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Fencing Out the Neighbors: Legal Implications of the U.S.-Mexico Border Security Fence

by Marta Tavares*

INTRODUCTION

The southwestern United States-Mexico border spans nearly 2,000 miles (roughly 3,000 kilometers), passing alongside the U.S. states of California, Arizona, New Mexico, and Texas. Approximately 11.8 million people reside in the region's border towns, including the urban zones of El Paso and San Diego as well as the inhospitable Arizonian desert. Hundreds of thousands of workers, traders, and goods transverse the border each day, and the region is also a gateway for illegal immigration into the U.S.

In an attempt to protect its population from illegal immigration, human smuggling, drug trafficking, and terrorism, the United States Congress passed the Secure Fence Act on October 26, 2006. The Act mandates the construction of 700 miles (1,125 kilometers) of separate physical barriers along the U.S.-Mexico border, in order to control illegal immigration. Its success in this regard is debatable; what is certain are the many corollary human rights implications. This article will consider the unique geographical and demographic characteristics of the southwestern U.S. border, and explain the purpose and scope of the Security Fence Act. It will then proceed to analyze the protection of fundamental human rights alongside the exercise of state sovereignty and good faith lawmaking. Finally, this article will explain the human rights impact that the construction of the U.S. border fence will generate in the international arena.

THE U.S.-MEXICO BORDER: AN OVERVIEW OF THE PROBLEM AND GOVERNMENT RESPONSES

The U.S.-Mexico border has long been a gateway for illegal immigration into the United States. Governmental responses over the years include the expansion of the enforcement power of the former Immigration and Naturalization Service (INS), augmentation of the INS budget, reformulation of the immigration law applicable to illegal immigrants entering without inspection, and implementation of a series of border control operations in permeable regions of El Paso (Operation Hold the Line), San Diego (Operation Gatekeeper), Tucson (Operation Safeguard), and Phoenix (Operation Ice Storm). Each of these operations involved the deployment of numerous immigration officers and the construction of separate physical barriers equipped with electronic surveillance systems. Almost immediately, the result was to channel illegal immigrants into more difficult and remote terrains of the Sonoran Desert, leading to the deaths of numerous potential immigrants, workers, and visitors.

Following the 9/11 terrorist attacks, the southwestern U.S. border attracted renewed attention, and began to play an important role in the nation's "war against terrorism."¹ As part of various immigration reforms adopted after the 9/11 terrorist attacks, Congress created the U.S. Department of Homeland Security to oversee immigration and national security affairs, and the U.S.



© Courtesy of Jessica Farb

Families have picnics around this fence, passing tamales through the fence holes.

Customs and Border Patrol assumed the responsibility of enforcing immigration regulations at the U.S. border.² Subsequently, in December 2005, Congressman Duncan Hunter (R-CA) introduced to the House of Representatives the Border Protection, Antiterrorism, and Illegal Alien Control Act of 2005, which mandated the construction of hundreds of miles of fencing along the southern U.S. border. This bill passed in the House but failed to secure Senate approval.³ Only ten months later, however, in October 2006, President George W. Bush signed the Secure Fence Act of 2006 into law, thereby authorizing the construction of 700 miles of fencing along the 2,000 mile U.S.-Mexico border. The fence will consist of separate-9-foot-high double fences, equipped with lighting, cameras and sensors, reinforced with additional physical barriers and parallel roads, at a cost of roughly U.S. \$7 billion.⁴

The primary objective of the Secure Fence Act is to achieve operational control over the entire land and maritime border between the U.S. and Mexico, thereby preventing unlawful entries by potential terrorists, undocumented immigrants, smugglers, and traffickers.⁵ The new law specifically targets porous areas such as the Tecate and Calexico ports of entry in California; the Douglas port of entry in Arizona; the Columbus port of entry in New Mexico; and the El Paso, Del Rio, the Eagle Pass, Laredo, and Brownsville ports of entry in Texas.

As part of the heavy enforcement plan designed for the U.S.-Mexico frontier, the U.S. also implemented Operation Jump Start, involving the deployment of approximately 6,000 National Guard troops along the border. The National Guard will lend support to the Customs and Border Protection (CBP) Border Patrol agents in their effort to stop illegal entry into the U.S. and fully secure the southern border.⁶

The Secure Fence Act of 2006 is premised on a strategy of "prevention through deterrence," the criminal justice theory surmising that high rates of criminal apprehension, prosecution, and punishment by law enforcement is the most effective means for discouraging lawbreakers from violating the law.⁷ The U.S.

