“A victim of a gross violation of international human rights law... shall have equal access to an effective judicial remedy as provided for under international law.”⁴⁷⁸ Currently, the families of migrants who have perished on U.S. soil as a direct result of US border enforcement policies are denied effective access to judicial remedy as required by international and regional law. While access to judicial, administrative, and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law are provided for on paper via traditional judicial claims, the Alien Tort Statute, Federal Tort Claims Act, and Administrative Procedure act, in reality these mechanisms do not function to afford victims of the US’s human rights violations with access to justice.

Under the doctrine of sovereign immunity, one cannot sue a United States government entity without its express permission. Because the perpetrators and facilitators of human rights abuses at the border are U.S. agents, agencies, and the government as a whole, any claim victims might bring under the Alien Tort Claims Act, is automatically converted into claims under the Federal Tort Claims Act. Because claims under FTCA must be based on and permitted by the law of the state in which the misconduct occurred, and because state law does not touch on negligence in terms of investigating migrant deaths or the like, families are unlikely to succeed under an FTCA claim.⁴⁷⁹

Qualified immunity for individual federal agents and local law enforcement results in a complete absence of accountability mechanisms for those agents who perpetrate harms against migrants crossing the border or are negligent in carrying out their duties. For example, in 2012 Border Patrol agents shot Jose Antonio Elena Rodriguez in a cross-border shooting. Jose, just sixteen at the time, was “four blocks from his home in Nogales, when... ten bullets struck him: eight in the

⁴⁷⁸ See G.A. Res. 60/147, para. 12, (Mar. 21, 2006).

⁴⁷⁹ “We have had no success against U.S. government officials under the Alien Tort Statute.” Zoom Interview with Paul Hoffman, former Legal Director of ACLU Foundation of Southern California, conducted in Boston, MA (Dec. 15, 2020). Hoffman has been lead counsel in most of the Alien Tort Statute cases brought before the United States Supreme Court.

back, two in the head.”⁴⁸⁰ The shots came from a Border Patrol agent, Lonnie Swartz, aiming through the fence separating Arizona from Mexico, allegedly at individuals throwing rocks.⁴⁸¹ There are conflicting reports on whether Jose was involved in throwing rocks, but the U.S. Customs and Border Protection Agency refused to release surveillance-camera footage of the incident.⁴⁸² A jury in Tuscon, Arizona found Swartz not guilty of second-degree murder and could not reach a verdict on manslaughter charges. The case “demonstrates the persistent obstacles to accountability in Border Patrol that remain, particularly when it comes to use of force.”⁴⁸³

The lack of accountability for a direct shooting highlights the difficulty in obtaining justice. “At least 102 people have died as a result of encounters with Border Patrol in the last decade. Six of these deaths were caused by Border Patrol agents shooting across the border into Mexico – murders met with complete impunity.”⁴⁸⁴ According to Hold CBP Accountable, a joint initiative of the ACLU of San Diego and Imperial Counties, the American Immigration Council, the National Immigration Project of the National Lawyers Guild, and the Northwest Immigrant Rights Project, of the nineteen cases brought against border patrol alleging assault and use of excessive force, only four have thus far been successful.⁴⁸⁵ “No agent has ever been convicted of criminal wrongdoing while on duty, despite deaths in custody and uses of excessive, deadly force.”⁴⁸⁶ Even non-legal complaints rarely result in a positive outcome. The American Immigration Council, through a Freedom of Information Act request, obtained data on 2,178 cases of alleged misconduct by Border Patrol agents and supervisors that were filed between January 2012 and October 2015. 95.9% of the 1,255 cases in which an outcome was reported resulted in “no action” against the officer or agent accused of misconduct.⁴⁸⁷

⁴⁸⁰ Rory Carroll, *Border Patrol Agent Found Not Guilty of Murder in Mexican Teen’s 2012 Death*, THE GUARDIAN (Apr. 34, 2018), <https://www.theguardian.com/us-news/2018/apr/23/border-patrol-shooting-jose-antonio-elena-rodriguez-lonnie-swartz>.

⁴⁸¹ *Id.*

⁴⁸² *See Mistrial Announced for U.S. Border Agent Linked to Teenager’s Fatal Shooting*, CBS NEWS (Apr. 23, 2018), <https://www.cbsnews.com/news/mistrial-us-border-patrol-agent-lonnie-swartz-manslaughter-charges-today-2018-04-23/>.

