Remedies for United States-Mexico Cross-Border Incidents

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I. INTRODUCTION

Countries that share borders inevitably encounter issues with each other. The United States and Mexico, however, face a uniquely complicated issue: United States federal officers standing in United States territory have shot and killed individuals standing in Mexican territory, generating much tension between the United States and Mexico.[1] Some believe that a remedy for cross-border incidents is best addressed through litigation in United States federal courts, particularly through common law causes of action that afford monetary compensation based on claims of constitutional violations.[2] This issue was recently addressed in part by the United States Supreme Court.[3]

Nonetheless, there are numerous issues associated with seeking a remedy for cross-border violence through claims of constitutional violations in United States federal courts. This Comment argues that the most viable remedy for individuals affected by cross-border violence is not through claims of constitutional violations, but through United States legislative action.

Part II explains the international nature of cross-border shootings and specifies why the issue is of major importance to United States-Mexico relations. Part III explains the shortcomings of current United States and international laws in a manner far more extensive than the Supreme Court's recent discussion on providing an adequate remedy for affected parties. Given the shortcomings of current laws and the necessity for an adequate solution, Part IV explains how legislation in the United States should provide for a remedy that resembles the right that protects individuals from excessive use of force under the Fourth Amendment of the United States Constitution.

II. HISTORICAL BACKGROUND OF CROSS-BORDER INCIDENTS

International migration has exponentially risen for nearly two decades.[4] The number of migrants worldwide reached 258 million in 2017, an increase

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1. *See* Rodriguez v. Swartz, 899 F.3d 719, 727 (9th Cir. 2018).
2. *The ABCs of Cross-Border Litigation in the United States*, CROWELL MORING, https://www.crowell.com/files/ABC-Guide-to-Cross-Border-Litigation_Crowell-Moring.pdf [https://perma.cc/8WSP-8CPZ].
3. Hernandez v. Mesa, 140 S. Ct. 735 (2020).
4. U.N. Dep't of Int'l Econ & Soc. Affairs, Int'l Migration Rep., at 4, U.N. Doc. ST/ESA/404 (2017).

from 173 million in 2000.[5] From 2000 to 2017, North America experienced an annual migration growth rate of 2.1%.[6] Although North America's migration growth rate is smaller than other continental regions, the United States hosted 49.8 million migrants as of 2017, making it the largest destination country for migrants and surpassing the second largest migrant destination country by over 37 million people.[7] Within North America, the United States and Mexico share a unique relationship with respect to migrant populations. The United States hosted 98% of all Mexican-born individuals living abroad as of 2017, amounting to 9.4 million people.[8]

The United States and Mexico share amicable relations in numerous respects. The countries are symbiotic trade partners, as Mexico is the United States' second-largest export market and third-largest trading partner.[9] The countries also rely on each other for national security by sharing resources and information to combat transnational organized crime.[10] Perhaps most notably, the countries also share a strong cultural connection with one another.[11]

Amicableness aside, the unique migratory relationship and increasing migration numbers between the United States and Mexico has imposed sociopolitical pressure on the United States to enact stringent border enforcement measures. The United States recently faced the highest levels of migration at its southern border in over a decade with more than 76,000 migrants crossing the border without government authorization in February 2019 alone.[12] The United States Border Patrol also apprehended 133,000 migrants in May 2019, the highest monthly total since May 2006.[13] United

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5. *Id.*
6. *Id.* at 5–6.
7. *Id.* at 6.
8. *Id.* at 14.
9. *U.S. Relations with Mexico*, U.S. DEP'T. OF STATE, https://www.state.gov/u-s-relations-with-mexico/ [https://perma.cc/62WJ-E43M].
10. *Id.*
11. *See, e.g.*, Cecilia Ballí, *Two Cities, Two Countries, Common Ground*, N.Y. TIMES (Feb. 5, 2018), https://www.nytimes.com/2018/02/05/travel/nogales-arizona-mexico-border.html [https://perma.cc/N9RK-6K8F]; Julián Aguilar, *From Museums to Mountains, Pride and Patriotism*, N.Y. TIMES (Feb. 6, 2018), https://www.nytimes.com/2018/02/06/travel/juarez-el-paso-border.html?module=inline [https://perma.cc/5QC2-VAKP].
12. Caitlin Dickerson, *Border at 'Breaking Point' as More Than 76,000 Unauthorized Migrants Cross in a Month*, N.Y. TIMES (Mar. 5, 2019), https://www.nytimes.com/2019/03/05/us/border-crossing-increase.html [https://perma.cc/F7D8-U22R].
13. RANDY CAPPS ET AL., FROM CONTROL TO CRISIS: CHANGING TRENDS AND POLICIES RESHAPING U.S.-MEXICO BORDER ENFORCEMENT 1 (Migration Policy Institute 2019).

States border enforcement officials describe the current migration situation as a "humanitarian crisis" that has reached its "breaking point."[14] The source of this crisis is considered to be sociopolitical instability among several Central American countries.[15] Guatemalans, Hondurans, and Salvadorans represented 74% of apprehensions, or 688,000 apprehensions, at the southern border during the first nine months of fiscal year 2019.[16]

The United States government's response to the southern border crisis has been severe. Under President Donald Trump's administration, border enforcement efforts have considerably increased compared to past presidential administrations.[17] Among these efforts are demands for expansion of border walls along the United States' southern border, increased deployment of border enforcement officers to the southern border, restriction of asylum qualification, increased prosecutions for unauthorized migrants, construction of temporary tent-facilities to alleviate overcrowded detainment facilities due to increased numbers of detainees, and systematic separation of migrant families due to implementation of a "zero-tolerance" policy of criminally prosecuting migrants.[18] Because of pressure exerted by the Trump administration, Mexico has initiated its own efforts to curtail migrants entering its southern border from Central America.[19] The Guatemalan government also recently engaged in joint efforts with United States Immigrations Customs and Enforcement to thwart crossings into Mexico in order to prevent migrants from eventually reaching the United States.[20]

Although the predominant country of origin of recent migrant groups is not Mexico,[21] the use of the United States-Mexico border as a crossing point by migrants has negatively strained relations between the United States and Mexico. Recent forceful border enforcement measures and policies are contentious, as evidenced by the extensive litigation in the United

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14. Dickerson, *supra* note 12.
15. CAPPS ET AL., *supra* note 13, at 12.
16. *Id.* at 9.
17. Border enforcement is largely considered to be subject to executive discretion. John Gramlich, *How Border Apprehensions, ICE Arrests and Deportations Have Changed Under Trump*, PEW RSCH. CTR. (Mar. 2, 2020), https://www.pewresearch.org/fact-tank/2020/03/02/how-border-apprehensions-ice-arrests-and-deportations-have-changed-under-trump [https://perma.cc/G2TB-7YNT].
18. CAPPS ET AL., *supra* note 13, at 5.
19. Miriam Jordan & Kirk Semple, *A Sharp Drop in Migrant Arrivals on the Border: What's Happening?*, N.Y. TIMES (July 10, 2019), https://www.nytimes.com/2019/07/10/us/border-migrants-remain-mexico.html?searchResultPosition=6 [https://perma.cc/BY65-2P37].
20. Sonia Perez, *Guatemala Sweeps Up Migrant Group, Returns Them to Border*, ASSOCIATED PRESS (Jan. 16, 2020), https://apnews.com/article/0a23a98b852f041585fe859591615850#:~:text=EL%20CINCHADO%2C%20Guatemala%20(AP),a%20%E2%80%9Ccaravan%E2%80%9D%20with%20hopes%20of [https://perma.cc/892R-VLR2].
21. Dickerson, *supra* note 12.

