

DIE-OFFS AT THE BORDER



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ABSTRACT: This paper examines the phenomenon of the death of migrants along the North American migration corridor, particularly between Mexico and the United States, from a human rights perspective. Our main argument is that current US migration policy explicitly seeks to dissuade migrants by increasing the costs and risks of irregular crossing. By diverting migratory flows towards wilder and more desolate areas, where crossing entails clear risks, the US authorities are submitting migrants to a kind of social Darwinism in which only those who are the strongest and have greater resources manage to overcome the dangers and reach their destination. Furthermore, we maintain that there is a legal vacuum in international and human rights legislation which prevents the promotion of concrete measures to protect migrants' lives as they attempt to cross into the US via unauthorized entry points.



International migration has always been thought of as an adventure, a step into the unknown, into a different world, full of mystery and opportunities or, at the very least, with more opportunities than in the place of origin. Nowadays, however, it has become a dangerous, expensive and risky adventure. There is no official data regarding the number of deaths involved in the contemporary migration adventure, but there are easily several thousand per year.

In general, straits claim the greatest number of victims. The sea tends to be treacherous in these areas and there are dangerous currents in the straits. The Straits of Florida between Cuba and Miami have claimed the lives of countless boat people attempting to reach the US; the sea has swallowed countless *yolas* (small fishing vessels) in the Mona Passage between the Dominican Republic and Puerto Rico; many *pateras* (small boats) that set sail from Magreb and navigate the Straits of Gibraltar do not make it to Spain, the gateway into Europe. Let us not forget the African *cayucos* that set sail from Mauritania and Senegal, hoping to reach the Canaries, which are European territory. In all of these cases, the seas do not discriminate between economic migrants, refugees and asylum seekers. Deaths on the high seas often go unseen, and as a result it is impossible to obtain exact figures. However, it is certain that the number of deaths is very high.

The sea constitutes a space through which migrants of all eras have passed, but the “boat people”, emigrants and asylum seekers, came onto the world stage in the 1970s. The name originally referred to the hundreds of Vietnamese who fled their country in fragile vessels at that time. “Boat people” hit the headlines once more in the 1980s, this time on their voyage from Haiti to Florida. An Indonesian vessel carrying hundreds of migrants was rescued on its way to Australia in 2001. Fishing vessels crowded with Peruvian and Ecuadorian migrants have also been rescued along the Pacific coast en route to Mexico, their first port of call on their way to the US.

The North American corridor that begins in Central America, crosses Mexico, and leads to the US has also registered an increasing number of migrant deaths. Mexico is the gateway into the US; it is the “back door”, but it is extremely wide and porous. Migrants from all over the world, especially Latin America, head towards Mexico with the aim of crossing over into the US.

Apart from the geographical vicinity, there is an additional incentive for heading towards Mexico; a whole grid of *coyote* services for surreptitious border crossing has developed there. This is not a new phenomenon; *coyotes* have existed since the late nineteenth century, when Chinese and later Japanese citizens entered illegally, prevented from entering legally by the racial exclusion laws (Ryo 2006).

Crossing the Mexico-US border has always been hazardous, especially via the Rio Grande, which is true to its Mexican name, Rio Bravo (*bravo* meaning ‘rough’, ‘stormy’). However, various sources point out the significant increase (over 100%) in the number of victims over the last 15 years, especially as a result of border control operations such as Operation Blockade (or Operation Hold-the-line) and Operation Gatekeeper, which began in 1993 and 1994 respectively.



The subject has been analyzed on different levels, in academia and by official bodies, lawyers, foundations and migrant support organizations. Karl Eschbach and colleagues, from the Center for Immigration Studies at the University of Houston, began to publish their seminal work on the subject in 2001; Cornelius (2001), Belinda Reyes (2002), Scharf (2006), Sapkota *et al* (2006), and Marroni and Meneses (2006) have continued in the line of academic research. It has also been analyzed in official documents, such as the case presented in 1999 before the Inter-American Commission on Human Rights (IACHR) regarding the deaths caused by Operation Gatekeeper, and the United States Government Accountability Office (GAO 2006) Senate report, which provides recent information, evaluation and analysis on border crossing.

In this paper, we aim to reconsider the subject of death at the border in the North American migration corridor, update the existing information, propose a new analysis perspective and discuss the problems in general, from a human rights perspective. Our main argument is that current US migration policy explicitly seeks to dissuade migrants from crossing by increasing the costs and risks of irregular crossing. By diverting migratory flows towards wilder and more desolate areas, where crossing entails clear risks, the US authorities are submitting migrants to a kind of social Darwinism in which only those who are the strongest and have greater resources manage to overcome the dangers and reach their destination. Moreover, we maintain that there is a legal vacuum in international and human rights legislation which prevents the promotion of concrete measures to protect migrants' lives as they attempt to cross into the US via unauthorized entry points.

In the first part of this paper we describe the phenomenon of the deaths on the border from statistical information that reveals that the measures implemented have not led to significant changes in migratory flows but have resulted in an increase in the level of danger to which migrants are exposed. In the second section, we examine the problem of migrant death from the perspective of international law on human rights and the legal vacuums that exist. Finally, we present conclusions and suggest some tentative avenues for encouraging in-depth debate surrounding this issue in order to mitigate migrant exposure to life-threatening dangers.

THE DEATH OF MIGRANTS EN ROUTE: THE CURRENT STATE OF AFFAIRS

At the beginning of the 1990s, the press, politicians and officials in charge of migration proved what have been called the “unintended consequences” of the 1986 migration reform (IRCA), that is, that the reform did not achieve the main purpose, which was to stop the flow of undocumented migration.



The 1986 migration reform was a watershed in the Mexican migratory pattern, mainly due to the consequences of the massive legalization process and subsequent border control (Massey, Durand & Malone 2002). However, during the early years of the IRCA (1986-1992), the situation remained more or less the same as before. Undocumented Mexican migration continued along its traditional path, undisturbed, the only change being the ever-increasing presence of Central American migrants from El Salvador, Guatemala, Honduras and Nicaragua who, fleeing wars and their consequences, joined the ranks of, and were subsumed by, the Mexican migratory flow.

