

HUMAN RIGHTS AND UNDOCUMENTED MIGRATION ALONG THE MEXICAN-U.S. BORDER

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“By natural law, every man has the right to his own life and physical and mental integrity.”

—Francisco de Vitoria, 1 *De Justitia*

“Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.”

—Preamble to the Universal Declaration of Human Rights

The statistics are clear: Between 1990 and 2002, there have been more than 3000 dead and missing unauthorized immigrants and 15,000,000 apprehensions and deportations along the Mexican-U.S. border. The border strategy of U.S. authorities has forced undocumented immigrants to pay higher prices to “coyote guides,” providing enormous financial incentives for smuggling. The immediate effect has been the creation of sophisticated criminal organizations that exploit this business. The worst effect of U.S. border policy, however, is that undocumented immigrants now face a border fraught with dangers of death, serious bodily injury, robbery, swindling, molestation, and other assaults. This is a complex and problematic reality.

Therefore, the U.S.-Mexican border is a “danger line” for unauthorized immigrants. In 2002, the U.S. Border Patrol discovered 323 deceased immigrants. American and Mexican researchers, nongovernment organizations, and journalists have declared that the U.S. government is responsible for these deaths. They have also called this tragedy a human rights violation. In this Article, cultural anthropologist Guillermo Alonso Meneses explores the problem of immigrant deaths and analyzes whether there is evidence of human rights violations in the United States’ border strategy or in the passive Mexican authorities’ attitude. This Article argues that the Mexican and U.S. governments have equal responsibility for the problem of

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immigrant deaths. Human rights violations exist, but these are isolated events. There is no clear evidence to charge Mexican or U.S. authorities with systematic human rights violations. Nevertheless, we need to stop the deaths of unauthorized immigrants through rapid and humane solutions.

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INTRODUCTION

May 2001 has been one of the most tragic and mournful periods in the history of underground human migrations. American and Mexican mass media covered the deaths of fourteen illegal aliens, who were natives of the state of Veracruz in Mexico. The immigrants died in the desert of Yuma, Arizona. Days before, the Mexican press had reported that five Guatemalans died of asphyxiation after they were abandoned in a trailer near Las Choapas, south of Veracruz. Also during that month, the news agency AFP in Niamey, Niger, reported that 140 Africans of different nationalities died in the Sahara desert in Libya, after the truck that was transporting them broke down. Lastly, in those same days, the Spanish press covered the deaths of several immigrants along the coasts of Cadiz, south of Spain; Melilla, north of Africa; and Fuerteventura, in the Canary Islands. These terrible news stories reflect an everyday tragedy. Every year thousands of undocumented immigrants, in search of an opportunity for a better life, suffer a terrible fate.

Unauthorized immigration has been and will continue to be a fundamental factor in the development of humanity. When we discuss immigrants, we discuss human beings. Therefore, migration should not be evaluated through only economic, political, or judicial approaches. Ethics should guide any decisions regarding the political handling of migration. Unfortunately, ethics and human rights concerns are not paramount in immigration politics.

Historically, the issue of undocumented immigration has been problematic. An obvious conclusion can be drawn, though: While many social actors are involved, the undocumented immigrants are the ones who suffer the most, especially those that die while attempting to cross the border.

The undocumented immigrant has generally been a social actor whose peaceful intention is to find work. To legitimize the plight of undocumented

immigrants, the U.S. government criminalized them. This criminalization led to the illegal business of immigrant trafficking. What used to be a peaceful labor migration has become a business in the hands of Mafioso rings and middlemen. This has led to the increased vulnerability of undocumented immigrants, and the increase in immigrant deaths. Because immigrants are more dependent on traffickers, traffickers have been able to charge higher rates and have enjoyed a higher volume of business. We must not forget, though, that not all the "coyotes" are smugglers.¹

This Article analyzes ethnographic and statistical data from the perspective of cultural anthropology, with the purpose of finding an explanation for the approximately three thousand immigrant deaths in the U.S.-Mexican border region from 1993 to 2002. A preliminary analysis examines the charge by several nongovernment organizations (NGOs) and researchers: "the U.S. government has flagrantly abused its right to control the border by resorting to a strategy which is designed to maximize the physical risks."²

I. UNDERGROUND MIGRATION AND THE FRONTIER BETWEEN THE UNITED STATES AND MEXICO: A VIEW FROM THE SOUTH

Historically, unauthorized or undocumented immigrants have been forced to enter the United States through secret routes. In recent years, however, there are fewer areas that are not watched by the Border Patrol. This fact is crucial. Since 1994, control operations along the nearly two thousand mile U.S.-Mexican frontier, such as Gatekeeper in California, Safeguard in Arizona, and Hold the Line and Rio Grande in Texas, have been the principal components of the United States' strategy for blocking secret border crossing routes. This strategy, though, has only shifted the flow of unauthorized immigrants to alternate, more dangerous routes.