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Government asserts that the implementation of the “prevention through deterrence” strategy along the U.S.-Mexico border region will make illegal entry so difficult and costly that fewer persons will attempt to do so.

PROTECTION OF U.S. SOVEREIGNTY AND SIMULTANEOUS COMPLIANCE WITH THE PRINCIPLES OF GOOD FAITH AND RESPECT FOR HUMAN RIGHTS

Universal and regional human rights systems each recognize the vital importance of state sovereignty and equality, and in fact depend upon the uniform personality and representation of all States Parties in the international forum. As a state exercising its sovereignty, the United States has the authority to implement the laws and policies necessary to guarantee its independence and secu-

the human rights protections afforded all those individuals who might be affected by U.S. border policies, regardless of nationality and/or immigration status.

U.S.-MEXICO FENCE AND ITS IMPACT ON THE SOUTHERN BORDER REGION

Ratification of international human rights agreements establishes an immediate duty on States Parties to respect and ensure in good faith the obligations enshrined in such instruments. The Human Rights Committee, which monitors States Party compliance with the International Covenant on Civil and Political Rights (ICCPR), notes that States Parties should not only respect human rights, but also ensure their enjoyment through the adoption of concrete implementation plans.¹³ For instance, States Parties are

“In enacting immigration policies, the U.S. Congress should find a balance between the national security, self-preservation, and sovereignty interests of the government with the human rights protections afforded all those individuals who might be affected by U.S. border policies, regardless of nationality and/or immigration status.”

urity without the intervention of any foreign power.⁸ The enactment of the Secure Fence Act of 2006, therefore, is a lawful exercise of state sovereignty to protect the U.S. border region. Additionally, the Act may be considered as fundamental to state self-preservation, a doctrine which recognizes that states are entitled to build fortifications within its own territory or on its border, increase its border patrol, and implement any strategy as necessary to protect the national security.⁹

Nevertheless, in certain circumstances state sovereignty and the right of state self-preservation are limited by international human rights law, particularly with respect to issues of broad international concern that extend beyond the realm of exclusive domestic competence.¹⁰ State sovereignty and national security concerns do not permit a state to violate *nonderogable* human rights norms and other fundamental rights enshrined by customary international law or *jus cogens* norms. State conduct should function in harmony with international human rights treaty and customary obligations, prescribed by the principle of good faith.¹¹ This principle consists of a state’s obligation to conduct its affairs with the genuine intention to achieve a positive result for its people, and to refrain from acts which might be deemed arbitrary or capricious.¹²

Thus, the United States, in exercising its sovereign authority to protect its borders, must also observe its international human rights obligations, lest State conduct become incompatible with international obligations. In enacting immigration policies, the U.S. Congress should find a balance between the national security, self-preservation, and sovereignty interests of the government with

required to “take affirmative action, avoid taking measures that restrict or infringe a fundamental right, and eliminate measures and practices that restrict or violate a fundamental right.”¹⁴ Moreover, international human rights instruments stipulate that fundamental human rights are to be protected, respected, and enforced without discrimination of any kind, including migrant status. The Human Rights Committee emphasizes that the rights enshrined in the ICCPR must be guaranteed to every person within a State’s territory and under its jurisdiction, regardless of his or her citizenship or statelessness.¹⁵

Consequently, once an immigrant crosses into the United States, he or she is physically located within U.S. territory and thus under its sovereign authority and control. The United States therefore bears the obligation to observe and ensure the rights enshrined in the ICCPR, other international covenants to which the U.S. is a party, and general international customary norms, with the exception of those rights expressly granted to citizens. Even though the United States has the right to adopt immigration policies as necessary to protect its national sovereignty and security, such policies and their implementation should operate in harmony with international human rights norms. To do otherwise puts the United States at risk of violating its international obligations under the ICCPR and other international human rights agreements.

The Secure Fence Act of 2006 bears important implications for several core human rights protections, namely, the right to life, the rights of indigenous peoples, and the right to a healthy environment. Each of these rights will be discussed in turn.