States regarding such measures and policies.[22] Mexico's foreign minister has repeatedly called for investigations into the United States' conduct at the countries' shared border.[23] United States border agents have also used deadly force forty-three times since 2007 resulting in ten deaths,[24] and fired tear gas into Mexico from United States territory.[25] The growing tensions related to border enforcement are recognized by both governments, prompting them to create a bilateral council to investigate and mitigate cross-border violence[26] and formally discuss the use of force at the border.[27] The impact of the United States' border enforcement practices also extends beyond the United States and Mexico, with United Nations figureheads expressing their condemnation of these practices.[28]

With tensions rising, issues related to cross-border enforcement should be met with a solution that addresses the root of concerns, while considering the challenges created by the international nature of the issue. An apparent issue for international plaintiffs is having sufficient standing for a lawsuit because such plaintiffs are often not United States citizens suing for conduct that affected them on international soil. Foreign parties have recognized constitutional protections when they enter United States territory,[29] but it is debated whether or not they have constitutional protection outside of United States territory.[30] Thus, issues related to standing arise when a

22. CAPPS ET AL., *supra* note 13, at 23–24.

23. Susan Heavey & Lizbeth Diaz, *Mexico Calls for 'Full Investigation' of U.S. Tear Gas at Border*, REUTERS (Nov. 26, 2018, 5:26 AM), https://www.reuters.com/article/us-usa-immigration/mexico-calls-for-full-investigation-of-us-tear-gas-at-border-idUSKCN1NV1MU [https://perma.cc/FYC6-A2UF].

24. Memorandum from Michael J. Fisher, Chief, United States Border Patrol, to All Personnel of United States Custom and Border Patrol (Mar. 7, 2014), https://www.cbp.gov/sites/default/files/documents/Use%20of%20Safe%20Tactics%20and%20Techniques.pdf [https://perma.cc/G6TX-SZS5].

25. Heavey & Diaz, *supra* note 23.

26. *Written Testimony for a House Committee on Oversight and Government Reform Hearing*, DEP'T OF HOMELAND SEC. (Sept. 9, 2015), https://www.dhs.gov/news/2015/09/09/written-testimony-dhs-southern-border-and-approaches-campaign-joint-task-force-west [https://perma.cc/7BWL-LT9W].

27. Joint Statement on the U.S.-Mexico Bilateral High Level Dialogue on Human Rights, Mex.-U.S., Oct. 27, 2016, https://2009-2017.state.gov/r/pa/prs/ps/2016/10/263759.htm [https://perma.cc/VP9W-ZU59].

28. Nick Cummings-Bruce, *U.N. Rights Head 'Shocked' by Treatment of Migrant Children at U.S. Border*, N.Y. TIMES (July 8, 2019), https://www.nytimes.com/2019/07/08/world/americas/michelle-bachelet-unhcr-migrants-border.html [https://perma.cc/KL6Z-T5FL].

29. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990).

30. *See id.* at 272–73; Rodriguez v. Swartz, 899 F.3d 719, 719 (9th Cir. 2018).

foreign party sues for conduct that affected them outside of United States territory—including injuries sustained in Mexico by a United States Border Patrol officer.

Nonetheless, escalated border enforcement tactics, and more specifically cross-border shootings, have prompted foreign parties to sue in United States federal courts for remedies.[31] Perhaps the most popular remedy that parties seek is through the use of *Bivens* claims.[32] In *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, a United States Supreme Court case which serves as the namesake of the term "*Bivens* claims," the Court held that individuals have standing to bring a civil cause of action for money damages or injunctive relief against federal agents for unconstitutional conduct.[33] Since *Bivens*, federal courts have extended the availability of *Bivens* claims to foreign parties who allege constitutional violations along and beyond the United States-Mexico border.[34]

However, the Supreme Court recently ruled that *Bivens* claims cannot be used for cross-border incidents.[35] In any event, even if the Court had created a remedy for cross-border incidents, it is far from certain that foreign parties would be ensured a consistent, durable remedy for such injuries on the basis of a common law ruling. Court-created remedies are limited in scope and subject to reversal. Also, the recent ruling in *Hernandez v. Mesa* hinted at the potential of eliminating *Bivens* claims altogether.[36]

The reluctance of courts to extend *Bivens* claims to a cross-border context and the potential futility of a court-sourced remedy points to the impetus of ensuring that foreign parties have the ability to seek remedy for excessive force in cross-border incidents. While federal officers tend to have much discretion in their operations due to its relation to national security, the United States should ensure that some remedy is available for foreign parties to bring action for claims of excessive use of force. Enabling foreign parties to sue does not conflict with the view that the United States government has an interest in border enforcement and in preserving national security. Rather, facilitating the availability of remedies for cross-border incidents would merely ensure that a remedy is available

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31. Debra Cassens Weiss, *Supreme Court Bars Damages Suit for Border Agent's Cross-Border Shooting that Killed Mexican Teen*, ABA J. (Feb. 25, 2020, 12:01 PM), https://www.abajournal.com/news/article/supreme-court-bars-damages-suit-for-border-agents-cross-border-shooting-that-killed-mexican-teen [https://perma.cc/339A-SZ9H]; *see also, e.g., Rodriguez*, 899 F.3d at 727.

32. *See* Hernandez v. Mesa, 140 S. Ct. 735, 739 (2020).

33. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 390–91 (1971).

34. *See, e.g.*, *Rodriguez*, 899 F.3d at 719.

35. *Hernandez*, 140 S. Ct. at 739.

36. *Id.* at 751 (Thomas, J., concurring).

to foreign parties when border enforcement efforts entail an excessive use of force.

Further, guaranteeing the availability of a remedy for foreign parties would ensure better diplomacy primarily between the United States and Mexico, as well as between the United States and the countries in which recent migrants typically originate. Tensions regarding escalated border enforcement are taken seriously by the Mexican government.[37] The symbiotic relationship between the United States and Mexico is one that should not be compromised, yet the United States' escalated border enforcement efforts have negatively affected that relationship.

The most viable remedy to enable foreign parties to sue for excessive use of force in cross-border enforcement is legislative codification of such a right. As this Comment will discuss, both United States domestic law and international law are not currently sufficient for providing a remedy. Moreover, this Comment discusses why concerns regarding affording foreign parties such a right are misplaced, and why it is in the best interests of the United States to ensure the availability of a remedy for excessive use of force in its cross-border enforcement.

III. ANALYSIS OF RELEVANT LAW IN THE CONTEXT OF CROSS-BORDER INCIDENTS

A. Law in the United States

1. The Development of Federal Case Law—From Possibility to Futility

a. The Constitution and § 1983

With respect to excessive use of force claims in general, the Fourth Amendment of the United States Constitution is relevant.[38] The Fourth Amendment ensures "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures."[39] This right has been interpreted to protect against excessive use of force by federal officers,[40] subject to a "reasonableness" standard.[41]

37. *See* Heavey & Diaz, *supra* note 23.
38. U.S. CONST. amend. IV.
39. *Id.*
40. Saucier v. Katz, 533 U.S. 194, 201-02 (2001).
41. Plumhoff v. Rickard, 572 U.S. 765, 774 (2014).