The greater part of the flow of undocumented migrants used to be concentrated in the Tijuana-San Diego area, from where it was very straightforward to get to San Isidro. Hundreds of migrants would wait for dark to then run to the other side, where the Border Patrol would be waiting for them. It was a game of cat and mouse; hundreds of migrants were caught every night, while others managed to cross (Durand & Massey 2003). Various indicators allow us to assess the limited changes in border control between 1986 (IRCA) and 1993 (Operation Blockade): the number of patrol agents and hours of surveillance increased very slightly, and there was no significant variation in the probability of apprehension. The only element to change was the Border Patrol budget, which doubled, above all for the use of new technology.

TABLE 1

Basic border control indicators from 1986 (IRCA) to 1993 (Operation Blockade)

YEAR	NUMBER OF AGENTS	HOURS OF SURVEILLANCE	PROBABILITY OF APPREHENSION	BORDER PATROL BUDGET
1986	3,683	2.4 million	0.301	150 million
1993	3,965	2.7 million	0.325	354 million

Mexican Migration Project. <http://mmp.opr.princeton.edu/> 2007

Nonetheless, US press and politicians began to demonstrate their alarmed concern regarding the border-crossing situation. Undocumented migration, traditionally veiled, had become visible, primarily thanks to the televised reports of how cheap and easy it was to cross the border, especially in the San Diego-Tijuana area. It consequently became clear that the 1986 migration reform (IRCA) did not fulfill its purpose of stopping the migratory flow.

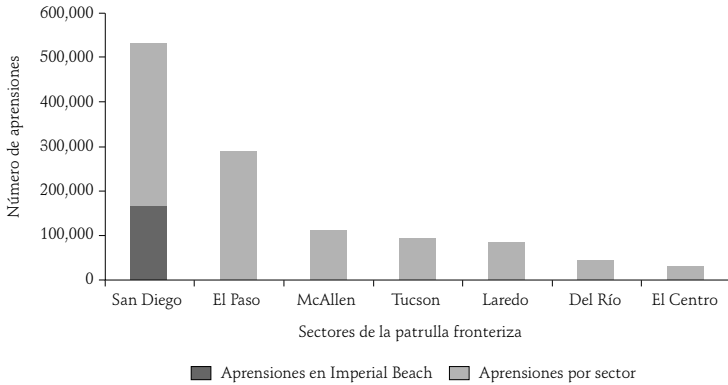
The IRCA approach was, nevertheless, well-structured. The problem was that it was not properly put into practice in all four dimensions: amnesty (LAW), special workers (SAW), border enforcement, and interior enforcement. Bureaucracy was very effective in terms of the legalization process, granting documents to 3.2 million previously undocumented workers (LAW and SAW), of which 2.3 million were Mexican. However, little was done in the first few years regarding border enforcement and practically nothing in terms of interior enforcement and em-



ployer sanctions for hiring undocumented workers (Massey, Durand and Malone: 2002; Durand and Massey 2003).

FIGURE 1

Apprehensions at different border sectors, 1993

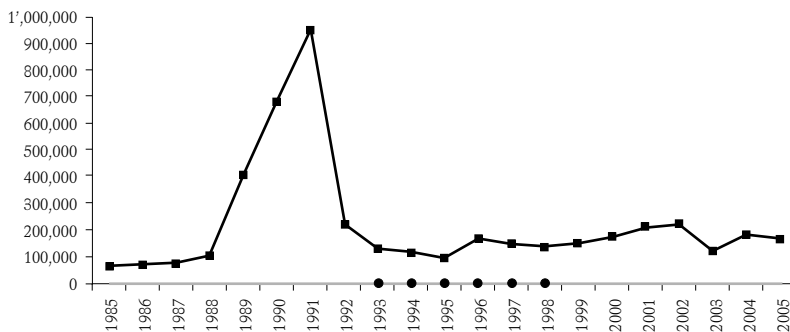


Source: INS, 1995.

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FIGURE 2

Legalized Mexican migrants 1985-2005



Source: data taken from official information systematized by the Mexican Migration Project: <http://mmp.opr.princeton.edu/>



Following various decades of debate, the so-called *Texas Proviso* (1951), which exempted employers from sanctions for hiring undocumented workers, was repealed. The legislation changed with the IRCA, but employers easily evaded the legal responsibility of hiring undocumented workers, as they were unable to determine or validate the authenticity of documents. Various pilot programs exist to verify document authenticity and SSNs (Social Security Numbers) but they are limited and have provided few results (Martin & Millar 2002).

Undocumented workers became clandestine migrants as in practice they had fake documents that they bought at reasonable prices from the forgery mafias. Once they crossed the border they could rest at ease as practically no one would bother them (Massey, Durand & Malone 2003). In 1995, the INS deported only 12,000 undocumented workers from their places of work (Martin & Miller 2002), while 1.340.000 (less than 1%) were deported at the border (Mexican Migration Project 2007). Operation Vanguard, which aimed to control the undocumented population in the meatpacking plants, found 4,500 irregular cases in 40 plants in 1999, but only deported 34 workers. The industrialists accused the Immigration and Naturalization Service (INS) of wanting to lead them to bankruptcy (Martin & Millar 2002).¹

It was not until 1993 that serious border enforcement measures were taken. In El Paso, Texas, Silvestre Reyes, the regional Border Patrol District Chief, launched a pilot program called Operation Blockade, also known as Operation Hold-the-line. It seemed to be a personal initiative that was not part of any general program. However, the sudden success of the measure, which consisted of intensive border patrolling in urban areas, led it to become official US policy (Cortés 2003).