Since the beginning of border control operations in 1993, the number of immigrant deaths in the Mexican-U.S. border region has remained constant. According to the Mexican SRE (Foreign Relations Office or Secretary of International Relationships), since 1998 there have been more than three hundred deaths every year.³ These immigrants die primarily in concealed transport while in U.S. territory. To explain how and why they die, we need

1. Some coyotes, called coyote-smugglers, work in criminal organizations. There are also independent coyotes, or coyote-guides, who help undocumented immigrants.

2. Operation Gatekeeper Fact Sheet, at <http://www.stopgatekeeper.org/English/facts.htm> (last updated on July 15, 2002); see also Claudia E. Smith, *La Problemática Migratoria Del 2000*, 6 EL BORDO 17, 18 (2000); *Frontera: saldo trágico de muertes de indocumentados; Organizaciones demandan al gobierno de EU ante la Corte Interamericana de Derechos Humanos*, LA OPINIÓN (Los Angeles), Dec. 23, 2002, available at <http://www.laopinion.com>.

3. See Secretaría de Relaciones Exteriores, <http://www.sre.gob.mx>.

to examine a variety of data. If we know the circumstances of these deaths, we can evaluate the sufficiency of the evidence of human rights violations.

Undocumented immigration to the United States is a classic theme in American and Mexican social science literature.⁴ In the last decade, though, the phenomenon has changed seriously. Commentator Peter Andreas explains the change:

The U.S.-Mexico boundary is the busiest land border in the world, the longest and most dramatic meeting point between a rich and a poor country, and the site of the most intensive interaction between law enforcement and law evasion. . . .⁵

....

By disrupting the traditional routes and methods of clandestine entry, the intensified border control campaign has transformed the once relatively simple illegal act of crossing the border into a more complex system of illegal practices. . . .⁶

....

... Yet as I have also stressed, the enforcement buildup has done far more than simply project an appearance of "doing something," for the collateral damage has been substantial.⁷

Author Joseph Nevins has also analyzed this phenomenon in his book, *Operation Gatekeeper*.⁸ His subtitle is more expressive: *The Rise of the "Illegal Alien" and the Remaking of the U.S.-Mexico Boundary*.

A preoccupation with "illegal" immigrants and boundary enforcement—at least in a sustained manner with widespread popular support—is of relatively recent origin.⁹

....

The fusing of the law, territory, and social power makes the construction of the "illegal" immigrant a difficult one to counter. The contemporary emphasis on illegality has stacked the debate surrounding unauthorized immigration as it is very difficult to argue in favor of something "illegal."¹⁰

....

José Luis Uriostegua was caught in between these two clashing functions. Border Patrol agents discovered his frigid body on Mount Laguna in

4. See, e.g., 2 MIGRATION BETWEEN MEXICO AND THE UNITED STATES: BINATIONAL STUDY (Mexican Ministry of Foreign Affairs & U.S. Comm'n on Immigration Reform eds., 1998).

5. PETER ANDREAS, BORDER GAMES: POLICING THE U.S.-MEXICO DIVIDE, at x (2000).

6. *Id.* at 95.

7. *Id.* at 148.

8. JOSEPH NEVINS, OPERATION GATEKEEPER: THE RISE OF THE "ILLEGAL ALIEN" AND THE MAKING OF THE U.S.-MEXICO BOUNDARY (2002).

9. *Id.* at 111.

10. *Id.* at 141.

eastern San Diego County, about twenty miles north of the U.S.-Mexico boundary, on March 22, 2000. From now on, he will be known as number 500—the 500th person to perish while trying to evade the U.S. Border Patrol in southern California since Gatekeeper's implementation.¹¹

The frontier reality that we analyze consists of three main elements. First, the U.S. government exercises severe and aggressive control of the southwestern frontier, but this does not halt undocumented migration, which has merely deviated its routes in response. Second, this “deviation effect” has driven migrants to use more dangerous routes. And, finally, the persistence of migrants is tied to a desire to work in the United States' underground economy. The conventional attitude is that, by entering dangerous areas, immigrants assume the high risk of the border crossing and possible later repercussions.