⁴⁸³ Kino Border Initiative, *KBI Stands With the Elena Rodriguez Family*, KINO BORDER INITIATIVE (April 23, 2018), <https://www.kinoborderinitiative.org/kbi-stands-with-the-elena-rodriguez-family/>.

⁴⁸⁴ Andrea Flores & Shaw Drake, *Border Patrol Violently Assaults Civil Rights and Liberties*, ACLU: NEWS & COMMENTARY (July 24, 2020), <https://www.aclu.org/news/immigrants-rights/border-patrol-violently-assaults-civil-rights-and-liberties/>.

⁴⁸⁵ *Assaults and Use of Excessive Force*, HOLD CBP ACCOUNTABLE, <https://holdcbpaccountable.org/abuses/use-of-excessive-force/>

⁴⁸⁶ Flores & Drake, *Border Patrol Violently Assaults Civil Rights and Liberties*, *supra* note 484.

⁴⁸⁷ GUILLERMO CANTOR & WALTER EWING, AMERICAN IMMIGRATION COUNCIL, STILL NO ACTION TAKEN: COMPLAINTS AGAINST BORDER PATROL AGENTS CONTINUE TO GO UNANSWERED 1 (August 2017), https://www.americanimmigrationcouncil.org/sites/default/files/research/still_no_action_taken_complaints_against_border_patrol_agents_continue_to_go_unanswered.pdf.

Accordingly, when federal or state officials choose to cut corners in search and rescue missions, fail to conduct complete and thorough investigations into the deaths of migrants at the border, or do not make any attempt to identify remains, there is little recourse that families can have.

In addition, the United States has failed to take measures to minimize the hardship to victims and their representatives. Families of victims who are within the United States are reluctant to bring complaints or claims against US agents or agencies for fear of deportation. The ACLU of New Mexico reports that it is common for ICE agents to show up in court proceedings where migrants may be involved, resulting in migrant witnesses and parties being reluctant to continue with their claims or participation in any proceeding. “Even if [ICE] only show up once, word gets around and that deprives people of the ability to access justice.”⁴⁸⁸ Thus, the US is failing to protect victims from unlawful interference with their privacy, and from obtaining answers and remedies.

For those victims living outside of the United States, a lack of resources and knowledge of their ability to pursue claims against the United States are a major barrier to justice. To abide by their international obligations, the United States should provide proper assistance to victims seeking access to justice, and make available all appropriate legal, diplomatic, and consular means to ensure that victims may exercise their rights to remedy for violations.

An adequate, effective and prompt remedy for violations should include all available and appropriate international processes in which a person may have legal standing and should be without prejudice to any other domestic remedies. The United States, by refusing to recognize the jurisdiction of the Inter-American Court of Human Rights, even though it is a member of the OAS and a signatory to the American Declaration of the Rights and Duties of Man, is thereby depriving victims of a venue to pursue claims and obtain redress and remedy for US violations of human rights.

b. Reparation for Harm suffered

“Victims of international human rights law ... should, as appropriate and proportional to the gravity of the violation and with the circumstances of each case, be provided with full and effective reparation, ... which include: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.”⁴⁸⁹ As discussed above, satisfaction includes verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm. The United States, by failing to keep full and accurate numbers pertaining to migrant deaths at the border, failing to effectively respond to family reports of missing persons at

⁴⁸⁸ Zoom Interview with Joachim Marjon, *supra* note 60.

⁴⁸⁹ See G.A. Res. 60/147, para. 18, (Mar. 21, 2006). Compensation should be provided for any economically assessable damage resulting from gross violations such as physical or mental harm. *Id.*

the border, and failing to provide information to those organizations which request it, is not complying with its obligation to provide satisfaction to victims.⁴⁹⁰

Satisfaction further includes the search for the whereabouts of the disappeared, for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expression or presumed wish of the victims, or the cultural practices of the families and communities. The previous two Sections elucidated the United States' failures on these fronts.