Thus, the budget was increased in 1994 under President Clinton's government, and a national Border Patrol strategic plan, based on a control paradigm of "prevention through deterrence", was launched (IACHR 2005; GAO 2006). It seems that military advice was sought to redefine control actions. The recommendations received were to radically change the strategy. It was no longer priority to detain and deport the undocumented but rather dissuade them, "...detering then rather than trying to apprehend at the border or in the interior" (Wayne Cornelius 2001).

The El Paso model was to be followed, that is, intensive border patrolling in urban areas; thus, the undocumented migrants would cease to be "visible", choosing more remote, difficult and dangerous routes (Cortés 2003) and the press, politicians and certain sectors of society could sleep in peace.

A year after the launch of the El Paso operation, Operation Gatekeeper was launched in 1994 in the San Diego-Tijuana area, which was the area with the most undocumented migrant movement (see Figure 1). The result was strikingly

¹ Raids have now multiplied and are more effective. More than 1,300 undocumented immigrants were captured in southern California in 2007. *La Opinión*, October 4th 2007.

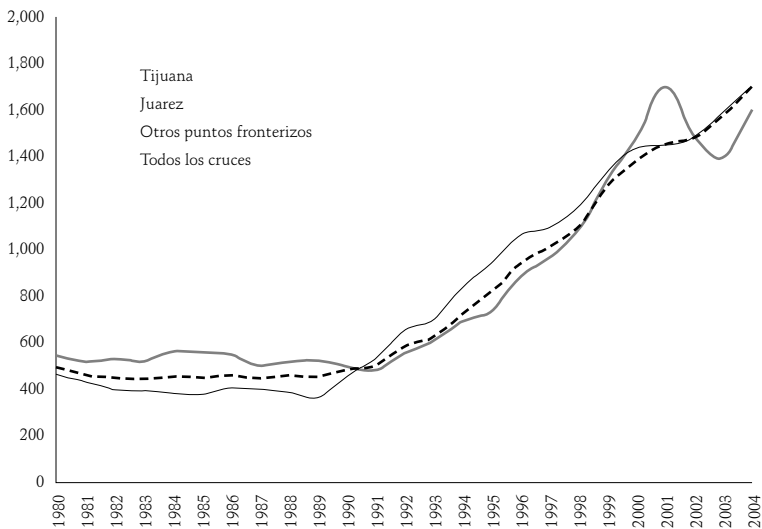


successful in terms of the significant decrease in the number of apprehensions. Migrants had to abandon their meeting point known as the soccer field and the Zapata Canyon route, switching to *el Bordo* (“the edge”), a stretch by the coast. Walls were built in the area, eventually fencing off Tijuana’s neighbor, including part of the sea. Migrants had to move to other areas and the number of apprehensions thus increased elsewhere.

The consequences, in this case foreseen, once more became obvious. The channeling of the migratory flow through deserts and mountains began to take its toll in lives and in dollars. Deterrence by increasing costs and physical risks began to yield results (see Figure 3).

FIGURE 3

Cost of *coyote* services on the Mexican border 1980-2004.



Source: Mexican Migration Project: MMP118 <http://mmp.opr.princeton.edu/>

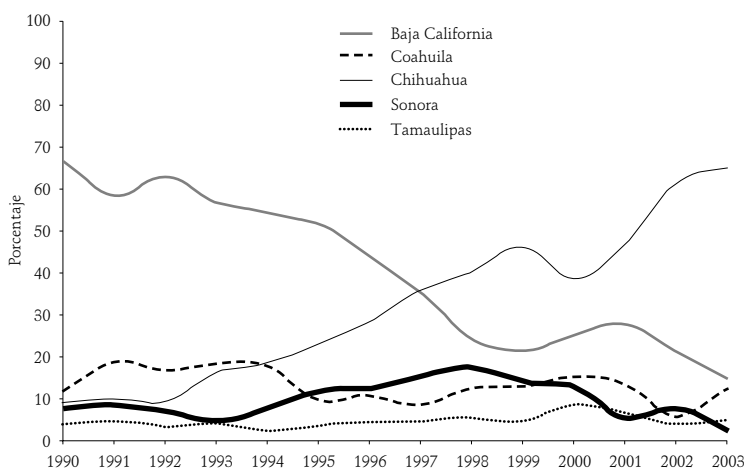
Among first to note and denounce the situation were researchers from the *Center for Immigration Research* at the University of Houston. They began opening the way, collecting quite disperse information that was not reliable and often not comparable. Nonetheless, once the criteria were defined, they were able to establish that 180 deaths were recorded in 1993 and that the number increased to 370 by 2000, following the implementation of border control operations (Eschbach, *et al.*, 2003). With more reliable data sources and DNA records, the Mexican Ministry for Foreign Affairs informed that 443 migrant deaths on both sides of the border were recorded in 2005 and 425 in 2006 (*La Jornada*, April 23rd 2007). Migrants who died in the US interior, in car accidents or in airtight trailer-containers, are not included in these figures, nor are the Central Americans who passed through Mexico and died along the way (on the “route of death”), about whom very little is known (IACHR 2004).



As foreseen, apprehensions dropped significantly in the urban areas of San Diego and El Paso and increased considerable in the Tucson, Yuma and El Centro areas. The main objective of redirecting the flow towards more dangerous areas had been achieved, and corpses began to be discovered. Based on data from the EMIF survey, Anguiano (2007) documents the change in migrant deportation, even within Sonora. Deportations were concentrated in the Nogales area (1995-2000) and then in Sásabe, in the Altar desert region (2000-2005).

According to MMP data, the Baja California pass, adjacent to California, ceased to be the main crossing point for undocumented migrants in 1996 and the state of Sonora began to become uncharacteristically important as of 1993. 70% of the undocumented population that crosses in the area is concentrated in these two states. The other border states of Chihuahua, Coahuila and Tamaulipas maintain a constant tendency of close to 10%. Other sources confirm these same tendencies (Eschbach *et al*, 1999, 2001; GAO, 2006; Anguiano, 2007).

FIGURE 4
Mexican states crossed by undocumented migrants, MMP
Data Base of 114 communities, 2007



Source: Data taken from the Mexican Migration Project, MMP114, 2007.