These three elements are obvious inferences from the undocumented immigration phenomenon. Now I propose an anthropological explanation or nonobvious sociocultural foundation for the phenomenon, in two hypotheses. The first hypothesis sustains that the immigrant deaths, primarily those on the U.S. side of the border, are bound to a flawed sociocultural perception of the dangers involved in underground border crossing in areas of extreme geographical climate or dangerous infrastructures. A second, complementary hypothesis is that, in many cases, this flawed sociocultural perception of the dangers stems from a “sociocultural *decapitalization*” of the migratory flow. In other words, as the crossing areas change, immigrants need information about the new areas but lack current knowledge. In theory, only the *polleros*, coyote guides, and U.S. smuggling organizations have the necessary information for crossing: This is sociocultural capital.

These two hypotheses do not exclude the possibility that someone with crossing experience and good knowledge of the dangers can die in the attempt. Crossing the border is risky for even the experienced. These hypotheses point us to the dangerous factors threatening immigrants. Most immigrant deaths are due to climatic factors or drowning. The areas of less or no surveillance are usually those whose geography and climate are most lethal; high temperatures in such areas often pose the risks of heatstroke and dehydration.

Not all migrants are aware of the dangers. Many times, they do not perceive the dangers, and thus ignore them entirely. Others poorly calculate the U.S. Border Patrol forces and the distance they need to travel. Still others rely on vague calculations, or venture recklessly. The circumstances vary. All of these actions translate into behaviors that assume risks, starting from insufficient information or from a position created by pressing circumstances. This gives rise to a series of questions: Who actually assumes the risks, the coyote

11. *Id.* at 187 (referring to the “clashing functions of the modern territorial state”).

guide or the undocumented immigrant? Does the coyote transmit sufficient information about the dangers to the immigrant? Who is responsible for the rash behavior of another, who has already considered the risks? Given that individual decisions, taken together as a whole, generate the interaction between coyote and immigrants, if a failed crossing results in death, who is responsible? It is difficult to discern. The combination of distorted perceptions, crossings guided by faulty information, and desperate behaviors, increases migrants' vulnerability to border danger.

The dangers are greater for immigrants in inhospitable areas far from urban areas and out of the sight of the public or Border Patrol. I have analyzed this in other works.¹² The dangers reflect a tension between undocumented immigrants and those who oppose undocumented immigration. In the United States, the government uses the natural dangers to discourage undocumented immigrants. On the other side of the border, immigrants use the natural dangers to succeed in undocumented crossings.

From the viewpoint of border patrol authorities, deserts and rivers act as obstacles to migrant crossings because they are dangerous. From the viewpoint of migrants, deserts and rivers operate as potential entrance routes because they are in distant and inhospitable areas, areas that are potentially dangerous to human lives.

U.S.-MEXICAN BORDER ¹³			
	Apprehensions	Rescues	Deaths
Fiscal Year 1999	1,536,947	1,041	231
Fiscal Year 2000	1,643,679	2,454	377
Fiscal Year 2001	1,235,717	1,233	336
Fiscal Year 2002	929,809	1,764	323

If we consider that, in recent years, the number of immigrants apprehended by the Border Patrol has decreased, but the number of rescues and deaths has grown or stayed constant, we find that border strategy has failed to stem the tragic number of human lives lost. But if we observe the rates of immigrant mortality in proportion to the rate of apprehensions by the Border Patrol, we find that the ratio has grown from fifteen deaths for every 100,000 apprehensions in 1999, to thirty-five deaths for every 100,000 apprehensions in

12. See Guillermo Alonso Meneses, *Migra, coyotes, paisanos y muertitos: sobre la analiticidad y el sentido de ciertos factores de la migración clandestina en la frontera norte*, 7 EL BORDO 27 (2001); Guillermo Alonso Meneses, *Riesgos y vulnerabilidad en la migración clandestina*, CIUDADES, Oct.-Dec. 2001, at 18 [hereinafter Alonso, *Riesgos y vulnerabilidad*].