Another relevant law is Title 42, Section 1983 ("§ 1983") of the United States Code.[42] A party can file a civil action under § 1983 if the party alleges that it is deprived of constitutional rights by state or local officials.[43] Parties who are denied constitutional rights may invoke § 1983 to obtain an injunction or damages.[44] Additionally, "[b]ecause vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution."[45] Thus, government agencies are not liable for the actions of state officials under *Bivens* claims.

b. Federal Case Law

Claims for excessive use of force in cross-border enforcement are rooted in the principle illustrated by the United States Supreme Court in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.[46] *Bivens* provides that federal courts can permit a civil cause of action for money damages for violation of the Fourth Amendment by federal agents acting under color of their authority.[47] *Bivens* thus concludes that liability for federal officers' conduct lies with the federal officers themselves and not with the agency. Therefore, *Bivens* demonstrates that there is no apparent hesitation by federal courts to prohibit damages against federal agents themselves.[48]

Justice Harlan's concurrence in *Bivens* affirmed that the Supreme Court has the power to "to accord damages as an appropriate remedy in the absence of any express statutory authorization" by Congress.[49] As will be elaborated on later, the absence of a remedy is important to allowing *Bivens* claims in the context of cross-border incidents because foreign parties often have limited options to pursue action for cross-border shootings.[50] The cause of action that the Court upheld in *Bivens* is referred to as an "implied private action," meaning one that is not explicitly provided by federal law.[51] The Supreme Court recognizes the constitutionality of invoking the Fourth

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42. 42 U.S.C. § 1983.
43. Monroe v. Pape, 365 U.S. 167, 168 (1961).
44. Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979).
45. Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009).
46. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971).
47. *Id.*
48. *Id.* at 402.
49. *Id.* at 402 n.4.
50. *See* Rodriguez v. Swartz, 899 F.3d 719, 756 (9th Cir. 2018).
51. Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009).

Amendment for the purpose of an action against unreasonable governmental intrusion and thus excessive use of force by federal agents.[52]

Still, there is disagreement as to whether these rights are afforded to those who would be deprived of them outside of the United States.[53] Accordingly, there is disagreement about whether conduct that would amount to a constitutional violation in the United States can amount to a constitutional violation if it is committed outside United States territory. In *United States v. Verdugo-Urquidez*, a Mexican citizen's residence in Mexico was searched and several documents were seized without a warrant.[54] The Mexican citizen attempted to suppress evidence acquired during the search, arguing that the lack of a warrant authorizing the search violated the Fourth Amendment.[55] However, the Court interpreted the words "the people" in the Fourth Amendment as limiting the availability of Fourth Amendment protection to "the people of the United States against arbitrary action by their own Government" rather than protection of foreign parties against actions by the United States government.[56] The Court in *Verdugo-Urquidez* thus held that Fourth Amendment rights were not afforded to foreign parties.[57] Ultimately, *Verdugo-Urquidez* shows that it is not clear whether cross-border incidents can amount to a constitutional violation.[58] Conversely, other federal courts have interpreted "the people" as securing rights to foreign parties.[59]

Nonetheless, the Ninth Circuit qualified the Supreme Court's reasoning in *Verdugo-Urquidez* regarding the limitation of Fourth Amendment protection in *Rodriguez v. Swartz* as limited to a factual situation where an American agent conducts a search or seizure outside of United States territory against a foreign party.[60] In *Rodriguez*, a United States border agent standing on United States soil shot and killed a Mexican citizen walking down a street

52. *See, e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259, 264.
53. *Id.* at 266.
54. *Id.* at 263.
55. *Id.*
56. *See id.* at 266.
57. *Id.*
58. *Id.*
59. The issue regarding who "the people" refers to was not addressed explicitly in the Rodriguez case, but the majority implicitly made the term applicable to foreign parties by allowing recovery in the case for excessive use of force. *See generally* Rodriguez v. Swartz, 899 F.3d 719, 727 (9th Cir. 2018).
60. *Id.* at 731.

on Mexican soil.[61] The court held that the border agent was subject to United States law because of his presence on United States soil.[62] Therefore, instances where an American agent uses excessive, deadly force against a foreign party violates the Fourth Amendment rights of the foreign party.[63] The Mexican citizen's foreign status and physical presence on Mexican soil apparently were not circumstances detrimental to the issue of standing of the foreign parties.[64] Rather, the *Rodriguez* court stressed that the ruling in the *Verdugo-Urquidez* case was not applicable in *Rodriguez* because the agent was on United States soil and thus subject to United States law.[65] Therefore, according to the majority in *Rodriguez*, matters of excessive use of force during cross-border enforcement do not pose the same concerns addressed in *Verdugo-Urquidez*.[66]

Actions under *Bivens* are particularly relevant to cross-border actions because the *Bivens* Court upheld its decision in part based on the policy that damages may be the only available remedy.[67] An injunction would not remedy what already happened and the United States remained immune to a suit in most cases, presuming that federal officers' actions were related to their official duties.[68] Likewise, an injunction would not remedy past cross-border conduct and border agents may be immune to suit for actions carried out in their official capacities.[69]

The Supreme Court, in several instances, extended the availability of *Bivens* claims beyond the factual situation in *Bivens* to violations of Fifth and Eighth Amendment rights.[70] Nonetheless, noting the Supreme Court's changes to its treatment of these causes of action over the past several decades, the Court recently indicated in *Ziglar v. Abbasi* that expansion of the applicability of *Bivens* claims should be judicially disfavored because implied causes of action (such as *Bivens* claims) are generally disfavored.[71] The Court in *Ziglar* believed that expanding *Bivens* claims presented separation of powers issues, and that the legislature is the appropriate branch to consider the expansion of remedies.[72] Expanding the availability of remedies, according to the Court, effectively creates new laws—a power outside the

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61. *Id.* at 727.
62. *Id.* at 731.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* at 736.
68. *Id.*
69. *Id.* at 734.
70. *See generally* Davis v. Passman, 442 U.S. 228 (1979); Carlson v. Green, 446 U.S. 14 (1980).
71. Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017).
72. *Id.*

proper scope of the judiciary.[73] However, *Ziglar* did not express concern over the viability of *Bivens* claims in general, with the majority stating "this opinion is not intended to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose."[74]

Nonetheless, *Rodriguez* held that the expansion of *Bivens* is still possible despite the Supreme Court's reluctance clearly expressed in *Ziglar*.[75] *Rodriguez* noted that the lack of explicit prohibition against expanding *Bivens* claims in *Ziglar* implies the possibility that *Bivens* could be expanded.[76] In holding such, *Rodriguez* emphasized *Ziglar*'s use of words such as "caution" and "disfavored" as opposed to a categorical prohibition.[77]

Accordingly, the *Rodriguez* court exercised "caution" in its expansion of *Bivens*: "We therefore cannot extend *Bivens* unless: (1) Rodriguez has no other adequate alternative remedy; and (2) there are no special factors counseling hesitation. We now turn to those two inquiries, keeping in mind that extension is disfavored and that we must exercise caution."[78] In extending *Bivens* claims, the majority in *Rodriguez* emphasized the plaintiff's lack of an adequate alternative remedy and stated that no special factors counseled hesitation in allowing a foreign plaintiff to sue under *Bivens*.[79]

With respect to the relation between § 1983 and case law, although § 1983 does not apply to federal officials,[80] courts often use § 1983 by analogy in cross-border cases, as it is useful for determining what remedies Congress intends to offer for constitutional violations.[81] Relevant to cross-border incidents, § 1983 states that its availability is limited to "any citizen of the United States or other person within the jurisdiction thereof."[82] In his dissent in *Rodriguez*, Judge Smith stressed that this limitation should be interpreted literally, meaning that when § 1983 was enacted, Congress did

73. *Id.*
74. *Id.* at 1856.
75. Rodriguez v. Swartz, 899 F.3d 719, 738 (9th Cir. 2018).
76. *Id.*
77. *Id.*
78. *Id.* at 738–39.
79. *Id.* at 744.
80. *See, e.g.*, District of Columbia v. Carter, 409 U.S. 418, 424 (1973).
81. The Rodriguez court uses § 1983 to determine what remedies Congress implicitly intends to offer in cross-border incidents (*i.e.*, whether remedies for constitutional violations can extend outside of United States jurisdiction for injuries abroad). *See* Rodriguez v. Swartz, 899 F.3d 719, 742 (9th Cir. 2018).
82. 42 U.S.C. § 1983.

not intend to provide remedies to foreign parties injured abroad, but to squarely preclude a party from bringing forth a *Bivens* claim for injuries in Mexico.[83] Further, Judge Smith questioned whether constitutional provisions in general apply to individuals who are injured abroad.[84] Such reasoning suggests that parties cannot sue in federal courts for injuries that occurred outside of United States jurisdiction, and thus prevent claims stemmed from injuries resulting from cross-border enforcement.