Despite having demonstrated with reliable data the significant increase in migrant deaths as a consequence of the application of new migratory policy, the US government does not feel responsible and alleges that the responsibility falls on the migrants, as they decide to risk crossing at unauthorized points. In other words, nature does its job and thus the migrants themselves are responsible, taking risks by entering dangerous zones. It is a kind of natural selection process whereby the strongest, those with better training, the fittest and who have greater resources can survive the challenge. On several occasions, migrants themselves accept having to abandon their companions who, because of accidents,



were unable to continue walking, or would slow down the whole group. It is often women and children who are most at risk (Marroni & Meneses 2006).

Statistics confirm that the natural landscape is the main cause of migrant death. Dehydration and hypothermia hold first place followed by natural accidents and poisonous animal bites. According to GAO statistics (2006), traffic accidents cause the most deaths at the border (35%), followed by exposure to extreme temperatures (23%). It is interesting to note that official GAO statistics (2006) highlight a notable reduction in violent deaths.² GAO data (2006) indicates that the proportion of deaths by murder (14%) is slightly below deaths by “legal intervention” (15%), that is, deaths caused directly by the Border Patrol. In spite of an agreement between Mexico and the US on the avoidance of the use of lethal weapons, deaths caused by US agents are a constant feature. According to the press, self-defense against the attacks of migrants who throw stones is the main argument.

Aware of these problems, there are humanitarian organizations that help migrants by providing signposts and large containers of water for their use. According to Humane Borders, an organization that has helped migrants at the border for several years, June, July and August are the most dangerous months in the Sonora Desert due to high temperatures. The highest number of deaths is registered in these months; as well as the high temperatures, this period coincides with a natural increase in migratory flow, due to the increased demand for workers during the summer.

Drowning is another significant cause of death. The fact that close to 15% of deaths are by drowning can be attributed to many factors. There are currently few options for migrants, they either cross the Rio Grande or take their chances in the desert. The river does honor to its Spanish name *bravo*, and like many rivers of little volume, seems calm on the surface but hides whirling undercurrents. In the words of Amador Lira in his ex-voto offered to the Virgin of San Juan de los Lagos, crossing *el peligroso río en Texas*, “the dangerous river in Texas”, is a miracle that one should give thanks for (Durand & Massey 1995). Drownings also occur in California. Channeled away from traditional crossing points, migrants now take their chances at the All-American Canal (53 miles) and the New River, both of which are very dangerous. 177 migrant deaths by drowning were recorded in California between 1995 and 2000 (Cornelius 2001).

The US-Mexican border is one of the most dangerous borders in the world, with an average of 1.3 deaths per day occurring there. The problem is more pronounced because of the growing militarization of the border, given the presence of a greater number of Border Patrol agents, backed up by 6,000 National Guard members who have been trained for duties very different from guarding and operating a border. The situation has become more serious due to the paramilitary

² See http://www.gob.mx/wb2/egobierno/egob_grupo_beta



groups, especially in Arizona, who strive to prevent undocumented entry into the US and who take it upon themselves to aid Border Patrol duties.

Paradoxically, the results are not promising. The balance of various indicators in different periods allows us to conclude that the solution does not lie in increasing the number of patrollers, surveillance hours and resources. In fact, the strategy has multiplied surveillance points, scattered flows, and made the panorama much more complicated. More apprehensions were made in 1986 with fewer agents than 20 years later with three times the number of staff.

TABLE 2

Border Patrol performance indicators for 1986, 1994 and 2005

YEAR	BORDER PATROL MEMBERS	SURVEILLANCE PER MILLION HOURS	APPREHENSIONS (EVENTS)	COYOTES CAPTURED	BOSTAR RESCUE AGENTS
1986	3,693	2.4	1.671.458	19,274	
1994	4,226	3.1	1.040.200	14,143	
2005	11,106	9.7	1.023.930	16,074	164

Source: Mexican Migration Project data: <http://mmp.opr.princeton.edu/>

This panorama concerns the US authorities who have tried to improve the situation and change their image. The main problem is that the same organization carries out two contradictory activities: on the one hand it pursues migrants and on the other, aims to rescue them. 164 agents were assigned in 2005 to BOSTAR (Border Patrol Search Trauma and Rescue) to rescue migrants in danger (GAO 2006), which is nothing compared to the more than 11,000 agents guarding the border. Nonetheless, the authorities are aware of and dealing with the problem, with some progress in terms of recording deaths in the National Center for Health Statistics (NCHS) and with rescue programs such as the Border Safety Initiative Tracking System (BSITS). This ambiguity in some organisms also occurs in Mexico with *Grupo Beta* on the southern border with Guatemala, where staff are supposed to protect, assist and guard the undocumented immigrants who travel through Mexico.

We must add society's apparent schizophrenia to that of the government. On the one hand, there are humanitarian organizations who try to help migrants and prevent deaths and on the other, anti-immigrant groups who wish to take justice into their own hands have multiplied. While Humane Borders, Samaritan Patrol, *Paisanos al Rescate* and other volunteers provide migrant support and rescue migrants in danger, the Minute-Men, American Border Patrol, American Resistance, and the Send-A-Brick Project among many others, report, harass and persecute migrants. Something similar occurs in the US interior, where some counties and cities have legislated punitive measures against undocumented migrants and in others, the local authorities protect workers and operate like sanctuaries (Hopkins, 2007).



The issues surrounding death at the border are riddled with contradictions, tensions and conflicts, partly because the subject and its reality find themselves on uncertain grounds where the responsibility for the deaths and the content and extent of migrant rights is open to opposing interpretations, which leads to no one taking responsibility for the death of innocent people. The right to free passage, a constitutional right in the overwhelming majority of states enters into conflict with the states' right to control and guard its territory. Another point of conflict is between labor supply and demand, which traditionally has been understood as a class struggle and in the context of labor migration between nations, moves within the parameters of an asymmetric bilateral relationship.

