Seeking Breaches in the Wall: An International Human Rights Law Challenge to the Texas-Mexico Border Wall

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INTRODUCTION

In the name of immigration control and national security, the U.S. began a massive project in 2006 to build physical barriers along segments of the border between the U.S. and Mexico with a mandate to construct 670 miles of reinforced wall. Opposition to the portions of the wall built along the Texas-Mexico border was particularly fierce and led to a number of efforts to challenge construction of the barrier in Texas. Yet, more than 100 miles of wall were built along the Texas-Mexico border in 2008 and 2009. The construction of the wall along the Texas-Mexico border has destroyed important environmental resources, has involved extensive taking of private lands owned by Latino small property owners along the border and has dramatically impacted the means of subsistence and way of life of persons living in border communities, including the members of several indigenous groups.

This Article will explore the human rights approach adopted by academics at the University of Texas to examine the wall project. This paper focuses on the Texas-Mexico border wall, although wall segments also have been built along the border between Mexico and the states of California, New Mexico and Arizona. Construction in Texas, which took place in the last stage of border wall construction, engendered unique opposition that led to the adoption of the human rights approach analyzed in this article.

This paper will first provide background on the legal framework for border wall construction and describe the manner in which the construction project unfolded. It will then explore the rationale for adoption of a human rights advocacy strategy to address the border wall issue. It will also describe the methodology used and the conclusions reached through the human rights analysis. Finally, it will make an effort to reflect critically on the decision to deploy international human rights law to challenge the border wall and on the effectiveness and limitations of that strategy as it played out.

1. This Article uses the terms “fence” and “wall” interchangeably to describe the eighteen-foot high barriers built along the Texas-Mexico border wall to halt the passage of pedestrians.
2. It has been astonishingly difficult to obtain exact information about fence mileage constructed. The mileage estimate for the Texas-Mexico border is obtained by extrapolating from several governmental and non-governmental sources because of the dearth of specific information from the government. See Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 73 Fed. Reg. 19078 (Apr. 8, 2008) [hereinafter DHS Waiver Determination] (laying out approximately 130 miles worth of Texas-Mexico border area as subject to fence construction); Hilary Hylton, Opponents of the Border Fence Look to Obama, TIME, Jan. 21, 2009, available at http://www.time.com/time/nation/article/0,8599,1872650,00.html (calculating the Texas segment of the wall at approximately 110 miles); Jeremy Schwartz, A Divided View, THE AUSTIN AMERICAN STATESMAN, Mar. 7, 2010, at A01 (calculating the Texas segment of the wall at approximately 110 miles); Jackie Leatherman, Border Wall Construction Slated to Begin by End of July, BROWNSVILLE HERALD, May 25, 2008 (placing initiation of Texas-Mexico border wall construction at the summer of 2008); Press Release, Dep't of Homeland Sec., Fact Sheet: DHS End-of-Year Accomplishments (Dec. 18, 2008), available at http://www.dhs.gov/xnews/releases/pr_1229609413187.shtm [hereinafter DHS 2008 End-of-Year Fact Sheet] (asserting that ninety-three miles of wall were constructed during fiscal year 2008, which was the year in which construction began in Texas); GOV'T ACCOUNTABILITY OFFICE, GAO-09-1013T, SECURE BORDER INITIATIVE: TECHNOLOGY DEPLOYMENT DELAYS PERSIST AND THE IMPACT OF BORDER FENCING HAS NOT BEEN ASSESSED 6 (Sept. 17, 2009) [hereinafter 2009 SECURE BORDER INITIATIVE TESTIMONY] (finding that a total of 264 miles of pedestrian fencing were constructed between 2006 and 2009 in all states covered by the project).
I. BACKGROUND ON THE TEXAS-MEXICO BORDER WALL

A. History of Border Wall Legislation

Historically, the U.S. and Mexico have not been separated by a physical wall or other barrier along most of the border. Border bridges and official land crossing points have existed at irregular intervals to control and facilitate cross-border movement. These entry points often include some limited fencing or wall in their immediate vicinity, but there has been no attempt until recent years to wall the border elsewhere. This is not surprising because the border between the U.S. and Mexico is approximately 2,000 miles (3,100 kilometers) long, is irregular in its shape and passes through rough and difficult terrain. From the southeastern point of Texas at the Gulf of Mexico, the border follows the winding course of the Rio Grande River all the way to the crossing point between El Paso in far west Texas and Ciudad Juárez in Chihuahua, Mexico. After El Paso, the border continues west in a largely straight line through broad spans of the Sonoran and Chihuahuan Desert and the Colorado River Delta along the border between New Mexico and Arizona in the U.S. and Mexico. Finally, it goes westward to the San Diego, California and Tijuana, Mexico border area before ending at the Pacific Ocean.

In 1990, the U.S. government began to erect physical barriers along the border but only for a short stretch in the San Diego, California area. In 1996, Congress passed immigration legislation known as the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which included in its provisions a grant of broad authority to the government to construct barriers along the border. This legislation also gives the government the power to take land, through condemnation proceedings if necessary, in the vicinity of the international land border when the government deems the land essential to “control and guard the boundaries and borders of the United States.” In 2005, Congress passed the REAL ID Act, which, among other things, authorized the Secretary of the Department of Homeland


5. See CRS BARRIERS REPORT, supra note 3, at 1 (describing initiation of fence construction efforts, near San Diego, in the 1990s).


7. Id.

8. Id.

9. Id.

10. CRS BARRIERS REPORT, supra note 3, at 2.


12. Id. at § 102(d); 8 U.S.C. § 1102(b).
Security (DHS) to waive all legal requirements to expedite the construction of border barriers.\(^\text{13}\)

Despite this legislation, the U.S. government did not build barriers outside of the San Diego area. Congress then passed the Secure Fence Act of 2006, which mandated that DHS construct fencing along five separate and specific stretches of the southern border, including several areas in Texas.\(^\text{14}\) The statute gave detailed parameters regarding the locations in which the wall was to be built, although it did not clarify the total mileage to be constructed.\(^\text{15}\) The legislation still did not envision a border wall along the entire southwest border, but it did provide new impetus for construction of a wall along significant segments of the border.\(^\text{16}\)

Pursuant to the Secure Fence Act of 2006, the government constructed about seventy miles of wall along the Arizona-Mexico border in 2007.\(^\text{17}\) By late 2007, the government had turned its attention to the Texas-Mexico border and began plans to construct more than 100 miles of wall along various stretches of that border by the end of 2008.\(^\text{18}\)