In contrast, the majority in *Rodriguez* stated that it was "inconceivable" that Congress intended to restrict § 1983 claims "for cross-border incidents involving federal officials," thus it is unlikely that that Congress consciously intended to limit the availability of § 1983 claims to American nationals in United States territory.[85] According to the majority in *Rodriguez*, when § 1983 was enacted, Congress wanted to shield local officials from constitutional violations in former Confederate states, which were previously not a part of the United States.[86] Congress was also not cognizant of the unique context of cross-border shootings between the United States and Mexico, and thus could not have "deliberately excluded liability for cross-border incidents involving federal officers."[87] In short, preclusion of remedies for injuries that occur abroad (and more specifically cross-border injuries) cannot be deduced from congressional intent behind § 1983.[88] It should be emphasized, however, that § 1983 is only relevant by analogy and not directly applicable to cross-border injuries. Therefore, concerns regarding the textual interpretation of § 1983 are not determinative of whether cross-border incidents are subject to suit.

The possibility of *Bivens* claims serving as the basis for cross-border incidents ultimately ended with the Supreme Court's decision in *Hernandez v. Mesa*.[89] Echoing the concerns in *Ziglar*, the Court held that multiple factors warranted hesitation to expand *Bivens* to causes of action sourced in cross-border incidents.[90] Specifically, national security and foreign policy are involved, and thus expansion of remedies by adjudication involves a potential infringement on separation of powers.[91]

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83. *Rodriguez*, 899 F.3d at 755–56 (Smith, M., dissenting).
84. *See id.* at 756.
85. *Id.* at 742 (majority opinion).
86. *Id.*
87. *Id.* (internal parentheses omitted).
88. *Id.*
89. Hernandez v. Mesa, 140 S. Ct. 735, 739 (2020).
90. *Id.*
91. *Id.*

2. *Customary International Law and the Law of Nations*

Customary international law provides another potential solution. Customary international law refers to general international practices that are by operation accepted as law.[92] Essentially, accepted international practices create legal obligations among countries to conform to such practices.[93] Unlike treaties, there are no signatories to customary international law, and thus parties are not bound solely by becoming a signatory.[94] All countries are bound by customary international law according to accepted international practices.[95]

There is arguably support for recognition of customary international law in the United States Constitution because it grants Congress the power "to define and punish . . . offenses against the Law of Nations"—the "Law of Nations" is often understood to refer to customary international law.[96] The Supreme Court also acknowledges that "domestic law of the United States recognizes the law of nations."[97]

Although there is support indicating the legitimacy of customary international law within international institutions and United States domestic law, its enforceability in United States federal courts is disputed.[98] The Supreme Court is reluctant to recognize customary international law as a "private cause of action where the statute does not supply one expressly."[99] The Supreme Court also questions the ability of federal courts to determine what constitutes customary international law beyond clear guidance from legislature (*i.e.*, the federal courts would be left to determine what constitutes customary international law—a concept that may lack specificity—through judicial review).[100] Thus, customary international law does not provide a freestanding right that individuals may invoke as a basis for a private cause of action.

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92. Bart M.J. Szewczyk, *Customary International Law and Statutory Interpretation: An Empirical Analysis of Federal Court Decisions*, 82 GEO. WASH. L. REV. 1118, 1120 (2014).
93. *Id.*
94. *See id.*
95. *See id.*
96. U.S. Const. art. I, § 8, cl. 10 (emphasis added); *see also* Szewczyk, *supra* note 92, at n.72 ("Historically, international custom was referred to as the law of nations.").
97. Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004).
98. *See id.*
99. *Id.* at 727.
100. *Id.* at 729.

The Court's reluctance also finds textual support in the Constitution. Congressional power "to *define* and punish" against customary international law assumes that customary international law is punishable only after it is indicated by Congress as a domestic offense.[101]

3. Alien Tort Statute

The Alien Tort Statute (ATS) provides a cause of action in United States federal courts for international law violations, including customary international law violations.[102] The ATS states that "district courts shall have 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."[103] However, the Supreme Court recently clarified that the ATS simply provides jurisdiction to "hear certain claims, but does not expressly provide any causes of action."[104] Therefore, under the ATS, federal courts can only adjudicate private claims for international law violations provided by federal common law.[105] In the absence of federal common law or statutory authorization, the ATS does not have extraterritorial application.[106] So because of the risk of affecting foreign policy, there is a strong presumption against the ATS applying to conduct outside of United States territory.[107] Federal courts are therefore largely constrained in exercising their power to apply the ATS in extraterritorial conduct.[108]

B. The Inadequacy of Laws in the United States

Current law in the United States does not provide an adequate remedy for cross-border incidents. With respect to case law, the Court's recent ruling in *Hernandez* points out that the special factors consideration for *Bivens* claims is a remarkably low bar, and the extension of *Bivens* to cross-border enforcement would interfere with the political branches' oversight of national security and foreign affairs.[109] *Hernandez* also asserts that Congress has provided causes of action for injuries that occurred abroad in very limited instances.[110] However, *Hernandez* does not reference the

101. U.S. Const. art. I, § 8, cl. 10 (emphasis added).
102. 28 U.S.C. § 1350.
103. *Id.*
104. Kiobel v. Royal Dutch Petro. Co., 569 U.S. 108, 115 (2013).
105. *Id.*; *see also Sosa*, 542 U.S. at 732.
106. *See Kiobel*, 569 U.S. at 119.
107. *Id.*
108. *Id.* at 115–16.
109. Hernandez v. Mesa, 140 S. Ct. 735, 739 (2020).
110. *Id.* at 16–19.

policies outlined in *Rodriguez* regarding the possibility of claims against federal officers and its consistency with prior cases.

Although *Rodriguez* presents a strong case for the constitutionality of allowing *Bivens* claims for causes of action regarding cross-border excessive use of force, its loose ends are apparent.[111] Federal officers have surely been found liable for excessive use of force claims, but the specific context of cross-border enforcement suggests expanding the availability of *Bivens* claims beyond United States territory, which is a large step that warrants judicial caution. Allowing claims under a cross-border context is textually inconsistent with § 1983 claims for reasons mentioned above.[112] The *Rodriguez* majority's argument for lack of Congressional intent to exclude cross-border incidents from § 1983 claims is not persuasive. Surely, Congress did not conceive the application of § 1983 in the specific context of cross-border enforcement and thus did not intentionally exclude it. However, the majority in *Rodriguez* makes no attempt to address the issue that § 1983 seems to textually exclude claims outside of the United States. Further, *Rodriguez* does not address *Ziglar*'s reluctance to expand *Bivens* claims beyond the facts of *Bivens* itself; in fact, no attempt to compare the case to *Bivens* was made.[113]

The *Rodriguez* majority also did not address the plaintiff's standing.[114] The court identified that a person standing on United States soil is subject to the legal consequences of their actions but did not address how a foreign citizen has standing to sue for injury that occurred abroad.[115] The majority focused solely on the officer's actions,[116] which does not address the international aspect of the issue.

It is also worth mentioning that Judge Smith's dissent in *Rodriguez* is not comprehensive. Although Judge Smith points out the restrictive nature of § 1983 and Congressional reluctance to extend claims abroad, the fact that the officer acted on United States soil is missing from his analysis.[117] Again, the federal agent's location in the United States was crucial to the

111. The Supreme Court did not address the deficiencies of the rationale in *Rodriguez*, so this Comment discusses such to show other deficiencies associated with pursuing a remedy for cross-border incidents through United States courts.
112. *See* 42 U.S.C. § 1983.
113. The *Ziglar* case preceded the *Rodriguez* case. The *Rodriguez* court therefore should have the reluctance expressed by the *Ziglar* court.
114. Rodriguez v. Swartz, 899 F.3d 719 (9th Cir. 2018).
115. *Id.* at 734.
116. *Id.* at 732.
117. *See id.* at 755–56.

majority's position.[118] Furthermore, when considering the availability of *Bivens* claims, Judge Smith's dissent did not address the importance of a plaintiff's lack of remedy; he noted that a lack of remedy is not for the judiciary to address.[119] Thus, by not entirely rebuking *Bivens*, Judge Smith's analysis of *Bivens* claims regarding lack of remedy is arguably inconsistent.