Another source of tension has to do with the participation of multiple actors, which dilutes responsibilities. We can easily identify eight different actors in the case in hand: migrants, the two governments involved, both sides of labor supply and demand –migrants and employers–, migrant support organizations and anti-migrant organizations, and finally, the intermediaries, that is, the coyotes, smugglers or *polleros*. In this tangled web of institutions, groups and people, it seems that no one is guilty of anything.

Smugglers clearly operate on the edge of criminality; however, the “crime” is committed in the moment that the *coyote* crosses the border. They have the right to free passage, to transport, accommodate and guide people while on their own territory, especially when the payment for the service takes place once the crossing has successfully taken place and not before. In the majority of cases, it is a service that is guaranteed and required by the migrants themselves. In strict legal terms, the coyotes commit an offense when they cross the border and they cannot be persecuted in their country of origin. In theory, the intention to commit a crime cannot be punished. It seems that the border context generates situations where the limits for the exercise of power are not clear and, consequently, there is a series of legal vacuums.

On top of all this, the environment now plays a role. This was the US government's argument in response to the lawsuit presented at the IACHR, in which it was affirmed that the deaths at the border can be attributed to the fact that people are ill-prepared to cross difficult terrain, to the coyotes for taking them to the worst areas of the desert; the state cannot be held responsible for the lay of the land where illegal activities take place, and the final decision rests on the individual who is prepared to take risks (IACHR, 2005).

In this race towards a better quality of life for individuals and their families, the fittest survive, those who have greater resources, those who are better prepared, those who have the best guides, all in all, those who hold “the evidence”, in the vast majority of cases.

This is why we must speak of die-offs on the border and not death, which usually has explainable causes. When we speak of die-offs, there is a reference to the absence of known causes, to the inevitability of the situation, to the condi-



tions of the environment, to a situation that can be attributed to nature and that generally refers to the animal species. Nonetheless, when we are dealing with a human die-off and the principle of “survival of the fittest” is argued, the phenomenon has been characterized as Social Darwinism. Selectivity, a classical topic in the literature on migration, now takes on new meaning.

MIGRATION POLICIES AND HUMAN RIGHTS

From the point of view of the doctrine of human rights, the death of migrants who try to reach a particular destination is a very worrying situation. Beyond the argument that there is no way of attributing responsibility directly to the state for the death of these people, the situation is morally reprehensible and should, therefore, be dealt with. For the purposes of this article, following Jack Donnelly (2003:8), we define human rights as those rights that we possess as members of the human species which allow for a decent life.

Studies of migration from a human rights perspective underline that people who migrate (migrant workers, refugees, asylum seekers) find themselves in a situation of structural vulnerability (United Nations Working Group 1998; Ghosh 2003). This vulnerability can be seen in different ways. During their journey towards the country of destination, migrants are victimized by unscrupulous authorities or by criminal organizations that not only profit unlawfully, but also often abuse, swindle or rob the desperate migrants who hire their services. Furthermore, in their attempts to defeat the surveillance of the authorities, these organizations often expose people, including women, children and the elderly to unnecessary dangers with sometimes fatal consequences.

Traffickers sometimes abandon their clients in the desert or at sea, or transport them in trucks or containers in cramped conditions that can lead to asphyxiation (Kyle & Dale 2001; IACHR 2002). Victimization is mainly produced in border areas characterized by high levels of violence and little State presence (Feldmann and Olea 2004). Another closely related point that increases migrant vulnerability is the desperation for new opportunities, which leads people to take enormous risks.

Migrants are vulnerable in receiving countries as they are often ignorant of laws and the language and sometimes must face open hostility from the local population and/or authorities. Their access to basic economic and social rights is often breached on the basis of their nationality and to a lesser degree, by virtue of their migratory status (Tarán 2000). The situation is particularly serious for undocumented persons, whose legal situation exposes them to greater abuses.

For authors such as Goodwin-Gill (1989), migrant vulnerability stems partly from their relationship to the State, inasmuch as the latter arbitrarily establishes migration policy, determines the set of rights to which these people will have



access, according to notions of community and citizenship, and act as protectors and executors of the human rights norms, in spite of the fact that it is often the State itself that violates migrant rights.

TENSION BETWEEN FUNDAMENTAL PRINCIPLES

In the case of the deaths of migrants in transit towards their final destination, in particular the case of those who die on the Mexican-US border, our analysis suggests that given the special circumstances under which they die, the general norms of protection of internal and international law are not effective in protecting their rights. There is a legal vacuum regarding their legal rights both in domestic law and international human rights law.³

The legal vacuum that characterizes the migrant situation is directly linked to the principle of sovereignty. This has been the guiding principle of modern international relations since the signing of the Peace of Westphalia (1648), which put an end to the bloody, religious wars that had ravaged Europe for centuries, and affirmed the principle that the religion of a given State was imposed by its regent. Sovereignty imposes rights and obligations based on the concept of reciprocity; thus, rights, such as total independence in the management of internal affairs, and obligations, such as non-intervention in domestic affairs of other States, arise. Sovereignty applies to a given territory and its population. In virtue of the principle of sovereignty, States – as modern forms of social organization – hold the prerogative of deciding on their internal affairs completely autonomously, with no interference from the outside world (Bull 1977:8-9; Biersteker & Weber 1996, Krasner 1999).⁴ The only restrictions on this principle are obligations of an international nature, ensuing from the ratification of international instruments to which the nation-states subscribe voluntarily in diverse matters such as human rights, the environment, and commercial law (this point will be developed further later).⁵

As a corollary of the principle of sovereignty, States regulate the entry and exit of people at their borders. In this sense, the control of the flow of people (as well as that of information, investment, and commerce), is one of the constituents of the principle of sovereignty. Dauvergne (2004: 592) points out that

³ Our argument is partly stems from conversations with Juan E. Méndez, former Special Rapporteur for Migrant Workers and their Families, IACHR.