13. See BCIS Yearbooks, <http://www.immigration.gov/graphics/shared/aboutus/statistics/ybpage.htm>.

2002.¹⁴ For comparison purposes, the highest rate of homicides in the European Union is that of Spain: three homicides for every 100,000 inhabitants.¹⁵

RATE OF MORTALITY OF MIGRANTS / APPREHENSIONS ¹⁶		
Fiscal Year 1999	231/1,536,947	15/100,000
Fiscal Year 2000	377/1,643,679	23/100,000
Fiscal Year 2001	336/1,235,717	27/100,000
Fiscal Year 2002	323/929,809	35/100,000

These rates perhaps have little statistical value, but they do have heuristic value. The available information, both quantitative and qualitative, shows us that the number of deaths of undocumented immigrants crossing into the United States from Mexico has not varied greatly in recent years. The ratio of mortality to apprehensions has steadily increased, and immigrants' knowledge of the risks has not halted the increase. Therefore, the Mexican and U.S. governments must outline alternative viable solutions to the problem, or the annual rate of more than three hundred deaths will continue. This reality presents a moral question for the current bilateral relationship between the two governments.

II. BORDER PATROL OPERATIONS, UNDERGROUND MIGRATION, AND THE VIOLATION OF HUMAN RIGHTS

Examination of the circumstances surrounding the deaths of undocumented migrants is necessary for determining if there are continuous or systematic human rights violations. Finding a human rights violation requires evidence that would show the U.S. border control policy and treatment of undocumented immigrants is brutal and insensitive. U.S. border strategy could be deemed brutal and insensitive because it forces immigrants to risk their lives. As Amy Gutmann states: "Human rights are important instruments for protecting human beings against cruelty, oppression, and degradation."¹⁷ Human rights are an instrument created to defend the individual against the brutality and insensitivity of the State. From this perspective, we create two hypotheses: first, individual cases of human rights violations could exist (for example, if

14. See Bureau of Citizenship and Immigration Services, (BC 15) <http://www.immigration.gov/graphics/shared/aboutus/statistics/Enforce.htm> (last modified May 22, 2003).

15. Interpol International Crime Statistics, <http://www.interpol.com/Public/Statistics/ICS/2000/spain2000.pdf>.

16. See BCIS Yearbooks, *supra* note 13.

17. Amy Gutmann, *Introduction* to MICHAEL IGNATIEFF, *HUMAN RIGHTS AS POLITICS AND IDOLATRY*, at xi (Amy Gutmann ed., 2001).

the Border Patrol used excessive force against some individuals); and second, a dimension of state responsibility could exist if the government has been managing the problem arbitrarily and wrongly (or, brutally and callously), and has done nothing about immigrant deaths.

The reality of the Mexican-U.S. border region is complex. Before the commencement of Border Patrol operations, a problem of "immigrant accidents" existed. The operations have not stopped the rising death rate, but instead have contributed to it. The strategy to control the border, and the devices used to make border control effective, are related to the increase in deaths. But here begin the evidentiary problems of proving systematic human rights violations: a real estimate of the death rate is impossible, and there have been "silences" in the records of migrant deaths. Before 1998, the Border Patrol did not keep reliable records of migrant deaths, and most deaths occurred in U.S. territory. This statistical hole may be a tactical omission; it is even difficult to find death statistics on official U.S. government websites. Human rights analysts therefore face a great problem: the underreporting of deaths. This problem is significant, because the death record is one the principal forms of evidence against the U.S. administration. The question remains: Why is it that U.S. authorities do not make the death registry more accessible to the public?

MIGRANT DEATHS ALONG THE MEXICAN-U.S. BORDER 1998-2002 ¹⁸					
	1998	1999	2000	2001	2002
SRE	329	358	491	387	371
Border Patrol	261	231	369	336	323

Between 1998 and 2002, according to the records of Mexican authorities, an average of 387 people died each year. This is greater than one death a day:

Meanwhile, border-crossing deaths continue to mount, at an annualized rate of more than one migrant death per day. The death toll is equivalent to the fatalities that might result from the crash of one fully-loaded 747 jumbo jet each year. The Border Patrol blames people-smugglers who callously abandon migrants in the mountains and deserts if they lag behind or run out of water.¹⁹

18. Bureau of Citizenship and Immigration Services, <http://www.immigration.gov>; Secretaría de Relaciones Exteriores, <http://www.sre.gob.mx>. The Border Patrol statistics refer to fiscal years (October–September); the Mexican statistics refer to calendar years (January–December).