RIGHT TO LIFE

The right to life is broadly recognized as a fundamental human right indispensable to the free exercise of all other rights and liberties; for this reason, it appears in nearly every human rights instrument, including Article 6.1 (right to life and freedom from arbitrary deprivation of life) of the ICCPR and Article 1 (right to life, liberty, and security of person) of the American Declaration of the Rights and Duties of Man (American Declaration). Both conventions converge in the idea that the protection of the right to life must be guaranteed even in times of emergency, and no derogation is permitted under any circumstance.¹⁶ The Human Rights Committee has also explained that the right to life cannot be understood in a restrictive manner. In this respect, the Committee considers that a violation of the right to life is committed not only when the State arbitrarily deprives someone of his or her life, but also when the State does not adopt positive measures to protect life, such as reducing infant mortality or increasing life expectancy.¹⁷

In this regard, the U.S. national immigration strategy of ‘prevention through deterrence’ by decreasing the flow of illegal immigration across the southwestern border may be described as interfering with one’s fundamental right to life. In the past, the ‘prevention through deterrence’ strategy exposed migrants to extreme climate and terrain conditions resulting in an increase in the number of deaths along the border. It is likely that the newly enacted Secure Fence Act will do the same. The cost in life along the border region is grave; from 1994 to 2003 2,600 deaths of would-be immigrants were reported,¹⁸ 330 deaths were reported in 2004, and 473 deaths were reported in 2005.¹⁹

The construction of the U.S.-Mexico fence in accordance with the Secure Fence Act will likely aggravate this situation. Though the Act will reduce the number of “permeable” locations and the number of illegal crossings, potential immigrants will still attempt to cross into the U.S. through “natural barriers”: those points that, because of their inherent dangerousness, will remain open and accessible to smugglers, traffickers, and immigrants. Increases in deaths along the border region would place the United States in violation of Article 6.1 and Article 2 (freedom from discrimination) of the ICCPR, and Article 1 of the American Declaration.

RIGHT OF INDIGENOUS PEOPLES

The construction of the U.S.-Mexico barrier fence will also affect indigenous communities located along the southwestern border. Some indigenous peoples reside between the southern border of the United States and northern border of Mexico, such as the Kumeyaay of California, the Cocopah and Tohono O’odham of Arizona, and the Kickapoo of Texas.

Prior to the enactment of the Secure Fence Act of 2006, the Tohono O’odham tribe unanimously opposed the construction of the fence, arguing that the wall would divide the ancestral lands of several Indian Nations whose territories lie between the U.S. and Mexico. The Tohono O’odham Indians claim that many tribal communities, including the Kumeyaay, Cocopah, Tohono O’odham, and Kickapoo, use the border as a passage for ceremonies and traditional practices. Furthermore, the deployment of National Guard troops along the border pursuant to Operation Jump Start has already caused discontent among indigenous people who claim that military personnel disrespect their ancestral

lands and harass members of their community, affecting their way of life and culture. Indigenous peoples allege that they were not consulted prior to the passage of the Act, even though it directly infringes upon their rights as sovereign nations.²⁰

In analyzing the situation of indigenous peoples, it is important to note that despite numerous efforts made in the international arena, the United States has always been a persistent objector to the full recognition of the rights of indigenous peoples. As a case in point, the U.S. has in place a “retrogression” process through which the Government has often acted to abrogate the rights of Native American tribes by denying or abridging voting rights, despite the recognition of Indian Nations sovereignty by the U.S. government in bilateral treaties signed in the nineteenth century.²¹



View from Zanyssidro, CA of cars going into Tijuana, Mexico.

The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by General Assembly on December 18, 1992, is the instrument in the universal system of human rights that specifically addresses indigenous issues. Article 1, for example, prescribes that States shall protect the existence and the identity of minorities within their respective territories and shall take appropriate actions, including legislative measures, to preserve them.²² Unfortunately, however, the obligations prescribed are non-binding.