The Court's recent ruling in *Hernandez* also brings up an important point: extending *Bivens* claims to cross-border enforcement is at least in some part relevant to foreign policy, which is consistently held to be outside the scope of the judiciary—or, at minimum, outside the scope of judicial actions amounting to policymaking.[120] As previously mentioned, the United States and Mexico formed a bilateral council and initiated talks regarding cross-border enforcement,[121] signifying a connection between foreign policy and cross-border enforcement. Thus, there is clearly a potential issue of infringement upon separation of powers if the judiciary singlehandedly offers a remedy for cross-border incidents.

Further, *Bivens* claims are not free-flowing remedies and must be sourced in a constitutional violation. In the absence of a clear indication that cross-border incidents amount to a constitutional violation, *Bivens* claims are not an available remedy for cross-border incidents. The Supreme Court ruled out *Bivens* claims for Fourth and Fifth Amendment violations—the most relevant constitutional amendments implicated—for cross-border incidents.[122] So at best, *Bivens* claims can only provide a remedy when there is some other constitutional violation that does not counsel hesitation among courts.

Moreover, cross-border incidents are easily characterized as violations of customary international law. Killing individuals through excessive force is not part of customary international law.[123] Such killings violate the affected country's sovereignty (*i.e.*, the country's ability to exercise control over its citizens) and the affected individual's right to personhood. To the extent that border enforcement is generally considered an acceptable practice among countries, excessive enforcement denotes that the force was not proportional to the provoking conduct. In the context of border enforcement between

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118. *Id.* at 747–48.

119. *Id.* at 755.

120. *See generally* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972) (indicating that courts should generally be reluctant to involve themselves in matters that may have an effect on foreign policy, particularly where consequences of such involvement are impactful).

121. *See* DEP'T OF HOMELAND SEC., *supra* note 26.

122. *See generally* Hernandez v. Mesa, 140 S. Ct. 735 (2020) (precluding Bivens claims for cross-border shootings).

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

the United States and Mexico, cross-border killings should not be considered customary to the relationship between the countries because the United States does not routinely engage in such acts. Assuming that cross-border incidents are considered violations of customary international law, an individual can sue only if Congress statutorily provides that such violations are actionable.[124] But Congress has not done so.

The ATS provides an unlikely avenue for foreign parties to successfully sue for cross-border incidents. Given the strong presumption against courts allowing the ATS to reach conduct beyond the United States' territory (and that occurs in another foreign sovereign's territory), it is unlikely that parties will be able to sue for injuries that occur in Mexican territory. To the extent that cross-border incidents may be characterized as conduct in United States territory because of a federal agent's presence in United States territory (and thus is not extraterritorial), it still involves foreign policy, and the Supreme Court urges federal courts to not adjudicate such ATS claims to prevent meddling in foreign policy.[125] Furthermore, there are no federal common law actions to date that can serve as the basis for a cause of action for a cross-border incident.

For the above-mentioned reasons, current United States law is insufficient to provide a viable solution for cross-border incidents.[126]

C. *International Law*

International law is relatively sparse and not easily enforceable. The lack of centralism and a hierarchical legislative lawmaker may be in part to blame for international law's deficiencies.[127] These deficiencies lead to laws that are "imprecise, contested, internally contradictory, overlapping, and subject to multiple interpretations and claims."[128] Thus, current international law lacks the effectiveness required to provide a proper solution to foreign parties in cross-border incidents.

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124. *Id.* at 12.
125. Kiobel v. Royal Dutch Petro. Co., 569 U.S. 108, 116–17 (2013).
126. *See generally* Federal Employees Liability Reform and Tort Compensation Act of 1988, 28 U.S.C. § 2679 (1988) (illustrating that state law and state courts are also unavailable as a remedy given these laws precluded states from allowing state-law suits against federal officers arising out of their official conduct).
127. Jack Goldsmith et al., Comment, *Law For States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1803 (2009).
128. *Id.*

1. United Nations Charter Article 2

Potential ineffectiveness aside, the United Nations provides several provisions that are relevant to cross-border enforcement. Under the U.N. Charter Article 2, "All Members shall refrain in their international relations from the threat or use of force against the *territorial integrity or political independence* of any state, or in any other manner inconsistent with the Purposes of the United Nations."[129]

No definitions for territorial integrity and political independence are provided in Article 2, but territorial integrity has been interpreted as the protection of a state's current borders against unilateral changes of territory by another country and as a concept related to political independence of a state.[130] Further, territorial integrity refers to a recognition that a state's territory is the "exclusive zone in which the political independence of a state can find its expression and where foreign governments may not—as a matter of principle—interfere."[131] Accordingly, territorial interventions violate a state's political independence.

The scope of territorial integrity is confined to "relations between states."[132] The concepts of territorial integrity and political independence are thought to be rooted in post-World War I Europe, where annexation of territory through external force was a threat among countries part of the former Ottoman Empire.[133] More recently, the concept of annexation of territory has been related to the Russian annexation of Crimea by military force.[134]

Territorial integrity and political independence under Article 2 are possibly related to border enforcement practices along international boundaries. A state's border is the territorial extent to which it exercises its political independence.[135] If border enforcement practices of one state extend into another independent state's territory by means of force and without consent, then such practices are a violation of the latter country's political independence over its territory. That is, the violated state's ability to independently exercise governance over its territory is compromised when the aggressor state imposes its own matters of governance through border enforcement. Depending on how relations and agreements between the two states define

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129. U.N. Charter art. 2, ¶ 4 (emphasis added).

130. Christian Marxsen, Comment, *Territorial Integrity in International Law – Its Concept and Implications for Crimea*, 75 HEIDELBERG J. INT'L L. 7, 9–10 (2015).

131. *Id.* at 10.

132. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J 403, 405 (July 22).

133. *See* Marxsen, *supra* note 130, at 8–9.

134. *See id.*

135. *Border*, NAT'L GEOGRAPHIC, https://www.nationalgeographic.org/encyclopedia/border/#print_link [https://perma.cc/3WW4-QU9A].

their respective territorial integrity, there is potentially an Article 2 violation with cross-border enforcement.

The United States' cross-border enforcement practices do not clearly illustrate a violation of Mexico's territorial integrity and political independence. Certainly, the border agents' cross-border enforcement is not welcomed in Mexico, as evidenced by Mexico's call for a full investigation when the United States shot tear gas into Mexico.[136] Mexico's expressed disapproval also suggests that Mexico does not welcome such cross-border activity.[137] Accordingly, Mexico's ability to exercise political independence over its territorial borders is violated when a United States border agent in United States territory shoots and kills a Mexican individual.

But the policy behind Article 2 Paragraph 4 is problematic to its application to United States cross-border enforcement. There is no indication that the United States intends to officially annex Mexican territory by its cross-border enforcement and thus extend its political independence into Mexico's territory. Policy reasons will therefore likely preclude a determination that the United States violates Article 2 Paragraph 4 of the U.N. Charter with cross-border enforcement.