Satisfaction also includes implementing codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social services and military personnel. Several interviewees reported that Customs and Border Patrol have had a startling lack of oversight and very little accountability. Observing codes of conduct and ethical norms is difficult "when you have an agency that don't think of themselves as accountable, or think that they are above the law."⁴⁹¹

One final aspect of satisfaction involves reviewing and reforming laws contributing to or allowing violations of international human rights law and serious violations of international humanitarian law. Over the past few decades, since implementation of Prevention through Deterrence, many variations of border control policies have been cycled through, none effectively addressing the United States' international obligations, nor resolving the shocking rate of deaths at the border.⁴⁹²

"In accordance with its domestic laws and international legal obligations, a state shall provide reparations to victims for acts or omissions which can be attributed to the state and constitute gross violations of international human rights law."⁴⁹³ By placing the barriers discussed above that prevent access to judicial and administrative procedures, the United States is denying access to reparations to victims for acts or omissions which can be attributed to it and which constitute violations of international law. In addition, the FTCA is the "exclusive means by which a party may sue the United States for Money damages ... in tort." Therefore, when claims under the FTCA fail, the majority of families are left without other domestic means to obtain monetary compensation.

⁴⁹⁰ See *supra* notes 201-202, and accompanying text.

⁴⁹¹ Zoom Interview with Astrid Dominguez, Border Rights Center Director, ACLU of Texas, in El Paso, TX (Nov. 23, 2020).

⁴⁹² *Id.*

⁴⁹³ See G.A. Res. 60/147, para. 18, (Mar. 21, 2006).

Currently, there is no national program for reparations or to provide assistance to victims. The United States could meet this obligation through full participation with the MAE, in close cooperation with Mexico and the states of the Northern Triangle.

c. Access to relevant information concerning violations and reparation mechanisms

Victims are entitled to “seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law... and to learn the truth in regard to these violations.”⁴⁹⁴ A lack of access to information in general and lack of access to what information the authorities have when the family of a missing migrants calls U.S. agencies to report their missing loved ones, is one of the biggest problems reported by NGO’s and experts working in the sector. “One of the things we do worry about across the country ... is having the victims who appear to be vulnerable or migrants, not investigated thoroughly. And there we run into a real issue, because it is almost impossible [due to qualified immunity] to attack the officers or the detectives for failed investigation.”⁴⁹⁵

In addition, there are reports that local law enforcement agencies in states such as Texas fail to collect information on migrant remains, or fail to record basic details like where certain remains were buried to facilitate identification and repatriation efforts. NGO efforts to obtain information on CBP’s processes and data pertaining to migrant victims have been stymied. For example, on April 19, 2019, the Center for Constitutional Rights and the NGO No More Deaths jointly filed a Freedom of Information Act request seeking information from Customs and Border Protection on Border Patrol’s policies and practices relating to emergency services it claims to provide along the U.S.-Mexico Border. CBP failed to deliver any documentation in the twenty months following that request. As a result, on February 3, 2021, the Center and No More Deaths filed a FOIA complaint in the Southern District of New York.⁴⁹⁶

The U.S.’s inadequate policies on information gathering and investigations, failure to provide access to such information, and general reluctance to cooperate with NGO’s and families to provide them with answers, all amount to violations of the US’s obligations to the public and to the families of victims themselves.

CONCLUSION

The shocking rate of migrant deaths at the United States – Mexico border is a clear demonstration of the U.S.’s failure to meet its international legal obligations to protect the right to life, as required by Article 6 of the ICCPR, Article 3 of the UDHR, and the American

⁴⁹⁴ *Id.* at para 24.

⁴⁹⁵ Zoom Interview with Joachim Marjon, *supra* note 60.

⁴⁹⁶ See Complaint, No More Deaths v. United States Customs and Border Protection, No. 21-cv-954 (S.D.N.Y. Feb. 3, 2021).