As DHS began the process of surveying properties along the Texas-Mexico border to determine which land the government would seek to take for construction of the fence, Congress acted again on the border fence issue. In December 2007, Congress amended the statute on construction of the border wall as part of the Consolidated Appropriations Act for 2008.\(^\text{19}\) The superseding legislation, in a turnabout, ordered DHS to construct "reinforced fencing" along "not less than 700 miles" of the southwest border of the U.S. but did not dictate where this fencing should be built.\(^\text{20}\) Instead, it left decisions regarding locations for the fence up to DHS.\(^\text{21}\) The legislation mandated that 370 miles of the required 700 miles of reinforced fencing be constructed by the end of 2008.\(^\text{22}\) The revised law also required consultation with those affected by the fence, providing that DHS "shall consult with . . . States, local governments, Indian tribes, and property owners in the U.S. to minimize the impact . . . for the communities and residents located near the sites [where] fencing is to be constructed."\(^\text{23}\) The law also required that DHS consider

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15. See id. (listing specific locations for fence construction by reference to particular points of entry along the border).
16. Id.; see also infra note 49 and accompanying text (noting that the Secure Fence Act required construction along more than 700 miles of the border but the language of the legislation led to differing calculations regarding the exact amount of total mileage mandated).
18. Ralph Blumenthal, Weighing Life with a Border Fence, N.Y. TIMES, Jan. 18, 2008, at A12; see Letter from Hyla J. Hend, Real Estate Division Chief, U.S. Army Corps of Engineers, to Dr. Eloisa Tamez (Dec. 7, 2007) (on file with author) (seeking authorization to conduct surveys on her land for the purpose of construction of the border fence) [hereinafter U.S. Army Corps Letter to Dr. Tamez].
20. Id.
21. Id.
22. Id. at § 564(2)(B)(i).
23. Id. at §564(2)(C)(i) (emphasis added).
alternatives to physical fencing.\textsuperscript{24} Despite the change in approach mandated by the new legislation and the greater flexibility afforded DHS, the government moved forward with its previously existing plans for construction of the wall in Texas. The government did not make significant changes either in the number of miles to be constructed or in the locations of the wall.\textsuperscript{25}

\textbf{B. Border Wall Construction Process}

The wall construction process along the Texas-Mexico border has involved various actors and stages. DHS has the responsibility for border wall construction and has assigned that authority specifically to the sub-component of DHS entitled U.S. Customs and Border Protection (CBP).\textsuperscript{26} Within CBP, the project was assigned to a unit called the Tactical Infrastructure Program.\textsuperscript{27}

At the end of 2007 and beginning of 2008, as plans for wall construction began in Texas, the U.S. government published draft Environmental Impact Assessments pursuant to the laws that normally govern large public infrastructure projects such as this one.\textsuperscript{28} These assessments were widely criticized for failing to identify all of the extensive environmental harms likely to be caused by wall construction and for failing to develop and assess alternatives to the wall, as also generally required by law.\textsuperscript{29} Then, on April 1, 2008, DHS Secretary Michael Chertoff executed a waiver of

\textsuperscript{24} Id.

\textsuperscript{25} 2007 SECURE BORDER INITIATIVE REPORT, supra note 17, at 11 (prepared before passage of the Consolidated Appropriations Act for 2008 and reporting that DHS planned to build 370 miles of pedestrian fencing by the end of 2008); U.S. GEN. ACCOUNTABILITY OFFICE, GAO-08-508T, SECURE BORDER INITIATIVE: OBSERVATIONS ON THE IMPORTANCE OF APPLYING LESSONS LEARNED TO FUTURE PROJECTS 6 (Feb. 27, 2008) [hereinafter 2008 SECURE BORDER INITIATIVE REPORT] (prepared after passage of the Consolidated Appropriations Act for 2008 and reporting that DHS would build 370 miles of pedestrian fence by December 31, 2008); see also Ariel Dulitzky, Denise Gilman & Leah Nedderman, VIOLATIONS ON THE PART OF THE UNITED STATES GOVERNMENT OF THE RIGHT TO PROPERTY AND NON-DISCRIMINATION HELD BY RESIDENTS OF THE TEXAS RIO GRANDE VALLEY 11 (JUNE 2008); DHS, ENVIRONMENTAL IMPACT STATEMENT FOR CONSTRUCTION, MAINTENANCE, AND OPERATION OF TACTICAL INFRASTRUCTURE: RIO GRANDE VALLEY SECTOR, TEXAS 1–2 (Nov. 2007) [hereinafter RIO GRANDE VALLEY DRAFT ENVIRONMENTAL IMPACT STATEMENT] (including maps of locations for fence before the legislation was amended); DHS WAIVER DETERMINATION, supra note 2, at 19078 (showing plans for mileage construction in most of the same locations).


\textsuperscript{27} Id.


\textsuperscript{29} See generally Lindsay Eriksson & Melinda Taylor, The Environmental Impacts of the Border Wall Between Texas and Mexico (2008), available at www.utexas.edu/law/academics/centers/humanrights/borderwall/analysis/briefing-The-Environmental-Impacts-of-the-Border-Wall.pdf (discussing the “detrimental effect” the border wall between Texas and Mexico will have on Texas's wildlife and environment and asserting that the government's environmental study “failed to adequately consider the proposed border wall's indirect or cumulative effects, the effect on wildlife and conservation lands, and meaningful alternatives that could minimize environmental damage.”); Letter from Defenders of Wildlife, Comments on Draft Environmental Impact Statement for Construction, Maintenance, and Operation of Tactical Infrastructure (Dec. 31, 2007).
With a single stroke of a pen, he made it unnecessary for the federal government to fulfill the normal environmental protection requirements. In addition to key environmental laws, such as the National Environmental Policy Act and the Endangered Species Act, Secretary Chertoff waived a myriad of other laws including, for example, the National Historic Preservation Act, the Native American Graves Protection and Repatriation Act, and the American Indian Religious Freedom Act. The waiver announcement applied by its terms to numerous specific stretches of land along the Texas border with Mexico. In these areas, the waiver thus allowed construction on the Texas-Mexico border to move forward without compliance with the numerous procedural and substantive requirements that would otherwise apply to such an extensive project.

Also at the end of 2007, DHS began seeking temporary access to property along the Texas-Mexico border for the purpose of creating surveys and maps. Although the access was temporary, it constituted a taking of land, because it required a temporary and partial relinquishment of land ownership rights to DHS. Some property owners voluntarily granted access to their land, although many did so without full knowledge of the consequences to their property or their rights to demand compensation from the U.S. government for this use of their property. Others refused to grant access voluntarily. DHS sued approximately sixty of those property owners in condemnation proceedings beginning in January and February 2008 to obtain the right to take the land for temporary access purposes. Those sued included individual property owners, city governments that owned property, school districts, and The University of Texas at Brownsville/Texas Southmost College.