2. *The United Nations Charter and Relevant State Powers*

Articles 39 and 40 of the United Nations Charter are also potentially relevant for cross-border incidents. Article 39 states in part that "[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken . . . to maintain or restore international peace and security."[138] Article 40 states the following:

> In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The

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136. *See* Heavey & Diaz, *supra* note 23.
137. *See* Paulina Villegas & Alan Yuhas, *Mexico Calls on U.S. to Investigate Use of Tear Gas at Border*, N.Y. TIMES (Jan. 7, 2019), https://www.nytimes.com/2019/01/03/world/americas/mexico-border-tear-gas-investigation.html [https:// perma.cc/TKT9-SXKX].
138. U.N. Charter art. 39.

> Security Council shall duly take account of failure to comply with such provisional measures.[139]

Taken together, when the Security Council determines a breach of peace or act of aggression, the Council should attempt to maintain or restore peace and should call upon parties to comply with provisional measures when peace is not preserved. Then, if a state still does not comply with the Council's provisional measures, Articles 41 and 42 enable the Council to take action by force, such as by economic or physical disruption.[140]

The Security Council is comprised of fifteen member states, five of which are permanent members.[141] The United States is among the five permanent member states.[142] Under Article 27(3) of the United Nations Charter, permanent members of the Council have a veto power over decisions on substantive matters because decisions of the Council must have "the concurring votes of the permanent members."[143] Thus, the United States, as well as other permanent members, has the power to veto any substantive matters.

Even if cross-border enforcement amounts to a threat or breach of peace by the Security Council under Article 39, the Security Council, which the United States is a part of, exercises discretion as to what measures should be taken to address the issue.[144] The United States' permanent membership in the Council makes it doubtful that it would vote to take action against itself for its own conduct. Therefore, recourse under the Security Council is inadequate to solve the excessive use of force by United States border agents.

For the above-mentioned reasons, provisions under the United Nations Charter do not provide a viable remedy for cross-border incidents.

3. *The Rome Statute and the International Criminal Court*

The Rome Statute also provides an inadequate solution for cross-border incidents. The Rome Statute established the International Criminal Court (ICC), which retains jurisdiction over matters related to "genocide, crimes

139. U.N. Charter art. 40.
140. U.N. Charter art. 41, 42.
141. *Current Members*, U.N. SEC. COUNCIL, https://www.un.org/security council/content/current-members#:~:text=The%20Council%20is%20composed%20of,Dominican%20Republic%20(2020) [https://perma.cc/ZGX4-R2U7].
142. *Id.*
143. U.N. Charter art. 27(3).
144. U.N. Charter art. 39.

against humanity, war crimes, and state aggression" in general.[145] The Rome Statute is "limited to the most serious crimes of concern to the international community as a whole," where perpetrators should not escape punishment.[146] "Ordinary" human rights violations, such as those that are not universally abhorrent, typically do not qualify as serious crimes for purposes of the Rome Statute.[147] Although there does not appear to be a clear distinction between serious or ordinary human rights violations, the policy behind the Rome Statute is clear: it does not apply to every human rights violation.

To the extent that excessive use of force in cross border enforcement may be subject to the Rome Statute (in part because of its policy to promote remedies for parties and to prevent evasion of punishment), the Rome Statute recognizes "[t]he search and seizure right to privacy" as an internationally recognized human right.[148] The right against excessive use of force thus has an actionable basis under the Rome Statute.

Mexico is a signatory to the Rome Statute, but the United States is not.[149] Therefore, the ICC has limited jurisdiction over the United States, and jurisdiction over non-signatories is largely reserved for non-signatory countries who have committed war crimes, crimes against humanity, and genocide.[150] Although excessive uses of force in cross-border shootings are grave occurrences, it is doubtful that the ICC will exercise jurisdiction over the United States for cross-border incidents. Moreover, the ICC is often considered a court of last resort and grants deference to member states to investigate and prosecute international law violations without the court's intervention.[151] Therefore, the fact that excessive use of force causes of action can potentially be tried in United States courts makes it even less likely that the ICC will exercise jurisdiction over the United States for such cases.

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145. G.E. Edwards, *International Human Rights Law Challenges to the New International Criminal Court: The Search and Seizure Right to Privacy*, 26 YALE J. INT'L L. 323, 325 (2001).

146. The Rome Statute for the International Criminal Court, art. 5(1), U.N. Doc. A/CONF.183/9 (July 17, 1998).

147. Edwards, *supra* note 145, at 326.

148. *Id.* at 327.

149. Rome Statute of the International Criminal Court, U.N. Treaty Collection, https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-10.en.pdf [https://perma.cc/FJL4-ZQT6].

150. *See* The Rome Statute for the International Criminal Court, art. 12(2), U.N. Doc. A/CONF.183/9 (July 17, 1998).

151. *Id.*

Lastly, the ICC only offers criminal prosecution for people who violate its laws as a solution.[152] Assuming successful prosecution against federal officers for cross-border incidents under the ICC, there is nonetheless no compensation for the affected private parties. Because civil suits would best remedy the affected parties, successful prosecution of federal officers by the ICC would not provide an adequate remedy.[153]

4. Customary International Law Under the United Nations

In addition to domestic law in the United States, customary international law is also codified in Article 38 of the United Nations' Statute of The International Court of Justice (ICJ), which states that the ICJ has jurisdiction over "international custom, as evidence of a general practice accepted as law" and "the general principles of law recognized by civilized nations."[154]

Although violations of customary international law fall within the jurisdiction of the ICJ, it is unlikely that pursuing any claims against federal officers in the ICJ will lead to much success. The United States largely objects to fully submitting itself to the ICJ's authority and often reacts negatively to rulings that are seemingly counter to United States interests.[155]

Collectively, the United Nations, the ICC, and customary international law do not provide adequate solutions for cross-border incidents.

5. Bilateral Treaties and International Agreements

Another potential remedy is a bilateral treaty or international agreement. In the United States, treaties are proposed by the President "by and with the Advice and Consent of the Senate . . . provided two-thirds of the Senators present concur."[156] Treaties in the United States are considered to be as authoritative as federal legislation.[157]

A bilateral treaty between the United States and Mexico could provide an adequate remedy for cross-border incidents if it restricts federal officers

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152. *See* Catherine Gegout, *The International Criminal Court: Limits, Potential and Conditions for the Promotion of Justice and Peace*, THIRD WORLD Q. (June 24, 2013), https://www.tandfonline.com/doi/full/10.1080/01436597.2013.800737 [https://perma.cc/27LE-VR3K].

153. *See* discussion *infra* Section V (for a discussion regarding why civil remedies best serve affected parties).

154. Statute of The International Criminal Court of Justice art. 38, ¶ 1, Apr. 18, 1946, 33 U.S.T. 993.

155. *See* Sean D. Murphy, *The United States and the International Court of Justice: Coping with Antinomies*, *in* THE UNITED STATES AND INTERNATIONAL COURTS AND TRIBUNALS 1, 2 (Cesare Romano, ed., 2008).

156. CONG. RSCH. SERV., 106TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 27 (Comm. Print 2001).

157. *Id.* at 1.

from using excessive force and provides an avenue for plaintiffs to bring a cause of action, irrespective of foreign status or presence on Mexican soil at the time of injury.

The United States and Mexico recently entered into an agreement in June 2019, whereby the United States and Mexico facilitated cooperation to handle the border crisis.[158] Although the agreement is bilateral and considered "burden-sharing," it largely shifts the burden of migrant management and enforcement upon Mexico.[159] It also gives the United States much discretion to assess the sufficiency of and amend measures taken by Mexico.[160]

Neither international agreements nor treaties provide adequate solutions. International agreements, such as the joint resolution recently entered into by the United States and Mexico, are essentially diplomatic arrangements that do not have a substantive effect on creating a source of actionable rights.

