

THE PERMANENT REPRESENTATIVE  
OF THE  
UNITED STATES OF AMERICA  
TO THE  
ORGANIZATION OF AMERICAN STATES

WASHINGTON, D.C.  
September 12, 2017

Dr. Paulo Abrão  
Executive Secretary  
Inter-American Commission on Human Rights  
Organization of American States  
Washington, D.C. 20006

**Re: Anastasio Hernández Rojas, Petition No. P-524-16  
Response to Petition**

Dear Dr. Abrão:

The United States Government has the honor of submitting to the Inter-American Commission on Human Rights (“Commission”) this response to the Petition your office transmitted to us on May 12, 2017 via a letter dated May 10, 2017. In its letter of August 15, 2017, the Commission provided an extension for the U.S. response until September 12, 2017.

The Petition, with exhibits, was filed by family members of Anastasio Hernández Rojas (“Petitioners”) in the above-referenced matter on March 30, 2016, and alleges that the United States violated<sup>1</sup> Articles I, II, XVIII, XXV, and XXVI of the American Declaration of the Rights and Duties of Man (“American Declaration”).

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<sup>1</sup> As the United States recently reiterated in detail at a hearing before the Commission on September 7, 2017, the American Declaration of the Rights and Duties of Man is a nonbinding instrument that does not create legal rights or impose legal duties on member states of the Organization of American States. Accordingly, the United States understands that a “violation” in this context means an allegation that a country has not lived up to its political commitment to uphold the American Declaration. The United States respects its political commitment to uphold the American Declaration. For further elaboration of the United States’ longstanding position on the nonbinding nature of the American Declaration, see Request for an Advisory Opinion Submitted by the Government of Colombia to the Inter-American Court of Human Rights Concerning the Normative Status of the American Declaration of the Rights and Duties of Man, Observations of the United States of America, 1988, available at <http://www1.umn.edu/humanrts/iachr/B/10-esp-3.html>. U.S. federal courts of appeal have independently held that the American Declaration is nonbinding and that the Commission’s decisions do not bind the United States. See, e.g., *Garza v. Lappin*, 253 F.3d 918, 925 (7th Cir. 2001).

The United States respectfully submits that the matter addressed by the Petition is not admissible and must be dismissed because it fails to meet the Commission's established criteria in Article 34 of its Rules of Procedure ("Rules"). In particular, supervening information and evidence presented in this response pursuant to Article 34(c) renders the Petition manifestly groundless under Article 34(b). As such the Petition fails to establish any violations of rights set forth in the Declaration.

This Petition arises out of the death of Mr. Hernández Rojas on May 31, 2010, three days after he was taken into custody at the San Ysidro Port of Entry in San Diego, California. Mr. Hernández Rojas, a Mexican national, was detained by the U.S. Customs and Border Protection (CBP) when he was seeking to enter the United States illegally on May 28, 2010, and was transported to the nearby Chula Vista Border Patrol Facility and Detention Center. In the course of processing and deportation, Mr. Hernández Rojas physically resisted CBP officers, who took steps to restrain him, including through the use of a taser. Mr. Hernández Rojas went into cardiac arrest, was transported to a hospital, and died two days later after being removed from life support.

CBP agents reported the incident to the San Diego Police Department (SDPD) on May 29, 2010, which began a criminal investigation. The SDPD referred the case to the federal prosecutor, the U.S. Attorney's Office in San Diego, after July 9, 2010. The U.S. Department of Justice's Civil Rights Division (DOJ/CRD) opened an investigation into the incident in 2012. On November 6, 2015, a detailed Department of Justice Press Release described an extensive, independent, and comprehensive investigation into Mr. Hernández Rojas's death.<sup>2</sup> This investigation was conducted by officials from DOJ/CRD, the Federal Bureau of Investigation, and the U.S. Department of Homeland Security's (DHS) Office of the Inspector General. The evidence developed during this investigation indicated that Mr. Hernández Rojas was noncompliant and physically assaultive toward CBP officers during processing on May 28, 2010. A thorough review by experienced federal prosecutors determined that the evidence was insufficient to pursue federal criminal civil rights charges or to prove, beyond a reasonable doubt, that any CBP personnel violated federal homicide statutes. As the Press Release stated, the loss of

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<sup>2</sup> The Press Release can be found at <https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-anastasio-hernandez-rojas>.

life was regrettable, and representatives of DOJ and DHS met with Petitioners and their representatives to inform them of the results of the investigation.