30. DHS WAIVER DETERMINATION, supra note 2, at 19078.
31. Id.
32. Id. at 19080.
33. See U.S. Army Corps Letter to Dr. Tamez, supra note 18 (informing Dr. Tamez that CBP would be seeking temporary entry within the following 30 days); 2008 SECURE BORDER INITIATIVE REPORT, supra note 25, at 16.
35. See, e.g., Interview by The Working Group on Human Rights and the Border Wall with Idalia Benavidez, Farmland Owner (near the U.S.-Mexico border west of Brownsville, Texas) (May 2, 2008) [hereinafter Working Group Interview].
36. See U.S. Army Corps Letter to Dr. Tamez, supra note 18 (stating that Dr. Tamez had not permitted access to her land by the government and that legal proceedings were imminent); 2008 SECURE BORDER INITIATIVE REPORT, supra note 25, at 16 (noting that 148 property owners had not given CBP access to survey their land when the government sought agreement from property owners to obtain this access in 2007).
37. E.g., U.S. v. Tamez Complaint, supra note 34; 2008 SECURE BORDER INITIATIVE REPORT, supra note 25, at 16. The cited number of complaints was obtained by searching the federal courts' publicly available electronic database, known as PACER, for all temporary condemnation actions filed at the beginning of 2008 by the U.S. in the U.S. District Courts for the Southern and Western Districts of Texas, which are the courts with jurisdiction over the targeted area.
Once the government obtained access to land, voluntarily or through condemnation suits, CBP worked with the U.S. Army Corps of Engineers to conduct land surveys.\textsuperscript{39} DHS then entered into the next phase of the process. Before it could actually construct border wall segments, it was required to obtain permanent ownership of the property upon which it wished to build. DHS, working with the U.S. Army Corps of Engineers, made offers, mostly in the $4,000–$10,000 range, for the purchase of land.\textsuperscript{40} If property owners did not voluntarily agree to sell portions of their land, DHS initiated condemnation lawsuits.\textsuperscript{41} For example, DHS filed about fifty such lawsuits in the month of May 2008 alone.\textsuperscript{42}

DHS only took ownership of the land upon which it planned to install stretches of the wall, often only a segment of the entire property.\textsuperscript{43} Yet, the construction also often deprived owners of effective use of other parts of their property not purchased by DHS, because residents also lost access to their property on the other side of the wall. For example, in the Rio Grande Valley, the wall does not closely follow the curving path of the river. Rather, it has been built in straighter line segments, which roughly follow the path of levees previously built to protect against flooding from the Rio Grande River.\textsuperscript{44} As a result, large pieces of land along the river banks are cut off by the wall.\textsuperscript{45} Some stretches of fence have been built up to a mile inland from the river.\textsuperscript{46} In a few cases, individual homes or even entire plots of property were scheduled to end up completely on the southern side of the wall.\textsuperscript{47} In many areas, the

\textsuperscript{39} CRS BARRIERS REPORT, supra note 3, at 20.

\textsuperscript{40} See, e.g., Working Group Interview, supra note 35; Declaration of Taking, U.S. v.0.43 Acres of Land and Estate of Pilar Cabrera, Case 1:08-cv-194 (S.D. Tex. May 28, 2008) [hereinafter U.S. v. Cabrera Declaration].

\textsuperscript{41} 2008 SECURE BORDER INITIATIVE REPORT, supra note 25, at 16; U.S. GOV'T. ACCOUNTABILITY OFFICE, GAO-08-1141T, SECURE BORDER INITIATIVE: OBSERVATIONS ON DEPLOYMENT CHALLENGES 16 (Sept. 10, 2008) [hereinafter SECURE BORDER INITIATIVE OBSERVATIONS ON DEPLOYMENT].

\textsuperscript{42} E.g., U.S. v. Cabrera Declaration, supra note 40. The cited number of complaints was obtained by searching the federal courts' publicly available electronic database, known as PACER, for all condemnation actions filed in May 2008 by the U.S. in the U.S. District Court for the Southern District of Texas, which is the court with jurisdiction over the targeted area.

\textsuperscript{43} DHS generally took possession of the land on which the wall was built an additional thirty to sixty feet on each side. RIO GRANDE VALLEY DRAFT ENVIRONMENTAL IMPACT STATEMENT, supra note 25, at 2–7, 44–54.

\textsuperscript{44} See U.S. DEP'T OF HOMELAND SEC., ENVIRONMENTAL STEWARDSHIP PLAN FOR THE CONSTRUCTION, OPERATION, AND MAINTENANCE OF TACTICAL INFRASTRUCTURE, U.S. BORDER PATROL RIO GRANDE VALLEY SECTOR, 1–4 (July 2008) [hereinafter RIO GRANDE VALLEY ENVIRONMENTAL STEWARDSHIP PLAN] (noting that the fence segments roughly follow the Rio Grande levee system); see also Blumenthal, supra note 18 (stating that the fence runs “north of the levees built decades ago to hold back the Rio Grande”).

\textsuperscript{45} Blumenthal, supra note 18; see also N.C. Aizenman, Border Fence Would Slice Through Private Land, WASH. POST, Feb. 16, 2008, at A01 http://www.washingtonpost.com/wp-dyn/content/article/2008/02/15/AR2008021503303_pf.html (highlighting several examples in which the wall will make large portions of land unavailable on the Mexico side of the fence; for one property, 25 of 80 acres of farmland were to be left on the south side of the wall).

\textsuperscript{46} See Aizenman, supra note 45 (noting that stretches of the fence are “located more than a mile inland from the river, cutting off substantial swaths of land”); see also Blumenthal, supra note 18 (stating that the Rio Grande is “now flowing in many places a mile or more to the south” of the levees, which means that the fence cuts off large areas between the river and the levees).

land is already partially disrupted by the existing levees, which are mostly sloping hills that have enough height to block the passage of flood water but still allow passage to the river by people and animals. However, rather than build on, immediately next to, or on the river side of the existing levees, DHS has built another barrier further inland, away from the river side of the levees. The wall is not passable like the levees. The construction has thus left the levees and additional property on the river side of the wall, and there is no ready access to that land.

To calm angry property owners, DHS promised that it would place gates or doors in the wall at some intervals. However, it has never provided specific plans or explanations regarding access to property on the other side of the wall or for the positioning of gates. Finally, in late 2008, when faced with continued questioning on the access issue from property owners as well as the courts, the government provided a brochure that gave a general explanation of the plans for installation of gates. However, the brochure simply stated that a “workable solution” would be provided to ensure access to property on both sides of the levee and said that access would “generally” be available twenty-four hours a day. It did not provide more detail. It

Engineers). Some have suggested that the United States is essentially ceding territory to Mexico. See Robin Emmott, Texan Mayors Threaten Court to Stop Border Fence, REUTERS, Oct. 12, 2007, http://www.reuters.com/article/idUSN1141879320071012 (quoting the mayor of Del Rio, Texas). While this suggestion is probably not technically correct, because the official border between the two countries will remain the same regardless of the placement of the wall, it raises important questions about control and sovereignty of the land on the other side of the wall. A no-man’s land of sorts has been created on the other side of the fence.

48. See Río Grande Valley Environmental Stewardship Plan, supra note 44, at 1–4 (stating that fence segments are placed on the side of the levee facing away from the Río Grande at a distance of about thirty feet from the base of the levee); see also Blumenthal, supra note 18 (noting that the fence runs north of the levees).