⁴ Krasner explains that the concept of Sovereignty consists of at least four fundamental elements: the political-administrative organization and the capacity for control that an authority exercises within a given a geographical space (domestic sovereignty); the ability to control cross-border movements (species, merchandise, and people) (interdependent sovereignty); external recognition (international legal sovereignty) and the exclusion of external actors in domestic affairs (Westphalian sovereignty) (1999: 9).

⁵ The great American jurist, Louis Henkin refers to these exceptions as the voluntary cession of sovereignty on the part of the nation-states (Henkin 1978).



migration control is one of the constituent elements of a nation (others include population, borders, and the monopoly on the legitimate use of violence). Although the delimitation of borders and creation of passports and other elements of migratory control emerged gradually towards the end of the 17th century, strict migration regulation between the geographically independent States that we know today only began in the 20th century (Dauvergne 2004: 591). Nation-states, therefore, hold the power to determine their migration policy according to their needs and requirements. In this sense, highly restrictive migration policies that currently exist can be explained by the existence of a crisis caused by the perception of authorities, the media, and some sectors of the population of overwhelming migration flows (Weiner 1995: 9-12, Loescher 1993:7-10; Teitelbaum & Weiner 1995: 16-26).

However, the faculty to regulate migration flows in a globalized and interdependent context is inserted in an extremely complex social process where diverse actors intervene (States, people, social organizations, business, employers, trade unions and various pressure groups); these actors are characterized by having multiple, often conflicting, interests. The nature and characteristics of migration flows depends partly on the economic, political, social and cultural interests of the States (receiving, transit and sender countries) and partly on the interests of the migrants themselves (economic, family, political) (Weiner 1995; Massey, Durand & Malone 2002; Zolberg 1999).

While carrying out migration policy is a state prerogative, it must be concordant with fundamental human rights norms, both *jus cogens*,⁶ and others derived from the obligations that a State voluntarily acquires by ratifying international instruments of human rights. Thus, States are obliged to ensure that migration control and border surveillance do not become in themselves a violation of human rights. Regardless of their nationality and migration status, States must safeguard the fundamental rights of those under their jurisdiction. Although one cannot demand the whole range of rights (political, economic and social) as a foreigner, especially undocumented persons, this does not mean that fundamental rights such as the right to life or to physical integrity can be transgressed (Ghosh 2003, Taran 2000; Méndez, Olea & Feldmann 2006; IACHR 2002). Sassen argues that in relation to the fixing of their migration policies, States governed by the rule of law are exposed not only to a series of obligations that emanate from fundamental human rights norms but also to the influence of pressure groups, internal and external (1999).

Several international human rights instruments, universal as well as regional, clearly establish State obligations in relation to migrants. The most important is probably the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), which seeks to broaden

⁶ Principles of international law that no nation may ignore, such as genocide or participation in the slave trade.



the protection mechanisms for migrant workers and their families in terms of exploitation in the workplace and legal discrimination; the control of human traffic and the creation of clear guidelines regarding the social benefits that these individuals should have access to. The Convention, however, has low rates of adhesion (only 37 States are party to it) and so far no receiving country has ratified it.⁷ There are further treaties and international agreements that guarantee general rights for everyone and, thus, extend to migrants.⁸

Beyond the existence of these instruments, various authors argue persuasively that existing international law is insufficient and inadequate in protecting the fundamental rights of migrant populations, as there are numerous vacuums and discrimination on the basis of nationality or membership to a given community (on religious or ethnic grounds) (Hill Maher 2004; Agamben 1998; Ghosh 2003; Taran 2000; Farer 1993). Goodwin-Gill holds that migrants, refugees and asylum seekers are not a protection priority and thus their rights are rarely respected (1989:526-8).

Beyond the established obligations in the aforementioned instruments and governments' declarations of good intentions with regards to defending the fundamental rights of those who migrate, the contradiction between State and individual interests has so far been resolved in favor of the former. This stems from the evident power asymmetries between individuals and States; the latter try to control entry flows into their territories, supported by the notion of sovereignty (Watson 1992; Krasner 1999).

In an attempt to regulate immigration, States often violate migrants' fundamental human rights. While arbitrariness can affect regular migrants, the majority of abuses and arbitrary acts are suffered by undocumented workers, refugees and asylum seekers. Another series of violations stems from the actions of private agents, both employers and citizens, who exhibit discriminatory attitudes and exploit disproportionately, without the State investigating events or sanctioning those responsible (Taran 2000; IACHR 2002). On other occasions, States resort to sophisticated strategies in order to conceal these violations (Feldmann & Olea

⁷ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, New York, December 18th 1990. <http://www.ohchr.org/english/countries/ratification/13.htm>

⁸ See the United Nations Universal Declaration of Human Rights (1948); the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966), the International Convention on the Elimination of All Forms of Racial Discrimination (1965), among the most relevant. Regional instruments such as the European Convention on Human Rights and Fundamental Freedoms, the American Declaration of the Rights and Duties of Man (1948) and the American Convention on Human Rights (1978) contain various clauses that protect the rights of these people. More specifically, Convention No. 97 (revised) of 1949 and No. 143 of 1975 of the International Labour Organization mandate protection for migrant workers and their families. However, these conventions have been ratified by few countries (41 in the case of No. 97 and 18 in that of No. 143). Similarly, the United Nations Convention against Transnational Organized Crime and the Protocol against the Smuggling of Migrants by Land, Sea and Air include articles relative to the protection of migrants, victims of this type of illicit acts (IACHR 2002, Bosniak 1990).



2004). Human rights violations against immigrants are often the result of a State's deliberate intention to discourage immigration (Loescher 1993; Farer 1993). It is interesting to note that while States try to control the entry of foreigners into their territory, at the same time they advocate the elimination of any kind of restriction on people leaving their home countries (Zolberg 1981 & Dowty 1994).