19. WAYNE A. CORNELIUS, DEATH AT THE BORDER: THE EFFICACY AND "UNINTENDED" CONSEQUENCES OF U.S. IMMIGRATION CONTROL POLICY, 1993–2000, at 22 (UCSD Ctr. for Comparative Immigration Studies, Working Paper No. 27, 2000), available at <http://www.ccis-ucsd.org/publications/wrkg27.pdf> (last visited Sept. 7, 2003).

The SRE estimated 1600 deaths during the six-year period from 1995 to 2000 in the frontier region of California, Arizona, New Mexico, and Texas. If we include the death counts for the last two years, according to the SRE a total of 2358 immigrants have died in the last eight years.

Other estimates exist for the period of 1993 to 2002. In this period, according to an investigation by the University of Texas, there were more than 3500 dead or missing undocumented immigrants, most of them Mexicans. This number may be incomplete or conservative.²⁰ The investigation found that, between 1993 and 1997, there were more than 1600 deaths at the U.S.-Mexican border:

We emphasize that our own enumeration of 1,600 possible migrant deaths in a five-year period was necessarily partial because our coverage was restricted primarily to the northern side of the United States-Mexico border, and even in those areas it was hampered by the absence of the kind of organized recordkeeping that can occur only with official recognition that the deaths of migrants are a pressing public concern.²¹

Therefore, if we keep in mind these 1600 deaths between 1993 and 1997, in addition to the number of deaths from 1998 to 2002 recorded by the SRE (1936) or the INS (1528), during the period 1993 to 2002 there were over 3000 immigrant deaths, most of them Mexicans. Estimates of this number vary from the 3536 recorded by the SRE to the 3128 recorded by the Border Patrol in the U.S.-Mexican border region.

These numbers are reliable, but many bodies will never be found, lost in the deserts or in the waters of the Rio Grande. We will never know the exact number of deaths, but these approximate numbers are tragic and shocking. Ignoring them is tantamount to supporting a brutal and insensitive border strategy.

U.S. authorities show no apparent intent to cause or induce the death of migrants, but, regrettably, it cannot be clearly shown that there is no intent. Does this constitute a human rights emergency? What has been done about the death rate in the last five years? There is a deliberate silence concerning the undocumented deaths, a daily tragedy. This silence suggests that U.S. authorities have violated Article 3 of the Universal Declaration: "Everyone has the right to life, liberty and security of person."²²

The controversy over how to find a solution and who is responsible for the deaths is complex. There has been a militarization of the Border Patrol.²³ Its

20. Karl Eschbach et al., *Death at the Border*, 33 INT'L MIGRATION REV. 430 (1999).

21. *Id.* at 451.

22. UNIVERSAL DECLARATION OF HUMAN RIGHTS art. 3.

23. See generally Carol Nagengast, *Militarizing the Border Patrol*, N. AM. CONGRESS ON LATIN AM. REP. ON THE AMERICAS, Nov.-Dec. 1998, at 37.

militarized nature increases suspicion that Border Patrol actions are sometimes brutal and callous toward undocumented immigrants. Is border control treated as a low-intensity military conflict with collateral damage? Collateral damage affects undocumented immigrants, who are civilians and not soldiers. The U.S. authorities call them "illegal aliens," a term that dehumanizes them. Granted, they are "illegal aliens" in the United States, but they nevertheless have human rights.

Other commentators support the hypothesis of human rights violation. The United States is treated differently from other nations when evaluating possible human rights violations. In Michael Ignatieff's words:

America's reluctant participation places it in a highly paradoxical relation to an emerging international legal order based on human rights principles. Since Eleanor Roosevelt chaired the committee that produced the Universal Declaration, America has promoted human rights norms around the world, while also resisting the idea that these norms apply to American citizens and American institutions. The utopia to which human rights activism aspires—an international legal order with the capacity to enforce penalties against states—is inimical to the American conception that rights derive their legitimacy from the exercise of national popular sovereignty.²⁴

Moreover, in recent years there have been significant changes in U.S. border strategy to justify its consequences. Certain terms have been created to legitimize Border Patrol actions. For instance, the names of some operations have been changed: "In 1993, 'Operation Blockade' was deployed in the El Paso area; 450 agents working overtime covered a twenty mile stretch of the border. Apprehensions fell sharply and 'Operation Blockade' (later diplomatically renamed 'Operation Hold the Line') was heralded as a success."²⁵