49. See Bureau of Public Affairs, Recovery Act Groundbreaking Ceremony, U.S. Dep’t of State, available at http://www.state.gov/r/pa/ei/pix/recovery/groundbreaking/index.htm (including images of the levees) (last visited Jan. 15, 2011); Interview with Barbara Hines, Co-director of the Immigration Clinic, University of Texas School of Law (June 2, 2010) (confirming as a native of Brownsville, Texas, that, traditionally, residents of the Rio Grande Valley regularly walked on and over the levees and even used them as recreational areas for jogging and other activities).

50. See Ildefonso Ortiz, DHS Moves Forward with Border Fence through Orchard and Man’s Heart, Brownsville Herald Nov. 11, 2009, available at http://www.brownsvilleherald.com/articles/moves-104925-border-orchard.html (describing repeated changes in the government position regarding the hours when the gates would be open and where the gates would be placed even though fence construction on the property in question was already underway); Sieff, supra note 47 (including interviews with several landowners—one with property that will fall completely on the south side of the fence and one with land that will be split in half, leaving the property’s farmland on the inaccessible river side of the fence—who sought unsuccessfully for months to obtain assurances from DHS that they would have access to their land after the fence is built); Letter from Gregory L. Giddens, Exec. Dir., Secure Border Initiative, to Rita P. Taylor (Apr. 4, 2008) (on file with author) (stating that roadways through the fence would allow access to her property and attaching a map that shows the roadways but does not show how they will connect with her property); Brownsville’s Bad Lie, Newsweek, Apr. 26, 2008, available at http://www.newsweek.com/2008/04/26/brownsville-s-bad-lie.html (noting that when asked about access to the golf course at the University of Texas at Brownsville, which will be left on the Mexico side of the wall, DHS’s response suggested that plans had not been made for access and that “options might include an electronic gate”); Blumenthal, supra note 18 (indicating that DHS has told concerned local officials that “there would be some kind of gates through the fence, but what kind and where have yet to be specified”).


52. Id.
appears that gates have now been installed on some properties.\textsuperscript{53} However, the gates are not close to one another, requiring residents to travel lengthy distances outside of their property to enter a gate and to return to their property.\textsuperscript{54} In addition, the government has not explained how it made decisions to put gates on certain properties, allowing direct access to the other side of the fence for those particular property owners, but not to install access points on other properties. Obvious questions are also raised about the nature of the gates. DHS has never explained with specificity how the gates will function or whether residents will be required to provide evidence of citizenship to travel around their communities or to enter and exit their own land.

As DHS obtained title to lands along the Texas-Mexico border, construction of the wall began in those areas. The government contracted out the work for the construction of the wall to private companies,\textsuperscript{55} which have carried out this major government project for significant profit.\textsuperscript{56}

Those property owners who did not agree to give up the rights to their land in negotiations with the government will go to trial in federal court to receive a ruling regarding the compensation they are owed by the government for the taking of their land. Those trials will take place long after the construction of the wall on the land in question.\textsuperscript{57}

The change in administration that took place when President George W. Bush left office and President Barack Obama was sworn in as President of the U.S. in January 2009 did not dramatically affect the trajectory of the wall construction project. By the end of the Bush administration, DHS had already indicated that it would not complete construction of the wall by the end of 2008, as required by the relevant statutes, but would instead seek to begin construction or enter into contracts for construction by the end of 2008.\textsuperscript{58} DHS under the Bush administration met that goal.\textsuperscript{59} Construction then continued well into 2009 under the new administration and was still concluding along a few remaining miles of fence into 2010.\textsuperscript{60} All of the

\textsuperscript{53} E-mail from Margo Tamez, (Dec. 21, 2009) (on file with author); Pedestrian Fence 225 U.S. Border Patrol: RGV Sector Project: 0-11, HRL-5014 at Exhibit 3 to Document 10, U.S. v. Tamez, No. 1:08-cv-00351 (S.D. Tex. Sept. 5, 2008) (showing the location of gates on some properties but not others).
\textsuperscript{54} Email from Margo Tamez, supra note 53; see also Ortiz, supra note 50 (discussing the uncertainties about access points and rules applying to the gates).
\textsuperscript{55} Christopher Sherman, Feds Look for Company to Build Border Fence in South Texas, A.P. ST. & LOC. WIRE, June 3, 2008; see 2007 SECURE BORDER INITIATIVE REPORT, supra note 17, at 7 (noting extensive use of commercial contracts to build wall segments after 2007); CRS BARRIERS REPORT, supra note 3, at 23.
\textsuperscript{56} See 2007 SECURE BORDER INITIATIVE REPORT, supra note 17, at 12 (noting that wall construction through commercial contracts cost three times more than construction by government entities); see, e.g., Letter from the U.S. Army Corps of Engineers, Contracting Division, to Keith N. Sasich, Kiewit Texas Construction, L.P. (Sept. 22, 2008) (awarding a contract with a value of more than $30 million for construction of fence in the Rio Grande Valley), available at: http://www.utexas.edu/law/academics/centers/humanrights/borderwall/analysis/foia-army-2008-09-22-2.pdf.
\textsuperscript{57} Christopher Sherman, Gov’t Dismisses Call for More Texas Border Fencing, A.P. (Oct. 9, 2009); see e.g., Order by Judge Hanen, in U.S. v. Tamez, Docket No. 1:08-cv-00351 (S.D. Tex. Oct. 26, 2009) (setting trial for compensation for April 2010 where property was taken and fence built on the land in April 2009).
\textsuperscript{58} 2009 SECURE BORDER INITIATIVE TESTIMONY, supra note 2, at 2.
\textsuperscript{59} Id.
\textsuperscript{60} See Tactical Infrastructure Projects, U.S. CUSTOMS & BORDER PROTECTION,
remaining wall construction originally planned under the Secure Fence Act and the Consolidated Appropriations Act for 2008 was presumably completed by the end of 2010.61

Attempts to make plans for new wall construction have not gained a foothold. In the summer of 2009, some U.S. Congress members sought to mandate new wall construction projects and to appropriate additional monies for that purpose.62 Those efforts failed.63 The buildup of the Texas-Mexico border wall has finally ground to a halt.