MIGRATION CONTROL OPERATIONS AND HUMAN RIGHTS

The death of migrants on the border constitutes an enormous challenge to those who aim to provide physical and legal protection to migrants, as the reasoning behind the abuses stems, on the whole, from the discretionary nature of the regulation of migration processes (Ghosh 2003; Méndez, Olea & Feldmann 2006; Goodwin-Gill 1989). In the case of the deaths on the Mexico-US border, the policy of prevention through deterrence has caused a channeling of migration flows towards remote, uninhabited areas, characterized by highly dangerous terrain (Spener 2001, 2004, Cornelius 2001; Eschbach *et al.*, 1999; Massey, Durand & Malone 2003). Various authors attribute the deaths to this policy (Smith 1998, Navins 2002, Cornelius 2001, Massey, Durand & Mallone).⁹

Regardless of whether the deaths are the direct or indirect result of a (public) migration policy, it is quite difficult to establish state responsibility in this case as there is a clash of rights: on the one hand, the state prerogative of regulating migration flows to its territory and on the other, the right of persons to migrate, their right to life, to work and to personal integrity. The challenge is even greater as we are in the presence of a collision between fundamental norms: the right to life vs. the principle of sovereignty. As a result of this tension, it is difficult to determine if the responsibility for the deaths is attributable to States (by redirecting flows towards dangerous terrain or expelling migrants) or, on the contrary, that the migrants are responsible for their predicament by taking excessive risks.

The IACHR recently dealt with the situation of the victims of the Mexico-US border in the case of Victor Nicolas Sanchez *et al* (Operation Gatekeeper) against the United States.¹⁰ The IACHR analyzed a petition on behalf of Mr. Sanchez and 354 other Mexican nationals who had died attempting to cross the border between 1995 and 1999.¹¹ While the IACHR rejected the petition against the United

⁹ Rodríguez points out that there were deaths on the border before Operation Gatekeeper, although he acknowledges that their number was considerably smaller.

¹⁰ Víctor Nicolás Sánchez *et al* (Operation Gatekeeper) vs. the United States, October 27th, 2005. <http://www.cidh.org/annualrep/2005eng/USA.65.99eng.htm>. The petitioners were Mr. Jordan Budd of the American Civil Liberties Union of San Diego and Imperial Counties, Ms. Claudia Smith of the California Rural Legal Assistance Foundation, Mr. Paul L. Hoffman of the law firm of Bostwick & Hoffman, LLP, and Associate Professor William Aceves of the California Western School of Law.

¹¹ Only 240 victims were accredited; the identity of the remaining 115 could not be established.



States on procedural grounds,¹² the arguments of the parties, as well as the “Concurring Opinion” of the ex-President Clare Roberts (the Antigua and Barbuda jurist), provide an interesting starting point for the analysis of this problem.

The petitioners alleged that the State had incurred in a violation of its international obligations as a result of Operation Gatekeeper, specifically the obligation of protecting the right to life, liberty, and personal security (IACHR 2005: paragraph 33). Furthermore, they argued that the State deliberately implemented its migratory policy in such a way that “abused its right to protect its borders and its human rights obligation” and which would lead to the death of border-crossers (IACHR 2005: paragraph 30). The petitioners also claimed that the policy violated the principle of good faith in the implementation of the United States’ international obligations, which led to an abuse of rights (IACHR 2005: paragraph 32). Finally, they assert that the State’s obligations “exist regardless of the purported culpability of migrants seeking to enter the United States illegally” (IACHR 2005: paragraph 35).

The State replied that there was no evidence that its action had been deliberate and much less that it had sought to cause deaths as a deterrent to potential migrants who might wish to enter its territory in the future. As proof, the United States pointed out that concrete measures had been taken to assist crossers, such as the establishment of search and rescue brigades which seek to protect migrants, even when they are, in the State’s view, committing an illegal act by entering its territory in an irregular fashion (IACHR 2005: paragraphs 40, 41, 42). Thus, the United States contended that it could not be held responsible for the decision of individuals to take the risk of crossing the border at unauthorized points. The United States argued that “the right to life does not impose an affirmative obligation for the State to somehow prevent all loss of life”, and that its actions in migratory matter are based on reasonable considerations (IACHR 2005: paragraph 43).

Clare Roberts held a similar view, expressing that while States must reconcile their migration policy in conformity with fundamental human rights norms, they have historically been afforded considerable discretion under international law to control the entry of foreigners into their territory. Roberts argued that in this case, individuals are responsible for their decision to hazard the journey; therefore, the State could not be held responsible. Roberts expressed that while the situation did not entail a violation of international human rights law on the part of the United States, the said State, along with others in the region perhaps had a moral obligation to make concerted efforts to alleviate the conditions that contributed to these deaths (IACHR 2005).

The petition before the IACHR clearly proves our point, in that the problem concentrates on the existing tension between opposing principles in this kind of

¹² The IACHR declared the petition inadmissible for failing to satisfy one of the basic requirements, the exhaustion of domestic remedies requirement (article 31 of the IACHR statute).



case. As the death ensues from a legal act, it is difficult to prove state responsibility. If there is a violation, it is a negative externality derived from a legal action such as border control, ensuing from a basic right that governs international life: sovereignty. The offense, therefore, is not clearly specified either in domestic US law or international human rights law.

However, while recognizing that we are in the presence of a legal vacuum, since there is no clear norm that specifically prohibits reinforcing borders in order to control migration flows, and that it is, furthermore, very difficult to prove to the authorities' express intention to divert migration flows in order to create a negative precedent (the death of persons) to deter potential migrants from crossing the border, there is an argument of a general nature that can be used to determine State responsibility for deaths. It is related to specific State obligations rather than an alleged act of omission.

In its response to the charges made by the petitioners, it is precisely the affected State that argues, not without reason, that it is responsible for making all reasonable (and necessary) efforts to minimize threats to life arising as a result of a policy of a general nature. It applies to everyone, regardless of nationality or migratory status. Goodwin-Gil argues that in terms of human rights, the distinction between nationals and foreigners is irrelevant (1989: 531).