Declaration on the Rights and Duties of Man. The U.S.’s adoption and continued use of Prevention Through Deterrence, a policy U.S. authorities themselves have recognized causes—and was designed to cause-- mortal danger to migrants who are forced to take highly perilous routes, clearly indicates the US is failing “to respect and ensure the right to life” from “reasonably foreseeable threats and life-threatening situations that can result in loss of life.”⁴⁹⁷

According to the U.N. Human Rights Committee, the purposes of the ICCPR “would be defeated without an obligation to take measure[s] to prevent a recurrence of a violation.”⁴⁹⁸ Accordingly, to abide by its obligations, the United States should terminate its Prevention Through Deterrence border policies, which directly and foreseeably lead to migrant deaths and disappearances. “The U.S., because of the number of migrant deaths, should take responsibility for that... throughout these past two decades, the result of their policies has ended up in more people dying, they are responsible for that. And they should not be trying to deter people from coming by letting them die.”⁴⁹⁹

Further, given that the U.S. has violated its obligation to respect migrants right to life, and given its obligations in international and regional law, the United States must (1) conduct prompt and thorough search and rescue missions for missing migrants; (2) investigate and identify migrant remains; (3) respectfully repatriate migrant remains; (4) and provide adequate remedies to victim’s families.

To those ends, the United States must comply with regional obligations to protect the right to life, which require the United States to coordinate with the Northern Triangle countries and Mexico to ensure the proper functioning of Mexico’s and Investigation of Disappearance (“MAE. The U.S. should enter into an agreement with Mexico and the Northern Triangle states to immediately and fully effectuate the MAE.

Recommendations

1. Global Recommendations

The United States must, as required under international law, ensure that its domestic law is consistent with its international legal obligations by:

- Incorporating norms of international human rights law and international humanitarian law concerning enforced disappearances and missing migrants into domestic law, or otherwise implementing them in the U.S. domestic legal system

⁴⁹⁷ *Supra* note 114 at para 7.

⁴⁹⁸ *See* Hum. Rts. Comm., General Comment No. 31, *supra* note 8, at para. 17.

⁴⁹⁹ Zoom Interview with Astrid Dominguez, Border Rights Center Director, ACLU of Texas (Nov. 23, 2020).

- Adopting appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice
- Making available adequate effective, prompt and appropriate remedies, including reparation
- Ensuring that U.S. domestic laws provide at least the same level of protection for victims as that required by its international obligations

The obligation to respect, ensure respect for and implement international human rights law with regard to missing and disappeared migrants provided for under the respective bodies of law, includes, inter alia, the duty to:

- Take appropriate legislative and administrative and other appropriate measures to prevent violations
- Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law
- Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and
- Provide effective remedies to victims, including reparations.

To those ends:

- The United States must promptly, thoroughly, and effectively address migrant deaths and disappearances, fulfilling its obligations under ICCPR, UDHR, and American Declaration.
- The United States must adopt all appropriate measures to prevent migrant disappearances and prevent migrants from going missing. Specifically, the United States should reform its immigration strategy, consistent with its international human rights obligations, and eliminate prevention through deterrence.
- The United States must adopt a comprehensive national plan to combat human rights violations against migrants, ensuring a consistent and concerted effort across all levels of government.
- The United States should ratify the treaties that address the issue of migrant disappearances, specifically the International Convention on the Protection of All persons from Enforced Disappearance, the Inter-American Convention on Forced Disappearance of Persons, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.
- The United States must create a comprehensive legal framework that guarantees and protects the rights of migrants and their families. This framework should ensure effective investigation by developing a streamlined process to be followed by families when reporting a missing migrant. To that end, the United States should enter into agreements to implement the Mexican External Support Mechanism (MAE) and pass similar

domestic legislation to ensure accountability for families through investigations into migrant disappearances and the respectful repatriation of remains.

- The United States must revise both CAFTA and NAFTA to mitigate the economic consequences of underdevelopment caused by those treaties and promote workers and union rights in those economies.

2. Search & Rescue

- The United States must establish clear institutional routes for the filing of a missing person's report by migrant family members, including the establishment of designated government authorities for the handling of migrant disappearances.
- The United States must promptly and diligently investigate cases of missing migrants in its territory, regardless of the victim's nationality or citizenship status.
- The United States must cooperate with the Northern Triangle and Mexico to the extent necessary to carry out any investigations of disappearances
- The United States must facilitate access to information to victims and their families, regardless of their nationality and location, concerning the circumstances of the missing migrant, the progress and result of an investigation, and the fate of the missing individual.
- The United States must regularly exchange information with Mexico and the Northern Triangle countries upon request of families of the missing migrants or their governments, and promptly transmit information of a disappearance or missing person status, as well as of the status of an investigation through the MAE.
- All reported disappearances made at police stations or related law enforcement institutions must be submitted to the states respective prosecutor's office and reported to the MAE.
- CBP must increase its collaboration with NGOs on the border that conduct search and rescue operations, providing support when necessary.
- CBP must construct additional search and rescue beacons and closely monitor heavily trafficked routes that are particularly perilous.