C. The Wall

Now that construction of the portions of the wall planned for the Texas–Mexico border is essentially complete, patches of intermittent wall break up the long border between Texas and Mexico. Yet, it is extremely difficult to obtain concrete information regarding the exact locations of all of the wall segments that have been constructed or even the total mileage that the wall now covers along the Texas–Mexico border. The government has not made clear and specific information available, failing to answer basic questions of where and how much border wall exists.64

At every stage of the project, the U.S. government has given differing and diverging numbers for the total length of fence planned or constructed. As noted above, the original Secure Fence Act of 2006 set out specific locations for fencing but did not specify the total mileage of fencing it mandated. Calculations of the total mileage involved varied, but suggested that the law required upward of 700 miles of wall, and at least one government source concluded that the law required 850 miles of wall.65 The Secure Fence Act required at least 300 miles of wall to be constructed


64. See, e.g., Complaint, Gilman v. U.S. Dep't of Homeland Sec. et al., No. 1:09-cv-00468-PLF (D.D.C. Mar. 11, 2009) [hereinafter FOIA Complaint] (bringing Freedom of Information Act claim against CBP and alleging that the government failed to provide adequate information about the fence and locations where it was being built).

in priority areas by the end of 2008. The Consolidated Appropriations Act for 2008 instead required at least 700 total miles of wall and mandated the construction of 370 miles of priority fencing by the end of 2008. In April 2008, DHS Secretary Chertoff authorized a waiver of environmental and other laws to allow for expedited construction which applied to approximately 470-490 miles of the border. Early on in the project, DHS announced that it would build 670 miles of wall by the end of 2008, but DHS subsequently changed its goal. In September 2008, the government set out an alternative goal of having 661 miles either built, under construction, or under contract by the end of 2008.

These varying numbers are further confused by the terminology used by the government to describe the fencing. The legislation—both the Secure Fence Act of 2006 and the Consolidated Appropriations Act for 2008—requires construction of “reinforced” fencing. The term “reinforced fencing” is used to describe both the total miles (700) to be constructed and the priority fencing that was to be completed by the end of 2008. Yet, DHS has eschewed the term “reinforced fencing” and has instead employed the terms “pedestrian fencing” and “vehicle fencing” to describe the types of barriers that it has built. It seems likely that Congress envisioned barriers along the lines of pedestrian fencing when it required construction of “reinforced fencing,” since vehicle barriers are not intended to prevent people on foot from walking right through them. DHS appears to have recognized that the statutes would require more than vehicle barriers, because it always claimed an intention to build 370 miles of “pedestrian” fencing by the end of 2008, which matches the statutory mandate of priority construction of 370 miles of “reinforced” fencing by the end of 2008.

While DHS appears to recognize that the statutory mandates for fence construction require pedestrian fencing, rather than a vehicle fence, DHS never committed to building more than 370 miles of pedestrian fencing by the end of 2008 or by any other date, even though the latest version of the statute requires 700 miles of “reinforced” fencing in total. However, DHS counts both vehicle and pedestrian

68. Press Release, Dept. of Homeland Sec., Statement of Secretary Michael Chertoff Regarding Exercise of Waiver Authority (April 1, 2008).
70. 2009 SECURE BORDER INITIATIVE REPORT, supra note 61, at 9.
73. See, e.g., 2009 SECURE BORDER INITIATIVE REPORT, supra note 61, at 8; Southwest Border Fence Construction Progress, supra note 60.
74. See 2009 SECURE BORDER INITIATIVE REPORT, supra note 61, at 9.
75. 2007 SECURE BORDER INITIATIVE REPORT, supra note 17, at 3; 2009 SECURE BORDER INITIATIVE REPORT, supra note 61, at 8–9.
76. See Consolidated Appropriations Act, 2008, § 564; CBP, TI TIMELINE, supra note 61 (noting CBP goal to have constructed, or to have under construction or under contract, 370 miles of pedestrian fence by the end of 2008); 2009 SECURE BORDER INITIATIVE REPORT, supra note 61, at 21 (noting CBP goal of 358 miles total construction of pedestrian fencing).
fencing when it claims success in exceeding its construction goals. For example, in December 2008, DHS announced that it had completed more than 520 miles of fencing and made no distinction between vehicle and pedestrian fencing. This announcement made it appear that the agency had met and surpassed the statutory instruction that it construct 370 miles of fencing by the end of 2008 and had started to reach the full 700 miles of fencing mandated without deadline by the statute. Actually, the agency had not constructed anywhere near 370 miles of pedestrian or "reinforced" fencing by the end of 2008. Instead, the 520 claimed miles were a mix of vehicle and pedestrian fencing.

At first glance, it might appear that DHS simply used the authority granted to the agency in the Consolidated Appropriations Act for 2008 to make the determination not to construct the full 700 miles of reinforced fencing and to adopt other, more effective, alternatives instead. As will be discussed further below, a serious analysis of the effects and consequences of wall construction and a study of the alternatives would likely have led to a reduction in wall mileage or a halt in construction. However, the government had in fact declared its intention to construct only 370 miles of pedestrian fencing prior to the passage of the Consolidated Appropriations Act for 2008 and has never modified that milestone construction goal for pedestrian fencing by more than a few miles. In addition, the government never announced that it intended to significantly lower the number of "reinforced" fencing miles that it would construct and certainly never stated an intention to use vehicle barriers instead to meet the statutory mandate for total miles of fence to be built.

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77. DHS 2008 End-of-Year Fact Sheet, supra note 2.
78. Id.
80. See 2009 SECURE BORDER INITIATIVE TESTIMONY, supra note 2, at 6 (establishing that DHS had constructed only 264 miles of pedestrian fencing through the project by June 2009). It is worth noting that DHS's figures for total fence construction accomplished under the statutes consistently include 143 miles of fence constructed before the adoption of the Secure Fence Act and the amending appropriations legislation. Id. In addition, DHS's figures appear to be internally inconsistent in a way that suggests inflation of the mileage actually constructed. For example, DHS stated that it had completed 341 total miles of fencing before August 22, 2008, then announced a few months later that it had completed 520 miles of fencing by December 18, 2008, and some weeks later gave a figure of 578 total fence miles completed by December 31, 2008. SECURE BORDER INITIATIVE OBSERVATIONS ON DEPLOYMENT, supra note 41, at 15; DHS 2008 End-of-Year Fact Sheet, supra note 2; 2009 SECURE BORDER INITIATIVE REPORT, supra note 61, at 9. It is difficult to believe that the increases in mileage reported at each interval reflect actual construction in such short time periods. In all of fiscal year 2007, DHS built about 73 miles of fence, and in fiscal year 2008 it built only 93 miles. 2007 SECURE BORDER INITIATIVE REPORT, supra note 17, at 11; DHS 2008 End-of-Year Fact Sheet, supra note 2. It seems unlikely that DHS nonetheless constructed almost 200 miles of fence between August and December of 2008 and another 58 miles in just a period of weeks in December 2008, particularly since the Government Accountability Office had concluded that DHS would face greater challenges in constructing fencing in 2008 on the Texas-Mexico border. SECURE BORDER INITIATIVE OBSERVATIONS ON DEPLOYMENT, supra note 41, at 15.
81. See 2007 SECURE BORDER INITIATIVE REPORT, supra note 17, at 11 (setting goal at 370 pedestrian fencing miles); 2009 SECURE BORDER INITIATIVE REPORT, supra note 61, at 21 (setting goal at 358 pedestrian fencing miles).
82. DHS did set an explicit goal of fence construction along 660 to 670 miles of the border rather than the 700 miles mandated by statute. However, DHS never stated that it had decided to construct only 370 miles of reinforced fencing rather than the 700 miles mandated by the statute. The agency simply conflated pedestrian and vehicle fencing again to make it appear that it had made only a minor reduction in the number of miles to be constructed under the statute. See supra text accompanying notes 67-75.
complete compliance with the statutory mandates regarding fence mileage.\textsuperscript{83} The discrepancy is highlighted here to underline the lack of transparency and accountability that has characterized the U.S. government’s actions in constructing the border wall and not to suggest that a full 700 miles of reinforced fencing should be built. The mileage already constructed has been damaging and ineffective enough.