Petitioners filed a lawsuit against the U.S. government, including CBP agents, in the U.S. District Court for the Southern District of California on March 23, 2011. Their complaint alleged numerous causes of action, effectively mirroring the allegations in the Petition they later filed before the Commission, namely: retaliation for exercise of constitutional rights (e.g., asserting right to a hearing, right to medical care), violation of due process (regarding a removal hearing), wrongful death (right to be free from the use of excessive force by law enforcement and punishment without due process), failure to supervise and properly intervene, the family's right to association, excessive force in violation of the Fourth Amendment of the U.S. Constitution, torture by taser in violation of the Fourth Amendment, torture by taser in violation of international law, wrongful death (a tort claim), assault and battery, intentional infliction of emotional distress, negligence, and negligent infliction of emotional distress.<sup>3</sup> The complaint sought damages, the costs of the lawsuit, punitive damages, attorneys' fees, and injunctive or declaratory relief, including an injunction requiring the institution of appropriate supervision and prohibition of the unjustified use of force.

On May 30, 2017 the district court granted an order based on a joint motion by Petitioners and the U.S. government to dismiss the entire claim, with prejudice, because the parties had reached a settlement in the case.<sup>4</sup> Under the settlement agreement, the U.S. government provided \$1 million to the Estate of Mr. Hernández Rojas to settle "each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise" to the civil case. This amount included payment of attorneys' fees, which were not to exceed 25 percent of the settlement amount. The settlement agreement specifically provides that the plaintiffs accept the funds

in full settlement, satisfaction, and release of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including any future claims for wrongful death and any claims for

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<sup>3</sup> Third Amended Complaint, Estate of Hernández-Rojas v. United States, No. 3:11-CV-0522-POR-DHB (S.D. Cal., Mar. 23, 2012) (enclosed as Annex 1).

<sup>4</sup> Order Granting the Parties' Joint Motion and Dismissing the Entire Action with Prejudice, Estate of Hernández-Rojas v. United States, No. 3:11-CV-00522-POR-DHB (S.D. Cal. May 30, 2017) (enclosed as Annex 2). When a case is dismissed "with prejudice," it is dismissed permanently and cannot be brought back to court.

fees, costs and expenses, arising from, and by reason of, any and all known and unknown, foreseen and unforeseen, bodily and personal injuries, death, or damage to property, and consequences thereof, which the plaintiffs or their heirs, administrators, or assigns may have or hereafter acquire against the United States, its agents, servants and employees.

The settlement agreement and ensuing dismissal of Petitioners' case in the district court show that Petitioners have now received adequate and effective remedies for the actions surrounding Mr. Hernández's death, in the form of significant monetary compensation, in exchange for the dismissal of the claims brought by Petitioners in district court. Petitioners freely and fully agreed to these remedies through the process of exhausting remedies in the U.S. court system.<sup>5</sup>

As noted above, these claims, which were outlined in the Third Amended Complaint, effectively mirror the claims that Petitioners assert before the Commission. The dismissal of the case with prejudice means that Petitioners are legally prohibited from ever again raising the claims asserted in the U.S. federal court case. They are likewise legally prohibited from ever again raising claims they could have asserted, or that they might in the future assert, arising directly or indirectly from the acts or omissions that gave rise to the federal court case. These include "any and all claims" and "rights" "of whatsoever kind and nature," which by the plain meaning of those terms includes the claims that were pending in the instant Petition at the time Petitioners reached the settlement agreement with the U.S. government.