Another example is the creation of the Border Safety Initiatives program in 1998. This program recognized the existence of a problem of "insecurity," and the Border Patrol began to record immigrant deaths. Despite this program, NGOs charge that the U.S. government has been committing human right violations. The American Civil Liberties Union (ACLU) and the California Rural Legal Assistance Foundation (CRLAF) are a paradigmatic example.²⁶

Three years ago the ACLU of San Diego and Imperial Counties and Oceanside-based CRLAF filed a petition with the Inter-American Court of Human Rights (IAHCR) charging the U.S. government with "flagrantly abus[ing] its right to control the border by resorting to a strategy which is

24. IGNATIEFF, *supra* note 17, at 13–14.

25. Eschbach, *supra* note 20, at 448.

26. See Operation Gatekeeper Fact Sheet, <http://www.stopgatekeeper.org/English/Facts.htm> (prepared by the California Rural Legal Assistance Foundation).

designed to maximize the physical risks.”²⁷ These organizations contend that the United States, as a signatory to the American Declaration of the Rights and Duties of Man,²⁸ is “oblig[ed]...to protect life,” regardless of a person’s status as a citizen or an undocumented migrant.²⁹ The organizations emphasize that while “the pre-Gatekeeper strategy...was no less effective than the new strategy,” migrant deaths on the border have increased significantly.³⁰ A hearing was held before the IACHR, and resolution of the issue is now pending a reply from the U.S. government.³¹ Notably, “[i]n another case before the Inter-American Commission on Human Rights, the U.S. has acknowledged limits on its right to control entry into its territory, stating that a government could ‘take effective and reasonable steps to prevent entries.’”³² In this light, the United States has not met the standard that it acknowledges is required under international human rights norms.

When United Nations High Commissioner for Human Rights Mary Robinson was briefed on the human tragedy occurring on the U.S.-Mexican border, she called the number of deaths “shocking.”³³ In her view, the United States’ border strategy was forcing immigrants from safe crossings “at a risk to their lives.”³⁴ United Nations Special Rapporteur on the Human Rights of Migrants Gabriela Rodríguez Pizarro was invited by the U.S. and Mexican governments to visit the border area in March, 2002.³⁵ The report that she generated as a result of her visit contained a number of criticisms and suggestions for improving conditions at the border.³⁶ The report received a

27. *Id.*

28. American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L.V/II.82 doc. 6 rev. 1 at 17 (1992).

29. Operation Gatekeeper Fact Sheet, *supra* note 26 (citing Article 1 of the American Declaration of the Rights and Duties of Man).

30. *Id.*

31. *Id.*

32. *Id.*

33. Jordan Budd, *CRLAF and CALU Allege That Deadly U.S. Border Enforcement Strategy Violates International Law*, in INTERNATIONAL CIVIL LIBERTIES REPORT, at 1, 3 (2001), available at http://archive.aclu.org/library/iclr/2001/iclr2001_1.pdf.

34. Mark Stevenson, *U.N. Blasts U.S. Border Policy*, ASSOCIATED PRESS ONLINE, Nov. 28, 1999, 1999 WL 28143748.

35. Report submitted by Ms. Gabriela Rodríguez Pizarro, Special Rapporteur, in conformity with resolution 2002/62 of the Commission on Human Rights, U.N. Doc. E/CN.4/2003/85/Add.3 (2002).

36. *Id.*

lukewarm reception from the U.S.³⁷ The situation at the border has prompted

Amnesty International-U.S.A. [to] overwhelmingly pass[] a resolution condemning Gatekeeper for forcing migrants to attempt border crossings in areas which put them in mortal danger. The resolution says that Amnesty "does not take issue with the sovereign right of the U.S. to police its borders, but insists that it do so in a manner which complies with international human rights obligations." In a letter addressed to the Special Rapporteur, the London Amnesty office also weighed in, saying that "the effect of [Gatekeeper] would appear to undermine this obligation."³⁸

What is the opinion of the U.S. authorities on immigrant deaths? A recurring response to NGOs' claims is that the undocumented immigrants die because they assume the risk of crossing through dangerous areas. We do not kill them, U.S. authorities claim; the climatic factors kill them. Thus, U.S. authorities should not be held directly responsible.