Despite this extensive confusion and even obfuscation by U.S. government authorities, the most reliable figures indicate that, by the end of 2010, CBP had completed roughly 350 miles of pedestrian fencing and 299 miles of vehicle fencing for a total of 649 miles of fence.\textsuperscript{84} This mileage amount includes more than 140 miles of pedestrian and vehicle fencing built before the passage of the Secure Fence Act and the initiation of the current wall construction project.\textsuperscript{85} It is still near impossible to determine how much of the wall was built in Texas. However, it appears that much of the fencing built between 2008 and 2010 was pedestrian fencing, installed in Texas along more than 100 miles of the border.\textsuperscript{86}

In addition, despite the obvious importance of this information, it is also impossible to determine the exact locations where DHS has built the fence along the Texas–Mexico border. For most of the duration of the wall construction project, the government did not make available detailed maps of locations for planned construction.\textsuperscript{87} Initially, the government made tentative maps available as part of the original draft environmental impact assessments. But those assessments and their maps were never finalized and were withdrawn when DHS Secretary Chertoff waived the applicable environmental laws.\textsuperscript{88} DHS subsequently provided new maps
as part of “Environmental Stewardship Plans” issued in July 2008. However, DHS repeatedly insisted that the various maps were tentative and subject to change until fence construction was actually underway. By the time most wall segments were finally built, the maps were many months old, and DHS has not provided information about the extent to which the wall’s final path followed the projections on the maps included in the Environmental Stewardship Plans.

In late 2009, a map of border wall construction was made available on a DHS website. The latest version of that map is reproduced below. The map provides a general picture of the areas of the border affected by the wall, although it has not been updated since December 2009. It is difficult to translate the map into an understanding of specific areas in which segments of the wall have been constructed. It does not include geographic information that would help pinpoint the exact areas in which the fence has been built. The scale of the map is such that it does not include anchoring landmarks such as towns or state or local parks or reserves. Nor does it include indicators of the length of any of the segments of fence depicted in the map. In addition, while the map shows those areas of the Texas–Mexico border that now include a wall, it does not show the exact location of the physical barrier in terms of distance from the border itself, which is the Rio Grande River. The fence is not built on the immediate bank of the river, yet the map does not show how far inland from the river it is built. The map does not provide information about the specific properties upon which the border wall has been constructed. As the website containing the map specifically notes, “maps and information regarding specific plots/parcels of land are not available at this site.” It is thus extremely difficult to know exactly which property owners and communities are affected and to what degree.

At least the total cost of the fence has now become known. The fencing miles completed cost an average of $3.9 million per mile for pedestrian fencing. The average cost for the fencing mileage completed by private contractors in the final stages of the project increased to $6.5 million per mile. The total cost of fence construction has been approximately $2.4 billion. The U.S. government has also calculated an estimate of the total cost of building and then maintaining the wall over a twenty-year period. That amount comes to $6.5 billion.

89. See, e.g., U.S. DEP’T OF HOMELAND SEC., ENVIRONMENTAL STEWARDSHIP PLAN FOR THE CONSTRUCTION, OPERATION AND MAINTENANCE OF TACTICAL INFRASTRUCTURE, EL PASO, YSLETA, FABENS AND FORT HANCOCK STATIONS AREA OF OPERATION 1–7 (July 2008) [hereinafter EL PASO ENVIRONMENTAL STEWARDSHIP PLAN]; RIO GRANDE VALLEY ENVIRONMENTAL STEWARDSHIP PLAN, supra note 44, at 1.
90. FOIA COMPLAINT, supra note 64; Blumenthal, supra note 18.
93. In late 2010, shortly before final publication of this article, the U.S. Army Corps of Engineers provided more detailed maps of actual fence construction in response to the Freedom of Information Act requests filed by the Working Group. Those maps are available at: http://www.utexas.edu/law/centers/humanrights/borderwall/analysis/foia-requests.html.
94. 2009 SECURE BORDER INITIATIVE TESTIMONY, supra note 2, at 21.
95. Id.
96. Id. at 29.
97. Id. at 19.
D. Widespread Opposition to the Texas-Mexico Border Wall

The U.S. government's construction of a border wall in Texas generated widespread opposition. Border residents and politicians largely united in their vocal opposition to the wall. The mayor of Eagle Pass, Texas called the wall “useless, expensive and potentially damaging.” The president of the University of Texas at Brownsville, Juliet Garcia, noted that the proposed construction on the university’s campus of “an 18-foot high steel barrier between two friendly countries” would “destroy the campus climate.” Students and public school teachers announced their opposition to the wall and organized well-attended protest marches.

98. See, e.g., Controversial Border Fence Hot Issue in Texas Primary, AFP, Feb. 25, 2008; Christopher Sherman, Hostile Reception for Pro-Fence Congressman in Brownsville, HOU. CHRON., Apr. 28, 2008; Miguel Bustillo, A Town Against the Wall, L.A. TIMES, Dec. 17, 2007, at A40 (“Complaints are heard from El Paso to Brownsville, in river towns only a football field away from sister cities in Mexico, where the prevailing culture has long been bilingual and binational, and where everyone knows someone on the other side.”).


101. See, e.g., borderwall, Border Walk, YOUTUBE (Mar. 9, 2008), http://www.youtube.com/watch?v=h2FuIqNPlEs.
Several lawsuits were initiated against the U.S. challenging its actions in constructing the wall. Eloisa Tamez, a vocal property owner who opposed the wall and the taking of her land, initiated class action litigation against DHS. Tamez asserted that the government had failed to properly consult with individuals and communities affected by the wall, to consider alternatives to the wall, or to negotiate regarding the taking of land.\textsuperscript{102} A coalition of mayors from border towns and cities initiated parallel litigation raising similar claims.\textsuperscript{103} The County of El Paso and additional plaintiffs including the Ysleta del Sur tribe brought another lawsuit to the U.S. Supreme Court challenging the constitutionality of the DHS Secretary's waiver of environmental and other standards.\textsuperscript{104} In addition, property owners in Eagle Pass filed litigation against DHS alleging violations of constitutional equal protection rights as well as improper property takings.\textsuperscript{105} A large number of property owners, including Eloisa Tamez, also vigorously fought defensively against the condemnation suits filed by the federal government.\textsuperscript{106}

The construction of the border wall evoked international ire as well, particularly among otherwise friendly governments in Latin America.\textsuperscript{107} Mexico is the country most obviously affected by the construction of the wall. The wall sends a message of antagonism rather than cooperation to Mexico and necessarily creates a negative impact on diplomatic relations between the two countries. In addition, numerous U.S. treaties are affected by the construction of the wall. For example, these treaties govern access to and control of the Rio Grande River, the use of water, and environmental protection along the border.\textsuperscript{108}