3. Investigation & Identification of Migrant Remains

- The United States must promptly and diligently investigate cases of missing migrants in its territory, regardless of the victim's nationality or citizenship status.
- The United States must regularly exchange information with Mexico and the Northern Triangle countries upon request of families of the missing migrants or their governments, and promptly transmit information of a disappearance or missing person status, as well as of the status of an investigation through the MAE.
- The United States must promote transnational cooperation through the MAE, and work with the Argentine Forensic Team to ensure the proper identification and repatriation of remains.
- The United States must cooperate with the Northern Triangle and Mexico to the extent necessary to carry out any investigations of disappearances.

- The United States, Mexico, and the Northern Triangle must institutionalize cooperation to address the investigation and prosecution of disappearances, identification and repatriation of remains, and availability of reparations for family members.
- The United States must facilitate access to information to victims and their families, regardless of their nationality and location, concerning the circumstances of the missing migrant, the progress and result of an investigation, and the fate of the missing individual.
- The United States must collect, examine, and preserve the bodies and remains of the disappeared according to best practice protocols such as that of the Argentine Forensics Team and the Minnesota Protocols, and take all reasonable measures necessary to identify the remains and determine the cause of death.
- Upon identification, the United States must ensure that families of the deceased are promptly informed and, where appropriate, facilitate the repatriation of the remains in a manner that is dignified and respectful to the deceased and the family.
- The United States should communicate with the family victims at least every six months to report on the progress of any investigation or repatriation.
- The United States must guarantee the integrity of the chain of custody for human remains. In accordance with the Minnesota Protocol, every stage of evidence recovery, storage, transportation and forensic analysis should be properly recorded to ensure the integrity of the evidence and facilitate identification of remains. Records of the chain of custody should include the information of all persons having any control over the remains. Additionally, all evidence should be uniquely referenced and marked for easy identification.
- Any disposal of those unclaimed and unidentified remains must occur in a dignified and respectful manner.
- The United States must incorporate international forensic protocols for human rights investigations into its domestic criminal procedures.
- The United States should cooperate with civil society and the families of missing migrants on the creation of a shared genetic database managed by EAAF's Proyecto Frontera. The state must ensure inter-institutional cooperation and that the database has the appropriate financial resources it needs to function.
- The United States should approve funding for the Missing Persons and Unidentified Remains Act of 2019, in order to fund local entities efforts in identifying unidentified migrant remains.⁵⁰⁰
- The United States must standardize identification and conservation of migrant remains procedures based on the practices of the PCOME.⁵⁰¹
- The United States should mandate forensic investigations into all cases of unidentified remains in order to take all reasonable steps to identify those remains.

⁵⁰⁰ Missing Persons and Unidentified Remains Act of 2019, 6 U.S.C. § 40501 (2020).

⁵⁰¹ Remarks at *Identifying the Dead Along Our Southern Border: Immigration, Regulation, Forensic Anthropology, and Human Rights* at the University of New Mexico Latin American & Iberian Institute (Feb. 25, 2021).

- The United States should ensure funding is available to local state authorities and NGO's for those efforts.
- The United States must make all efforts to contact the biological next of kin when remains have been found. The state shall ensure that remains are returned promptly and intact to family members, with complete identification information.
- The United States should continue the search for remains regardless of how much time has elapsed after the missing persons report was filed.
- In cases where remains are not identified, they need to be returned to the country of origin if that can be identified. In case of no identification, there must be a record kept of all the evidence available at the time of finding the remains in a forensics facility for later identification in the event relatives are found.
- The United States must keep an accurate record of where unclaimed and unidentified remains are buried, and maintain gravesites respectfully in the locations where bodies are buried.

4. Respectful Repatriation of Remains

- The United States must work through the MAE to ensure that remains are promptly returned to family members, in the form and manner requested by the families.
- When remains are identified, family members must be included at each stage of the investigation and repatriation process.
- When remains are unable to be identified, local officials should retain the remains in case family members come forward. If, after a year or more has elapsed, the remains are still unclaimed, they should be respectfully interred in a well-marked cemetery.
- Local officials must collaborate with consulates and NGOs like EAAF and Colibrí to ensure that no family members are able to contact forensic anthropologists and/or justices of the peace to search for missing loved ones.