This Article has highlighted the basis of the NGOs' charge. The Border Patrol operation along the southwestern border has blocked traditional border crossing routes and resulted in the rerouting of undocumented immigrant flows to more dangerous routes. The immediate and tragic effect of this change has been an increase in deaths during border crossings. There has also been a selective watch over the border: The more dangerous areas are "open." This "open door" leads immigrants into a mortal trap, where the climatic factors kill them. Does U.S. strategy purposely maximize the physical risk? Are U.S. authorities responsible for the consequences of this strategy? Is this a human rights violation? The answer is not easy to determine.

The Border Patrol and INS are aware of the lethal collateral damage of U.S. border strategy: more than three thousand immigrant deaths since 1993. And, certainly, it is the climatic factors that kill them. However, do U.S. authorities use the climatic factors as dissuasive instruments or as a weapon to deter illegal aliens? Does the evidence permit us to consider this? These are key questions. The answer could involve the same issue as fox hunting: Who is the responsible for the death of the fox, the dogs or the dogs' owners who loosed them? Without a doubt, the dogs' owners are responsible. The United States thoroughly patrols the safe areas while leaving open the dangerous areas. In some areas, the dangers are apparent, but in other areas they are hidden, manifested

37. See, e.g., Statement of Ambassador E. Michael Southwick on the Report of the Special Rapporteur (April 10, 2003) (speaking for the U.S. Governmental Delegation to the 59th Session of the U.N. Commission on Human Rights), available at <http://www.humanrights-usa.net/statements/0410Migrants.htm>.

38. Operation Gatekeeper Fact Sheet, *supra* note 26.

only through deadly accidents. In those areas where the Border Patrol is not watching, the “bloodhound” of extreme climate is watching instead.

Thus, the less watched areas are actually mortal traps. These traps are treacherous; it is difficult to perceive the dangers. Many immigrants are not fully aware of the gravity of the risk they are taking. It is also difficult for them to fully control the different risk variables. And the Border Patrol operations lead to these problems. Because of migrant inexperience or ignorance about the new and dangerous routes, the migrants are very vulnerable. They have suffered a “cultural decapitalization” of necessary knowledge. Immigrants do not have sufficient knowledge to cross new areas.³⁹ Debbie Nathan is explicit: “If the new geography weren’t bad enough for illegal crossers, the INS program has created further mayhem by altering border culture.”⁴⁰

Thus, we face the question: Could the U.S. government be charged with a human rights violation for maintaining a surveillance strategy that contributes to the death of hundreds of immigrants every year? Could the U.S. government be charged with a human rights violation when their Border Patrol uses excessive force against individuals? For example, the Border Patrol caused the deaths of three women in San Diego in January 2003, after engaging in a vehicle pursuit of questionable necessity.⁴¹

The undocumented migrant is sometimes injured by Border Patrol officers with weapons, chemical substances, or through mechanical forms of immobilization. This may be accompanied by insults or jeers that, in many cases, attack their dignity. This violates Article 5 of the Human Rights Declaration: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Attacks against the dignity, physical integrity, and personal belongings of undocumented immigrants are documented. In some instances, apprehended immigrants are not informed of their rights or are transferred in vehicles violating the basic norm of providing seat belts. These abuses are instances of human rights violations. Is this not a contradiction for a state that defends human rights and democracy around the world?⁴²

While immigrants as a whole are a vulnerable group, they include women, children, the elderly and ethnic minorities, who are even more vulnerable. In

39. Alonso, *Riesgos y vulnerabilidad*, *supra* note 12, at 20.

40. Debbie Nathan, *Border Geography and Vigilantes*, N. AM. CONGRESS ON LATIN AM. REP. ON THE AMERICAS, Sept.–Oct. 2000, at 5, 5.

41. See, e.g., Jessica Garrison & Beth Silver, *Border Patrol Crash Kills 2, Hurts 13*, L.A. TIMES, Jan. 10, 2003, at B-1; Gregory Alan Gross & Norma de la Vega, *Pickup-Crash Injuries Claim Life of Third Woman; Driver Was Fleeing From Border Patrol*, SAN DIEGO UNION-TRIB., Jan. 18, 2003, at B-2.