Bilateral treaties are considered binding under international law,[161] where enforceability is too uncertain to provide a viable avenue for claims for excessive use of force in cross-border incidents. Once a bilateral treaty is made, it is then subject to the legislature to fulfill the obligations sourced in the terms of the agreement.[162] The legislative stage of treaty creation is subject to legislative modification, whereby modification might not follow the explicit terms of the agreement, provided that the Senate advises otherwise.[163] Thus, before a treaty is legally enforceable, its terms undergo semi-conventional legislative processes, which could create legislation that does not comport with the terms of the original treaty. Ultimately, the procedural processes of treaties create an additional stage prior to enforceability that may give false hope that the treaty terms originally agreed upon are binding.

Unlike other potential solutions, there may be benefits to bilateral treaties and international agreements entered into between the United States and Mexico regarding claims for cross-border enforcement. Unlike law that is purely internationally sourced, treaties and agreements give parties a chance to directly negotiate terms, which would otherwise be unavailable under international legislation. This option benefits Mexico due to their ability

158. *See generally* Joint Declaration and Supplementary Agreement Between the United States of America and Mexico, Mex.-U.S., June 7, 2019, 19 U.S.T. 607.
159. *Id.*
160. *Id.*
161. CONG. RSCH. SERV., *supra* note 156, at 12.
162. *Id.*
163. *See id.*

to provide terms advantageous to its citizens. It may also benefit the United States more than a purely domestic legislative solution because allowing claims for excessive use of force is itself a beneficial term to Mexico, enabling the United States to negotiate for other terms beneficial to itself. Treaties and agreements may therefore be a "win-win" for both the United States and Mexico, and thus a potentially excellent solution.

However, as previously stated, there are numerous practical issues associated with treaties. The legislative process may undercut terms of the agreement if the Senate advises against the original terms. In such an event, cross-border excessive use of force claims might not withstand, causing further strain between United States and Mexico relations. Additionally, because most migrants in recent years have originated from El Salvador, Guatemala, and Honduras,[164] it is likely that these governments would also want to partake in negotiations to vouch for terms beneficial to their citizens. Nonetheless, adding more countries to negotiations would further complicate the matter and create wider international issues if terms of the agreement change in the legislative process or if enforceability of the terms is insufficient.

IV. SOLUTIONS

Rather than acquiesce to the unviability of current laws, it is necessary to implement a solid, withstanding solution for cross-border incidents for the policy reasons previously mentioned. Before offering a solution, it is important to address and rebut potential concerns with permanently establishing a remedy for international parties for cross-border incidents. These rebuttals collectively show that providing such remedy is largely uncontroversial.

A. Providing a Legislative Remedy Does Not Violate Separation of Powers

One concern consistently mentioned by federal courts with respect to enabling actions against border enforcement officials is the possibility of infringement upon traditional notions of separation of powers. The Supreme Court has long recognized that "[t]he President is the constitutional representative of the United States with regard to foreign nations."[165] At the extreme of this view, some believe that the "President is the sole organ of the nation in its external relations, and its sole representative with foreign

164. CAPPS ET AL., *supra* note 13, at 12.
165. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936).

nations."[166] Accordingly, an act of Congress relating to foreign relations edges towards compromising the constitutionally-sourced separation between the executive and legislative branches of government.

This concern understandably extends to cross-border incidents. Instrumental to its cautionary policy, the Court's recent ruling in *Hernandez* noted the importance of recognizing a strict interpretation of the separation-of-powers principle.[167] *Hernandez* noted that the case concerned national security and foreign policy.[168] The Court essentially echoed its concerns in *Ziglar*, where judicial inquiry into national security matters "raises 'concerns for the separation of powers in trenching on matters committed to the other branches.'"[169] According to the Court in *Hernandez*, matters of national security should be left solely to the executive and legislative branches and free from judicial inquiry in most cases.

It is worth mentioning that it is unclear whether instances of excessive use of force in cases of cross-border enforcement are clearly tied to national security as opposed to general foreign policy, the latter of which may find greater support. An *excessive* use of force in cross-border enforcement may also lessen the likelihood that a seizure or confinement was truly executed for the sake of national security. The *Rodriguez* court noted this when it distinguished cross-border enforcement from national security, stating "no one suggests that national security involves shooting people who are just walking down a street in Mexico."[170] Recognition that a use of force was excessive inherently denotes that the use of force was not proportionate, for the sake of national security or for any other matter.

But even stipulating that excessive uses of force along the border are considered matters of national security, if the legislative branch provides the source for cross-border enforcement remedies, then the potential issues related to separation of powers are eliminated. The unlikelihood that such claims will be considered matters of national security should thus prevent Congress from characterizing codification of a remedy as counter to national security.

Lastly, because excessive use of force in cross-border enforcement can be characterized as violating customary international law, Congress has

166. *See* 6 ANNALS OF CONG. 613 (1799).
167. *See* Hernandez v. Mesa, 140 S. Ct. 735, 735 (2020).
168. *See id.*
169. Ziglar v. Abbasi, 137 S. Ct. 1843, 1861 (2017) (quoting Christopher v. Harbury, 536 U. S. 403, 417 (2002)).
170. Rodriguez v. Swartz, 899 F.3d 719, 745 (9th Cir. 2018).

textual power to create laws regarding such enforcement. Again, Congress can legislatively define and devise punishments for violations of customary international law.[171] Regardless of concerns regarding national security and separation of powers more generally, Congress independently possesses the power to create a law prohibiting excessive cross-border enforcement and providing remedies to those who suffer from such violations.

B. *Providing a Remedy Will Not Invite More or Frivolous Claims*

A general policy concern associated with allowing foreign parties to bring claims for cross-border enforcement is the potential for more suits or entirely frivolous suits. Under this concern, codifying a remedy for foreign parties may even condone claims against border enforcement officials, potentially delegitimizing the actions of such officials. This concern is rooted in the inherently contentious nature of cross-border enforcement, where stringent border enforcement is considered necessary by some.[172] Since 2007, Border Patrol agents have experienced 6,000 assaults resulting in three agent deaths.[173] Agents have also been confronted with projectile rocks 1,713 times since 2010.[174] Statistics aside, cross-border issues are generally highly contentious within the United States political sphere.[175] Given this atmosphere, there may be concern that any injury resulting from border enforcement will lead to a claim against federal officers, frivolous and non-frivolous alike.

Frivolous claims will likely not be successful under an adequate solution. Remedies would be limited to instances where such enforcement is necessarily excessive and disproportionate. Because this remedy would be modeled after comparable remedies afforded by *Bivens* claims and by Fourth Amendment claims generally, frivolous claims would likely be sorted out by pleading standards. Thus, in instances where officers are physically assaulted or have legitimate apprehension for their safety, even the most stringent enforcement might not be considered excessive given the discretion that law enforcement officers are often afforded. This prevents the actions of federal officers in these situations from amounting to an excessive use

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171. *See* U.S. CONST. art. I, § 8, cl. 10.

172. Matthew Feeney, *Walling Off Liberty: How Strict Immigration Enforcement Threatens Privacy and Local Policing*, CATO INST. (Nov. 1, 2018), https://www.cato.org/publications/policy-analysis/walling-liberty-how-strict-immigration-enforcement-threatens-privacy [https://perma.cc/9YPJ-YYHQ].

173. Memorandum from Michael J. Fisher, *supra* note 24.

174. *Id.*

175. *See* Jeffrey M. Jones, *New High in U.S. Say Immigration Most Important Problem*, GALLUP (June 21, 2019), https://news.gallup.com/poll/259103/new-high-say-immigration- important-problem.aspx [https://perma.cc/8BXD-BXTS].

of force, thus preventing the possibility for remedy in such instances. To the extent that there may be claims where it is uncertain whether an officer exercised excessive force, possibly resulting in more claims, the determination will be left to a jury in the same manner as excessive use of force claims outside of the border enforcement context.