Previously, Article 27 of the ICCPR prescribed the right of persons belonging to ethnic, religious or linguistic minorities to enjoy their culture, to profess and practice their religion, and to use their language; a right that would later be used by the Human Rights Committee as a tool for providing protection to indigenous peoples. Hence, through ratification of the ICCPR, States Parties commit to protect against the denial or violation of the rights of persons who are part of a group sharing a common culture, religion and/or a language, regardless of their nationality. In order to accomplish the effective implementation of Article 27, States may need to adopt positive measures “aimed at correcting conditions which prevent or impair the enjoyment” of the right.²³

The Inter-American Commission on Human Rights also reaffirms the need for special protections for ethnic groups in order to promote equality among all nationals of a State.²⁴ The Commission emphasizes the centrality of human rights norms to preserving and strengthening the cultural heritage of indigenous populations.²⁵ This principle is in accordance with the very essence

of the American Declaration, which declares in its preamble that “[s]ince culture is the highest social and historical expression of spiritual development, it is the duty of man to preserve, practice and foster culture by every means within his power.”²⁶

In part, the special protections afforded indigenous populations are connected to the intimate connection many indigenous communities share with their land. Land can be essential for the transmission of culture and the practice of religious ceremony. Although the UN Human Rights Committee has not specifically addressed the right of indigenous peoples to profess and practice their religion when interpreting Article 18 of the ICCPR (freedom of religion), religious freedom is protected under Article 27, which imposes upon States Parties the affirmative duty to ensure the right

General Recommendation 23 of the Committee on the Elimination of Racial Discrimination concerning Indigenous Peoples expressly calls on States Parties to ensure that “indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent ...”²⁹ The Human Rights Committee further asserts that individuals may exercise their right to participate in public affairs when they adopt decisions regarding issues that affect their lives in any way.³⁰ Rodolfo Stavenhagen, Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, recommends that in order to afford effective protection to indigenous communities, governments must guarantee their free and

“The construction of the U.S.-Mexico border fence will likely violate the fundamental human rights of undocumented migrants trying to cross the border into the U.S. as well as the indigenous communities and others living permanently along the border region.”

of indigenous communities to practice and profess their religion. Moreover, the UN Human Rights Committee interprets the indigenous use of land as the manifestation of culture, thereby extending the reach of Article 27 to religious and cultural expression that constitute “dimensions of communal spirituality and identity.”²⁷

As the foregoing analysis suggests, the construction of the security fence that will divide ancestral lands of Indian Nations in the U.S. southern border may constitute a violation of the rights of minority groups to enjoy their culture and religion. The security fence as proposed will interfere with the ordinary practice of religious ceremonies and traditional pilgrimages that are central to the transmission of culture and preservation of identity. Accordingly, the United States immigration policy as enacted by the Secure Fence Act violates Article 27 (protection of ethnic, religious, linguistic minorities) of the ICCPR, by denying indigenous populations the enjoyment of the rights conferred to minority groups by international agreements.

The Secure Fence Act also jeopardizes indigenous peoples’ right to participate in public affairs, as protected by Article 21 of the Universal Declaration, Article 25 of the ICCPR, and Article 20 of the American Declaration. More specifically, Article 3.3 of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities recognizes the right of persons belonging to minorities “to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation.”²⁸

equal participation in the decision-making processes of issues that may affect their survival.³¹

Members of the Tohomo O’odham community in Arizona argue that they were not consulted by the U.S. government prior to the implementation of any of the operations launched in the southern border region. The failure of the U.S. government to involve the indigenous communities in the political process places the United States in violation of its obligations under Article 6.1 and 2 of the ICCPR and Article 20 of the American Declaration, and threatens the integrity of indigenous communities affected by the construction of the U.S.-Mexico border fence.

RIGHT TO A HEALTHY ENVIRONMENT

The construction of the U.S.-Mexico fence could also interfere with the right to enjoy a safe and healthy environment, and endanger the already fragile ecosystem of the southwestern border region. The Rocky Mountains in southwest U.S. and the Sierra Madres in northern Mexico are part of a chain of 40 mountains known as the Sky Islands, which serve as a corridor for numerous migratory species as snakes, turtles, wild turkeys, road runners, jaguars, Gray and Swainson hawks, Rufous hummingbirds, Mexican grey wolves, and Sonoran pronghorns that need to travel across the border to complete their daily, seasonal, or annual life-cycle. The construction of the fence causes concern among environmentalists and biologists, including the non-profit Sky Island Alliance in Tucson, Arizona, and the U.S. Fish and Wildlife Service. One major concern is that the physical barrier will impede the migration of species already crossing the border due to habitat destruction in Mexico. Furthermore, William Radke, the manager

of the San Bernardino National Wildlife Refuge, explains that the bright lights at the top of the fence would attract insects that are responsible for pollinating cactus, and thus may interfere with the reproduction cycle of the cacti. He added that bright lights would also interfere with avian migratory patterns, affecting the birds' ability to use stellar navigation and moonlight, and also disrupting the birds' feed and rest habits, which could negatively impact their survival.³²