42. The greatest contradiction of the U.S. government, however, is the “berlinization” of all the cities on the southwest frontier between Tijuana and Ciudad Juárez (from San Diego to El Paso). This is in flagrant contradiction with President Ronald Reagan’s famous Cold War call to Soviet Premier Mikhail Gorbachev to “tear down this wall!”

the first half of 2003, more than 6700 Mexican children were deported from the United States to Mexico.⁴³ This number is already higher than the number of Mexican children deported in all of 2002.⁴⁴ These children, far from their homes when returned to Mexico, are often cared for by publicly funded ONG hostels, which received more than eight thousand children in 1999.⁴⁵ These cases constitute a violation of the Human Rights Declaration and of international conventions on the protection of children.

Furthermore, U.S. authorities deny basic rights to incarcerated migrants: "The bottom line, however, is that INS continues to use secret evidence and to maintain its right to do so. No system of justice can be deemed legitimate that denies to incarcerated human beings the right to examine and confront the evidence used to detain them."⁴⁶

Another important aspect of this debate is the accusation made by some North American analysts that Mexican authorities do not try to impede undocumented migration. However, it would be a serious error for the Mexican police to impede the exit of the migrants, which could constitute a human rights violation. Nevertheless, the Mexican government has orchestrated some preventive measures, such as the creation of the Beta groups⁴⁷ protection for migrants, and the Mexican consulate's "High Visibility" program to document and denounce the violation of migrants' human rights. However, because of the forgetfulness or carelessness of the Mexican authorities, the weight of immigrant problems has fallen on NGOs in the border cities. The Mexican authorities have been questioned for their political decisions in this regard.

DISCUSSIONS AND (IN)CONCLUSIONS

During the period of 1993 to 2002, thousands of immigrants died along the border. Most were Mexicans. The estimated number of deaths varies between 3536, according to by the SRE, and 3128, according to Border Patrol. These deaths are the principal evidence of possible human rights violations by U.S. authorities.

43. Fabiola Martinez, *En seis mese, 6,700 menores repatriados*, LA JORNADA, July 30, 2003, available at <http://www.jornada.unam.mx/2003/jul03/030730/004n1pol.php?origen=index.html&fly=1>.

44. *Id.*

45. Alberto Najjar, *Migración Infantil: la otra cara del fenómeno*, LA JORNADA, Oct. 13, 2002, available at <http://www.jornada.unam.mx/2002/oct02/0210/13/mas-najjar.html>.

46. David Cole, *Secret Trials*, HUM. RTS., Winter 2001, at 8, 9 (discussing how the INS relies upon secret evidence to unconstitutionally detain immigrants).

47. Grupo Beta de Protección a Migrantes is a special organization for migrants' protection. The organization also provides information about the risk involved in illegal border crossing. See http://www.e-mexico.gob.mx/wb2/eMex/eMex_Grupo_Beta_de_Proteccion_a_Migrantes.

The repression and control of undocumented migration to the United States could be proof of human rights violations. This would be more plausible if the U.S. authorities used excessive force and if they instigated the circumstances that led to immigrant deaths.

Aggressive, indeed belligerent, strategies of control are used in the border region. The border strategy in Tijuana reproduces the pattern of the Great Wall of China or the Berlin Wall (a concept of Stalinist communism). The United States has "berlinized" all the cities along its southwest border. History demonstrates how absurd the Great Wall and Berlin Wall were and, regrettably, it will demonstrate that the death of undocumented immigrants in the southwestern frontier of United States could have been avoided.

Many U.S. decisions concerning border policy have had warlike characteristics. To legitimize its actions, the U.S. government criminalized the unauthorized immigrant, a social actor who has historically behaved as a peaceful person whose only intention is to find work. The criminalization stimulated the illegal business of trafficking in immigrants. What used to be a peaceful labor migration has become a business in the hands of mafia rings. The increased vulnerability of immigrants is apparent from the increased death rates and the invigoration of certain trafficking mafia: Greater dependence on guides has led to increased demand for guides and increased fees.

The U.S. strategy is based on the logic of a low-intensity military conflict with collateral damage. This has resulted in the death of immigrants coming from the south and the violation of their human rights. Besides being forced to pay higher rates to guides, the unauthorized immigrants must also face the dangers of death, injury, robbery, swindling, molestation, and other assaults. Do these circumstances reflect human rights violations?

The Mexican and U.S. governments have equal responsibility for the problem of immigrant deaths. Human rights violations exist, but they are isolated violations and not systematic ones. That is, the evidence needed to charge the Mexican and U.S. authorities with systematic human rights violations is not clear. However, we need to stop the deaths of unauthorized immigrants with rapid and humane solutions. Slow solutions or responses to this problem would themselves be human rights violations.