5. Provision of Adequate Remedies

- The United States government must facilitate access to adequate reparations for family members.
- The United States must cooperate with the MAE to facilitate the process by which family members of disappeared people can claim reparations by encouraging effective investigations and prosecutions.
- The United States must facilitate access to information to victims and their families, regardless of their nationality and location, concerning the circumstances of the missing migrant, the progress and result of an investigation, and the fate of the missing individual.
- The United States must facilitate the domestic and international travel of families so that they may participate in the investigation, criminal proceedings, and/or identification of remains.
- The United States should facilitate access to judicial mechanisms so that family members of missing migrants can bring claims for U.S. violations of the right to life.

- The United States must provide reparations proportionate to the gravity of the human rights violation, taking the victim’s family’s circumstances into account. For example, the fact that the victim was the sole or primary breadwinner for the family should be factored into compensation.
- The United States must ensure that domestic human rights laws are available and fully implemented, and do not place a high burden on victims and their families to grant them access to restorative justice mechanisms.

APPENDIX I: LIST OF INTERVIEWEES

Tony Banegas, Executive Director of [The Colibrí Center for Human Rights](#). Colibrí is a non-profit that helps connect families with forensic professionals to identify disappeared migrants. It also offers a community for the families of the disappeared in Mexico and the United States.

Jose Vasquez, Board Member of [Humane Borders/Fronteras Compasivas](#). Based in Tucson, Humane Borders is a non-profit run almost exclusively by volunteers that maintains a system of water stations in the Sonoran Desert to help save desperate people from death by exposure and dehydration.

Eddie Canales, Secretary/Treasurer, [South Texas Human Rights Center](#). STHRC is a community-based center dedicated to the promotion, protection, defense and exercise of human rights and dignity in South Texas. STHRC works to prevent migrant deaths through advocacy, organizing and public-education.

Vicente Rodriguez, Co-founder, of [Aguilas Del Desierto](#). Aguilas is a non-profit that conducts search and rescue operations in the deserts of California and Arizona.

Yvette Borja, Border Litigation Attorney, of [American Civil Liberties Union \(ACLU\) of Arizona](#). At the ACLU of Arizona, Borja supports legal advocacy and litigation efforts to curb CBP’s abusive practices.

Astrid Dominguez, Director, Border Rights Center, of [American Civil Liberties Union \(ACLU\) of Texas](#). Based in El Paso, the Regional Center for Border Rights coordinates ACLU efforts to litigate, advocate and organize to stop abusive practices by local law enforcement and CBP.

Nia Rucker, Policy Counsel and Regional Manager of [American Civil Liberties Union \(ACLU\) of New Mexico](#). Together with Joachim Marjon (below), Nia Rucker oversees the ACLU of New Mexico's litigation and advocacy efforts to support migrants in the border region.

Joachim Marjon, Immigrant Rights Attorney, [American Civil Liberties Union \(ACLU\) of New Mexico](#).

Dr. Greg Hess, Chief Medical Examiner of [Pima County Office of the Medical Examiner](#). Dr. Hess and the staff of PCOME coordinate with Colibrí and other non-profits to assist families seeking their disappeared loved ones. PCOME oversees the bulk of the remains found in southern Arizona and conducts a cutting-edge investigation to identify them.

Roxanna Altholz, Co-Director of [Berkeley Law International Human Rights Law Clinic](#). Altholz has extensive experience working in the Inter-American System of Human Rights and on the border region in particular.

Paul Hoffman, former Legal Director of [American Civil Liberties Union of Southern California](#). Hoffman is an expert in constitutional and civil rights litigation and is regarded as the leading Alien Tort Statute litigator in the country.

Dillon Kim, former volunteer at [No More Deaths](#). NMD is a humanitarian organization based in southern Arizona. They conduct search and rescue operations, assist deportees with phone calls and other support, and engage in advocacy.

Jason De León, Executive Director of [Undocumented Migration Project](#) (UMP). The author of *The Land of Open Graves*, De León has written extensively on the crisis of migrant disappearances as an anthropologist. The UMP seeks to raise awareness of the crisis to inspire immigration reform.