In response to the progressive degradation of the environment, many states have taken steps to protect the quality of the global biosphere, its ecosystems, and the environment. The right to a healthy environment has been the focus of several international environmental treaties, though the right is still not widely recognized. The Declaration of the United Nations Conference on the Human Environment, also known as the 1972 Stockholm Declaration, is the first instrument adopted internationally that made a liaison between human rights and environmental protection even though it fell short in recognizing the right to a healthy and safe environment.³³

The right to live in a healthy environment is perhaps best understood through assessing the relationship between the environment and other fundamental human rights. A healthy and safe environment promotes the dignity of human beings, and permits the ultimate enjoyment of the right to life. In this manner, the right to a healthy environment provides the foundational basis upon which other civil, political, economic, social, and cultural rights may be developed and exercised.³⁴

Conversely, another approach defines the right to environment as part of solidarity rights or third generation rights. These rights include the right to development, peace, common heritage, communication, and humanitarian assistance, aspirational rights to be realized through international and local cooperation and initiative.

Finally, some maintain that the right to environment derives principally from numerous international, regional, and national legal instruments. An example is the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, the "Protocol of San Salvador" (not signed by the United States); Article 11 recognizes the right to a healthy environment.³⁵

Though international human rights instruments recognize and refer to the right to a healthy environment, and even though the construction of the U.S.-Mexico fence will likely alter and negatively impact the already fragile ecosystem of the southern border, it will be difficult to hold the United States accountable for a violation of the right to environment for several reasons. First, the United States has not ratified important international treaties that deal with such right. Second, international declarations regarding the right to a healthy environment represent aspirational "soft laws" offering guidelines for environment protection, not strict standards for environmental preservation. Finally, in order to clearly construct the linkage between the exercise of civil and political rights and the right to a healthy environment, further examination into to potential environmental consequences of the fence construction is required.

CONCLUSION

The United States has long maintained an interest in border protection and securing the country from illegal immigration. National security concerns, particularly since the 9/11 terrorist attacks, sparked a renewed interest among the U.S. government and the people. Despite the attention immigration receives, the number of undocumented immigrants entering the U.S. continues to rise. More than fifty percent of undocumented immigrants are Mexican, due in part to geographic proximity but also in part due to the similarity and historical connection between Mexico and the United States.

Most recently, the U.S. Congress passed the Secure Fence Act of 2006, designed to further strengthen the southwestern border of the U.S. with Mexico and control the influx of smugglers, traffickers, and undocumented migrants. Though this initiative does not directly violate international law, the construction of the U.S.-Mexico border fence is likely to violate the fundamental human rights of undocumented migrants trying to cross the border into the U.S. as well as the indigenous communities and other living permanently along the border region.

As a sovereign nation, the U.S. has the right to protect its integrity and national security through the implementation of immigration policy; however, this right cannot be understood as unlimited and unchecked. The right to enact domestic legislation to treat an internal problem must be in harmony with international standards, and international treaty obligations should be interpreted and observed in good faith. The complex issue of immigration, particularly between the U.S. and Mexico, is a matter that must be addressed by both countries through active bilateral cooperation in conformity with the UN Charter. In this manner, these neighboring countries will be able to negotiate a strategy that protects fundamental human rights, while promoting and respecting state sovereignty and integrity.

As part of the ideal strategy to address the problem, both countries could create a bilateral fund to finance a campaign raising awareness among the migrant community as to the multiple dangers one would confront at the border. Joint training programs of Mexican and American immigration officers would also strength cooperation between the agencies. Besides learning how to treat immigrants respectfully and humanely, the scope of the training could include information about the cultures and location of indigenous peoples in the area, and international obligations that ensure the special protection of those groups.

Additionally, for Mexican workers who do not qualify for visas, it is also important to establish a program permitting their temporary legal entry into the U.S., particularly if they have relatives and family members lawfully residing in the country. Guest and permanent worker programs should also be designed to meet the needs of employers and employees, so as to best benefit the U.S. economy. Finally, the U.S. should be encouraged to cooperate with the Mexican Government in the creation of a comprehensive economic development scheme, with the goal of creating opportunities within Mexico so that fewer people will be forced to risk their lives in exchange for a better standard of living. *HRB*

ENDNOTES: Fencing Out the Neighbors *continued from page 37*

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