The Mexican government has made its opposition to the wall clear. Its official position states: "The government of Mexico reiterates its rejection of this [border wall] project, because it does not correspond to the climate of cooperation and joint responsibility that should exist between our countries, nor does it offer a solution to address effectively the problems that we share in the border area."\textsuperscript{109} The Mexican

\begin{footnotesize}
\begin{enumerate}
\item See generally U.S. v. Tamez, No. 1:08-CV-00351, slip op. (S.D. Tex. Apr. 16, 2009); 2009 SECURE BORDER INITIATIVE REPORT, \textit{supra} note 61.
\item Press Release, Secretaría de Relaciones Exteriores, El gobierno de México protestó ante autoridades de EUA y gestión la inmediata remoción de un tramo del muro fronterizo que se construyó en territorio Mexicano [The Mexican Government Protested Before Authorities from the United States
\end{enumerate}
\end{footnotesize}
government received support for its position from other countries in the Americas. In the fall of 2006, twenty-seven countries voted in favor of a declaration in opposition to the wall presented by the Mexican government at the Organization of American States. Mexico also obtained a resolution at the Summit of the Americas—an important gathering of heads of state from the region—urging the U.S. to reconsider its decision to build a wall. In February 2008, representatives of the legislatures from Canada and Mexico, meeting in an inter-parliamentary session, set forth an agreement in opposition to the border wall. The Chilean legislature, in support of Mexico, sent its own formal protest against the wall to the U.S. government.

II. THE HUMAN RIGHTS RESPONSE TO THE BORDER WALL

A. The University of Texas Working Group on Human Rights and Border Wall

However, protests from within the United States or outside the country had no significant effect on the U.S. government’s border wall construction project. The inherently international nature of the border wall problem and the serious, multifaceted and largely unaddressed harms resulting from construction led to the adoption of an international human rights approach as the next strategy for challenging the wall. At the beginning of 2008, a multi-disciplinary collective of faculty and students at the University of Texas at Austin ("UT") formed to analyze the human rights implications of the construction of a border wall on the Texas-Mexico border under international law.


14. The project was facilitated through the Rapoport Center for Human Rights and Justice at the University of Texas School of Law and was supported by the University of Texas Office of Thematic Initiatives and Community Engagement. The collective included faculty and students from the Department of Geography, the Department of Anthropology, the Lyndon B. Johnson School of Public Affairs, the Teresa Lozano Long Institute of Latin American Studies, and the Immigration Clinic, Environmental Clinic, and Rapoport Center at the Law School.

15. See THE TEXAS-MEXICO BORDER WALL: UT WORKING GROUP HUMAN RIGHTS ANALYSIS,
owners, indigenous communities, environmental groups, Environmental Sciences faculty at the University of Texas at Brownsville, other academics and advocates, in investigating and analyzing the border wall from a human rights perspective.116 The Working Group visited areas of the border affected by construction and also filed requests with the U.S. government under the Freedom of Information Act to obtain additional information.117 The Working Group then applied international human rights law to assess the actions of the U.S. government in constructing the border wall and the harm suffered by individuals and communities affected by the border wall.

The Working Group presented its findings in a set of briefing papers submitted to the Inter-American Commission on Human Rights (the "Inter-American Commission") of the Organization of American States in June 2008.118 The Working Group then requested and obtained a general hearing on the border fence issue during the 133rd period of sessions of the Inter-American Commission, which took place in Washington, D.C. in October of 2008.119 After presenting its briefing papers and conducting the hearing before the Inter-American Commission, the Working Group worked with the media120 and also developed a website121 to make its research and findings known to the public and to policymakers within the U.S. government.

Because of the Commission's central role as a regional human rights body with jurisdiction over all countries in the Americas, including the United States, the Working Group focused on the Inter-American Commission as the principle forum for its human rights challenge to the border wall.122 The Inter-American Commission is also the only international entity with jurisdiction to accept and decide individual human rights complaints against the United States.123 The Working Group pursued
the strategy of filing general briefings and requesting a general hearing, rather than filing an individual petition, because domestic remedies had not yet been exhausted as required by human rights law. But the ability of the Commission to eventually entertain an individual petition alleging violations by the United States provides additional weight to the body's consideration of the border wall issue.

B. Human Rights Impact of the Texas-Mexico Border Wall

The Working Group concluded that the planned wall along the Texas-Mexico border violated international human rights law in numerous and serious ways. Because the Working Group focused on the Inter-American Commission on Human Rights, it analyzed breaches by the United States of its obligations under the American Declaration of the Rights and Duties of Man (the "American Declaration"), interpreted in light of the American Convention on Human Rights and other relevant international human rights norms. The American Declaration constitutes an international legal obligation for the United States as a member state of the Organization of American States. The human rights violations found are described in the following subsections.

1. Articles II and XXIII of the American Declaration

Article II of the American Declaration guarantees equality before the law without distinction as to race, sex, language, creed, or any other factor. Pursuant to its Article XXIII, the American Declaration guarantees the right to private individual petitions filed against states that are not parties to the American Convention on Human Rights).


126. According to the jurisprudence of the inter-American human rights system, the provisions of the American Declaration should be interpreted and applied in the context of ongoing developments in international human rights law, and specifically, in the light of the American Convention on Human Rights and other prevailing international and regional human rights instruments. See Garza v. United States, Case 12.243, Inter-Am. Comm'n H.R., Report No. 52/01, paras. 88–89 (2001) (confirming that while the Commission does not apply the American Convention on Human Rights in relation to member states that have yet to ratify that treaty, the Convention's provisions may well be relevant in informing an interpretation of the principles of the Declaration); Dann v. United States, Case 11.140, Inter-Am. Comm'n H.R., Report No. 75/02, para. 127 (2002).


property. Under these provisions, distinctions between individuals and taking of property constitute unlawful violations of human rights unless they are necessary for the achievement of a legitimate and lawful governmental goal and are proportional to that goal. Under this standard, if various options are available to achieve a lawful objective, the one that least restricts or impinges on human rights must be selected to ensure necessity and proportionality. The United States has violated these provisions.

To build the wall, the United States took property, such as the land owned by Dr. Eloisa Tamez, which has been held by families for generations; in some cases family ownership dates back to land grants from the Spanish crown issued in the 1700s and 1800s. In addition, as described above, the taking of land and fence construction has resulted in the inability of some property owners to reach large portions of their property that abut the river. Many residents use these portions of their land to graze and water livestock, to irrigate crops, to enter the river for recreation and transportation, and to fulfill other economic purposes. These property takings thus have the potential to destroy their livelihood.

In addition, the U.S. treated property owners on the border unequally. A statistical analysis conducted by Professor Jeff Wilson of the Working Group and his colleagues demonstrates that the property owners impacted by the wall are poorer, more often Latino and less educated than those not impacted who also live along the border. Numerous small landowners lost their property to the wall while more lucrative developed properties and resorts were not included in the wall’s path.