Accordingly, Petitioners can no longer bring claims before a reviewing forum asserting that the United States violated Mr. Hernández-Rojas's rights with regard to acts or omissions that gave rise to their district court complaint. These acts or omissions include all the claims that Petitioners make in the Petition before the Commission.

Apart from the fact that Petitioners have now obligated themselves under U.S. law not to further pursue the claims in the Petition against the United States,

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<sup>5</sup> See, e.g., *Sánchez et al. v. United States* ("Operation Gatekeeper"), Report 104/05, Inadmissibility, Oct. 27, 2005, ¶ 62 ("domestic remedies, in order to accord with generally recognized principles of international law, must be both adequate, in the sense that they must be suitable to address an infringement of a legal right, and effective, in that they must be capable of producing the result for which they are designed").

nothing in the principles established by the American Declaration or in the Rules would suggest that the Commission should intervene in a matter that has been voluntarily settled between a petitioner and the governmental authorities that are accused of violating the petitioner's rights. Moreover, implicit in the requirement of exhaustion in Article 31 of the Rules is the incontrovertible principle that if a petitioner has received an effective remedy in the domestic system, then his or her claim is not admissible before the international forum. And in fact, the Commission itself encourages the settlement of human rights claims, by placing itself at the disposal of petitioners and the government to reach a friendly settlement, as reflected in Article 40 of the Rules. It would also be fundamentally unfair for the Commission to allow the Petition to go forward even though the United States believed, at the time it agreed to the settlement agreement, that any and all other claims arising from this incident would be relinquished, and paid monetary compensation in reliance on that belief.

In considering the instant Petition's admissibility under the Rules, it is important to recall the procedural timeline. Petitioners filed the Petition on March 30, 2016. The Commission forwarded the Petition for a U.S. response on May 12, 2017. Thereafter, a material development occurred: on May 30, 2017, Petitioners and the U.S. government reached a settlement whereby Petitioners relinquished all claims of whatever nature against the United States, in any forum. Therefore, as a result of the settlement agreement Petitioners voluntarily concluded with the U.S. government, the claims in the earlier-in-time Petition have now been rendered manifestly groundless, and thus inadmissible in light of supervening information, as provided for under Articles 34(b) and (c) of the Rules. The Commission should respect the legally binding agreement reached by Petitioners and the U.S. government, dismiss the Petition, and close this matter so that it may focus its resources on the many other matters that demand its attention.<sup>6</sup>

In closing the United States notes, for the record, that it does not concede any matters or facts not specifically addressed in this response, and any such facts should not be presumed true under Article 38 of the Rules or otherwise. Moreover, we reserve the right to submit any further observations at a later date, including

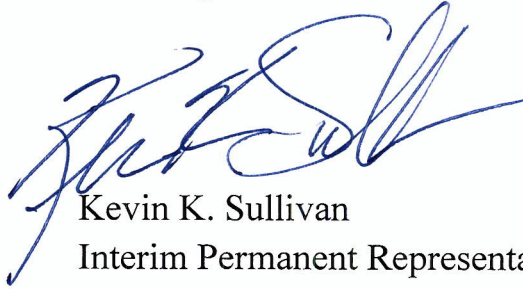
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<sup>6</sup> *Compare, e.g.*, Undocumented Migrant, Legal Resident, and U.S. Citizen Victims of Anti-Immigrant Vigilantes v. United States, Petition No. 478-05, Report No. 78/08, Admissibility, Aug. 5, 2009, ¶ 60 (where alleged victims pursued a civil lawsuit and won a judgment, Commission concluding that the alleged victims had access to an effective remedy and that no further review would be warranted).

during the merits stage if this matter reaches that stage or if the Commission chooses to defer its examination of the Petition's admissibility until its review of the merits under Article 36(3) of the Rules.

Please accept renewed assurances of my highest consideration.

Sincerely,



Kevin K. Sullivan  
Interim Permanent Representative

Annexes:

1. Third Amended Complaint, Mar. 23, 2012
2. Dismissal Order, May 30, 2017