The Inter-American Court on Human Rights has referred to this point in particular, highlighting the obligation of the protection of the right to life through measures of prevention (Medina 2003: 89-99). In the case of *Velásquez Rodríguez vs. Honduras*,¹³ the Court expressed that the State has the obligation to take specific preventive measures to safeguard the right to life. According to the Court, this should comprise various measures, from political, administrative and legal, and even cultural (educational) measures that safeguard the right to life and impose sanctions on those responsible for violating it. In this sense, Medina finds that it is from such logic that prevention is likened to guaranteeing this fundamental right (Medina 2003: 91). Medina argues that, as the State holds the monopoly on the use of legitimate force, "the norms that regulate its use must be devised with great care in order to prevent [an] abuse" that results in the death of a human being, be that deliberate or the result of negligence (Medina 2003:92).

The Human Rights Committee¹⁴ reasoned in a similar fashion to the Inter-American Court. In a general comment on the meaning and scope of article 6 of the Covenant on Civil and Political Rights regarding the right to life, the Committee noted that the right to life has often been interpreted too narrowly. The "inherent right to life", argued the Committee, cannot be understood in a restrictive manner, but rather entails *positive* actions on the part of the State in order to guarantee its full enjoyment (Human Rights Committee 2004:128).

¹³ *Velásquez Rodríguez*, Sentence of July 29th, 1988, Inter-American Court of Human Rights (Ser. C) No. 4 (1988). <http://www1.umn.edu/humanrts/iachr/C/4-esp.html>

¹⁴ The Human Rights Committee is a body of 18 outstanding jurists that monitors implementation of the International Covenant on Civil and Political Rights (Donnelly 2003: 133).



Following this reasoning, in this case, it can be said that the responsibility of proving that migration policy is reasonable and does not lead to committing potential violations of human rights falls to the State. In other words, the burden of proof falls to the State, who has to prove beyond reasonable doubt that its policies do not constitute an infringement of fundamental rights. From our point of view, the United States fails to pass the test, since it has not taken the necessary precautions to avoid the deaths. The fact that its policy may not have been deliberate does not exempt it from responsibility, especially if, seeing that the number of deaths has increased significantly, no thorough measures were taken to stop them continuing. Néstor Rodríguez (2007: 20) suggests in a very interesting manner that there is a moral responsibility on the part of the bureaucratic state agent, in this case, the Department of Homeland Security,¹⁵ for designing and implementing a policy with unintended (negative) results.

Lastly, it is worth questioning up to what point there is responsibility on the part of the sender state, in this case, Mexico. Has Mexico taken the necessary provisions in order to avoid its nationals perishing while attempting to cross the border? Some authors propose the suggestive theory that the violations of economic, social and cultural rights in the states of origin are a push factor for migration (Gzesh 2006).¹⁶ From this point of view, Mexico also holds its share of responsibility. Another relevant strain regards the responsibility of the states of origin, transit and destination, in combating the networks of smugglers and traffickers of persons, who put migrants' lives in danger. In this case, in relation to Mexico, several works show that this does not seem to be true (Spener 2001; IACHR 2004) and that there is a series of legal contradictions, interpretations, vacuums and anachronisms.

CONCLUSIONS

The death of migrants who try to reach a destination that offers them a decent standard of living is unacceptable. Hundreds of people die every year in different parts of the globe. There is little information regarding those who drown at sea, but those who die by risking rugged terrain and extreme weather, and those who are abandoned or murdered by criminals or traffickers can be traced and counted. The desperation to escape miserable conditions in their communities leads these people to take enormous risks, in an attempt to defeat the surveillance of state agents. Beyond the evident physical and psychological resistance and high pain threshold, the risks associated with the migrant's odyssey magnify the structural vulnerability suffered. Under these conditions, only the strongest survive.

¹⁵ From 1993-2003 the responsibility fell on the Immigration and Naturalization Service.

¹⁶ See Feldman & Olea 2004 for the argument that Mexico has a similar policy on its southern border in that it leaves control in the hands of private agents who victimize migrants and thus inhibit migration.



The vicissitudes that would-be border-crossers face injure fundamental rights such as the right to life and physical integrity. There is very little protection for them because of inadequate legal recognition of migrants' human rights. Current international law is insufficient and has many vacuums which prevent the full enjoyment of migrants' fundamental rights. In general, there is no international regime that regulates the massive migration flow in an ideal and humane way.

In the case of the deaths of those trying to enter a given territory in an unauthorized manner, we have argued that there is a clash of fundamental norms: on the one hand, the right to life, to physical integrity, to work, and to freedom of movement, and on the other, the right of States, stemming from the principle of sovereignty, to regulate migration flows. International society has been unable to resolve this contradiction by means of progress in institutionalism that leads to obtaining both principles together in harmony, that is, respecting the prerogative of States to regulate migration flows, but safeguarding the fundamental rights of the thousands who migrate.

The lack of a solution to this problem is expressed in the absence of a legal framework, both in domestic and international human rights law that protects migrants' life and integrity. There is no specific norm that limits the way in which states regulate entry into their territory and guard their borders. There is only a general obligation to carry out all reasonable (and necessary) efforts to reduce possible threats to life, suggested by a general policy. The problem becomes more serious as there is currently growth in the flow of irregular migration all over the world, especially from poor southern countries towards northern economic and industrial powers. At the same time, state controls and restrictive migratory policies have intensified. The economies of central countries demand workers, cheap labor, and provide migrants with work; but the states do not recognize migrants' human and labor rights. In this context, a profound review of international legislation to fill the numerous legal vacuums that prevent migrants fully enjoying their fundamental rights is required.

As there is no adequate legislation, it is of paramount importance to seek a rapid solution to this problem, for ethical reasons. There should be tangible progress on the part of the states to end this dreadful situation. This requires great leadership and vision on the part of the authorities of various states, especially receivers, who are vulnerable to pressure from groups who demonize migrants.

With imagination and political will, it could eventually be possible to create a framework that provides guarantees to the State but stops the chain of deaths, not only on the Mexico-US border but also at other critical points.

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