Enabling claims for excessive enforcement does not amount to an endorsement by the United States government to bring claims against its officers. As noted in *Rodriguez*, border agents have faced *Bivens* claims for Fourth Amendment violations in the past, so holding agents liable is not an entirely unprecedented remedy.[176] The argument that allowing these claims will amount to a new endorsement of action against federal agents is weakened by agents' liability in the past. Generally, federal agents have also been subject to civil suits in the past and courts have not indicated that remedies in such instances amount to endorsement or encouragement of actions against the government. The context of cross-border enforcement does not change this analysis because federal agents have already been subject to lawsuits in the past—this solution merely expands the possibility of instances where individuals may bring forth action.

Further, even if there are more claims in general, this is not an issue of much magnitude. Expanding potential sources of excessive use of force claims does not clearly open the floodgates to more claims because instances of excessive uses of force in cross-border enforcement are not common.

C. Providing a Remedy Will Not Prevent Agents from Performing Assigned Duties

Another potential concern associated with allowing claims for cross-border enforcement is that it will prevent border agents from performing their assigned duties. That is, the actions of border agents will be subject to lawsuits for conduct that is an essential part of an agent's duty, thus limiting their ability to perform essential duties.

But this concern shares the same faults with the previous concern. Claims will be limited to instances where use of force was excessive. Legitimate, non-excessive actions by border agents will not be the subject of successful claims. Law enforcement, including border agents, have long been subject to claims for excessive use of force, yet such actions have not categorically prevented law enforcement agents from performing their duties. There is

176. Rodriguez v. Swartz, 899 F.3d 719, 746 (9th Cir. 2018).

no indication, and it is doubtful that any court would attempt to make the argument, that excessive uses of force are an essential part of a law enforcement officer's duty. In fact, Judge Smith's dissent in *Rodriguez* also suggested that excessive uses of force by officers are generally not protected under the Constitution.[177]

Likewise, in *Harris v. Roderick*, it was clarified that law enforcement officers enjoy qualified immunity.[178] But inherent in the concept of qualified immunity is the "balance between the rights of persons residing in this country to be free from blatant constitutional violations and the need to ensure that the larger needs of society are met and that law enforcement personnel are not unnecessarily diverted from their duties."[179] The established principle of qualified immunity ensures that officers are not subject to liability for performing their assigned duties but are also not free to blatantly violate the Constitution. Further, qualified immunity precedes an action, as it is considered immunity from suit and not a defense to liability after a lawsuit has been filed.[180] It is therefore not possible for plaintiffs to sue for excessive use of force, thereby clogging federal dockets, with the hope that a qualified immunity defense does not work during litigation.

In fact, ensuring the availability of these types of claims would likely incentivize officers to be more cautious in their on-duty behavior and thereby deter future excessive cross-border enforcement, as suggested by both the majority and minority opinions in the *Rodriguez* case.[181]

D. A Remedy Sourced in the Legislature is the Most Proper and Durable Remedy

Legislative action is the last option for providing a firm solution to excessive use of force in cross-border enforcement. Current international law is too vague and discretionary to offer a viable solution.[182] Additionally, judicial resistance to ruling on anything that resembles policymaking renders the viability of *Bivens* claims as uncertain and unlikely. Thus, the most apparent and viable solution is for Congress to pass a statute which codifies the ability of foreign parties to sue for excessive use of force.

The proposed legislation should prohibit excessive uses of force in cross-border enforcement similar to the rights ensured by the Fourth Amendment.

177. *See id.* at 757.
178. Harris v. Roderick, 126 F.3d 1189, 1200 (9th Cir. 1997).
179. *Id.* (citing Harlow v. Fitzgerald, 457 U.S. 800, 813–14 (1982)).
180. *See* Plumhoff v. Rickard, 572 U.S. 765, 772 (2014).
181. *See generally* Rodriguez, 899 F.3d at 757.
182. The inadequacies of international law in providing an effective solution to cross-border incidents show that the proposed solution would not be as effective if sourced in international law.

Accordingly, the legislation will likely not provide remedies for all injuries occurred during cross-border enforcement, but only for those that were caused by excessive uses of force. Although the legislation is largely intended to solve the procedural issues related to the inability of foreign parties (*i.e.*, non-United States citizens) to sue for injuries that occur outside of the United States jurisdiction, this legislation does not need to exclude domestic parties for injuries that occur abroad.[183]

The remedy best takes the form of a civil suit for monetary damages, similar to *Bivens* claims. Such remedy would enable private parties to recover monetary damages for cross-border incidents. Given that the parties may be foreign, criminal prosecution in the United States may not provide feelings of adequate justice for rogue agents. Also, the political implications surrounding cross-border enforcement make it unlikely that the United States government would criminally prosecute border agents if their conduct is even tangentially related to their assigned duties.

United States law currently recognizes the possibility of foreign parties to bring suit for excessive force, as evidenced in *Rodriguez v. Swartz*.[184] Thus, legislation that codifies such a remedy is not unprecedented. The policy concerns discussed above should dispel any hesitation for Congressional enactment of this remedy.

Furthermore, the uncertainty that lies with applying constitutional rights across international borders is generally not an issue with the application of legislation. It is a longstanding principle that Congress may enforce its laws beyond the territorial boundaries of the United States.[185] This resolves whether the issue is cross-border enforcement is a matter of foreign policy that only the executive branch has the power to address, or whether the issue should not be remedied by the judiciary. Therefore, if Congress passes a law ensuring the ability of foreign parties to bring suit in United States federal courts, the possibility that such legislation extends to parties beyond the territorial boundaries of the United States is not an unprecedented remedy, but rather is a long-recognized one.

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183. The extent to which such an injury occurs may be limited; however, because the proposed legislation is intended to solve procedural issues, the legislation should also apply to United States citizens (and other parties who usually do not face procedural issues in filing lawsuits) for injuries occurred abroad as a result of cross-border enforcement.

184. The recent Supreme Court ruling in Hernandez did not specifically take issue with the appellant's foreign status. *Rodriguez*, 899 F.3d at 738.

185. *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991).

Congress's ability to create laws that define and punish violations of customary international law indicates its ability to do so for excessive cross-border enforcement. It also indicates that if any remedy is to be offered for excessive cross-border enforcement, the legislature is the proper branch to provide such remedy. Even if cross-border incidents do not qualify as violations of customary international law, they still create tension between the United States and Mexico.[186]

There are procedural advantages in a legislative sourced a remedy for cross-border incidents. Concerns related to whether cross-border incidents amount to a constitutional violation do not pose a problem for Congressional action. Congress can provide a remedy irrespective of whether the conduct is unconstitutional.[187]

V. CONCLUSION

As discussed earlier, policy reasons guide the need for providing a solution for excessive use of force during cross-border incidents. Cross-border incidents have gained attention and condemnation from numerous countries and multinational actors. These incidents can potentially create further tension between the United States and Mexico if substantive action to remedy the issue is not taken.

While cross-border incidents are certainly condemnable, it is uncertain whether United States federal courts can provide adequate remedies for cross-border incidents in the absence of relevant legislation. Issues arise regarding the ability of foreign parties injured on foreign soil to bring forth such claims. International law also does not provide adequate remedies to address these claims.

Instead of balking at the unavailability of remedies within United States and international law, action must occur to address and provide adequate remedies for cross-border incidents. Legislative remedies for cross-border incidents find textual support within the United States' legal framework and are subject to the least concerns and uncertainties. Thus, a legislative remedy in the form of allowing private affected parties to bring civil claims for excessive cross-border enforcement is the most adequate in ensuring that this contentious issue does not evolve into one that can no longer be solved.

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186. *See generally* Dickerson, *supra* note 12.

187. It is nonetheless helpful to consider what rights are afforded by the Fourth Amendment as an indication of what rights should be granted to those affected by excessive cross-border enforcement. As discussed in other sections, issues relating to whether a constitutional violation has occurred mainly depends on how the Constitution applies abroad, which only poses a procedural issue. These issues do not address the substantive issue of whether excessive use of force was used.