129. Id. art. XXIII.
133. TEX. GEN. LAND OFFICE, GUIDE TO SPANISH AND MEXICAN LAND GRANTS IN SOUTH TEXAS para. 336 (1988) (describing the history of the San Pedro de Carricitos land grant to which the Tamez family traces its connection to their property).
134. Ildefonso Ortiz, DHS Moves Forward with Border Fence Through Orchard and Man’s Heart, BROWNSVILLE HERALD, Nov. 11, 2009, available at http://www.brownsvilleherald.com/articles/moves-104925-border-orchard.html (describing the difficulties faced by the Loop family in accessing and utilizing parts of their land due to the fence, including their inability to irrigate their orchard); Monica Weisberg-Stewart, Chairman, Tex. Border Coal. Immigr. Comm., Speech at Greater Southwest Region of Hadassah Convention (May 22, 2008) available at www.roigrandeguardian.com (search “Weisberg-Stewart: Contrasting the fence in Israel with that proposed for Texas”) (noting that “[f]armers irrigate from the river, ranchers water their herd in the river, children and kayakers play in the river, and people are baptized in the river”).
136. See, e.g., del Bosque, supra note 65 (describing construction of the wall on small properties but not on the River Bend Golf Resort or on acreage owned by the wealthy and politically active Hunt family); see Herrera, et al. v. United States, et. al. No. 2:08-cv-00070-AML (W.D.Tex. October 8, 2008)
One of the most well known examples of this difference in treatment is found in the handling of border wall construction near the River Bend Golf Resort. The resort is a development located near Brownsville, Texas along the banks of the Rio Grande River, which caters to white golfers generally from other parts of the United States.\textsuperscript{137} While the wall has been constructed on numerous small properties around Brownsville, Texas, the resort has not been affected.\textsuperscript{138} The government's plans for border wall construction have always included properties just a short distance down the banks of the Rio Grande River from the resort but have never called for construction within the resort itself.\textsuperscript{139}

The wall also had a particularly negative impact on Native American communities, including individual landowners who are Lipan Apache and the federally recognized Kickapoo and Ysleta del Sur (Tigua) tribes that live and practice their traditional cultures and religions along the Texas-Mexico border.\textsuperscript{140} Indigenous communities enjoy unique and vitally important rights to property and equal protection under international human rights law.\textsuperscript{141} These rights were not respected. The U.S. government took property in southern Texas from Lipan Apache families such as the Tamez family to build the wall.\textsuperscript{142}

The U.S. government's wall construction also deprived the Kickapoo and the Ysleta del Sur of the ability to observe certain traditions relating to the land and the Rio Grande River, leading to harms against these communities not experienced by other groups.\textsuperscript{143} The Kickapoo live near Eagle Pass, Texas and are recognized by the U.S. government.\textsuperscript{144} The tribe is one of the more traditional indigenous communities in the entire United States.\textsuperscript{145} The Kickapoo have seen the wall affect their access to religious and ceremonial sites along the river.\textsuperscript{146} The wall also creates a barrier to the tribe's historic annual migration back and forth between Texas and northern Mexico, which is otherwise specifically guaranteed by federal law in order to respect the

\textsuperscript{137} See \textit{RIVER BEND RESORT}, http://riverbendresort.us (last visited Oct. 6, 2010).

\textsuperscript{138} Del Bosque, \textit{supra} note 65.

\textsuperscript{139} \textit{WILSON, ET AL., supra note 135; U.S. DEPARTMENT OF HOMELAND SECURITY ET AL., ENVIRONMENTAL STEWARDSHIP PLAN App. F (2008) (showing fence location along the Rio Grande River near Brownsville and showing gap in fence location at the bend in the river that houses the River Bend Resort)}.


\textsuperscript{141} See, e.g., \textit{Yakye Axa v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No 125, paras. 137, 144-45 (June 17, 2005) (discussing importance of property rights enjoyed by indigenous communities given unique connection to the land)}.

\textsuperscript{142} \textit{GUZMAN & HURWITZ, supra note 140, at 3}.

\textsuperscript{143} See \textit{id.} (describing the unique nature of the Kickapoo and Tigua settlements and the wall's harm to the tribes).

\textsuperscript{144} \textit{See BILL WRIGHT & E. JOHN GESICK, JR., THE TEXAS KICKAPOO: KEEPERS OF TRADITION (1996) (describing the history and current cultural life of the Kickapoo tribe)}.

\textsuperscript{145} \textit{Id.} at 10–11.

\textsuperscript{146} Statement from Eric Anico on behalf of the Kickapoo Traditional Tribe of Texas (Oct. 13, 2008) (on file with author).
traditions of the tribe. The Ysleta del Sur, also a federally recognized tribe, settled along the banks of the Rio Grande River in the 17th century and has continued to maintain a traditional community there. Border wall construction has taken place on traditional lands of the sovereign Ysleta del Sur tribe, impacting their nearby reservation as well as their access to important cultural and religious sites utilized along an extensive stretch of the river for the last 300 years.

Despite the severe and unequally distributed negative impacts of the wall and the taking of property implicated by its construction, the U.S. government did not properly analyze the need to take property or to build the wall, and did not meaningfully consider other alternatives for controlling the border. As a result, the necessity and proportionality of the government's actions cannot be established.

The U.S. government has never explained the necessity of taking particular properties for construction of the fence or for placing the intermittent fence in certain areas and not others. It is therefore impossible to assess whether particular segments of the fence are necessary or whether the fence might have been placed effectively in other areas without as great a burden on rights.

Furthermore, the U.S. government failed to make a showing, as required by international human rights law, that it was necessary to take property and build a wall in order to meet the government's goals. The stated goal of the border wall statutes is to protect and control the border by preventing unlawful entries by immigrants, terrorists, or drug traffickers. While the goals of impeding unlawful immigration and protecting national security are presumably legitimate, as a matter of international human rights law, the construction of the border wall cannot be considered effective, much less proportional, in achieving these objectives.

Because the evidence suggests that terrorists do not seek to enter the United States through the Texas-Mexico border, the construction of a wall along that border is not effective in preventing terrorism. It has been well established that the 9/11 terrorists entered the country through legal immigration channels, and there have been no credible reports that terrorists have now begun to sneak across land borders. Government studies suggest, in any case, that terrorists attempting to cross a land border illegally to enter the United States would much more likely enter the U.S. from Canada, since there are fewer controls on the Canadian border.

149. Guzman & Hurwitz, supra note 140, at 13.
151. See 2009 Secure Border Initiative Report, supra note 61, at 29 (noting that CBP never analyzed the impact of deployment of the “costly” fence in the areas in which it was deployed, nor the impact it might have had if deployed in other locations).
152. One Border Patrol official stated that the wall along the Texas-Mexico border was necessary to prevent the arrival of weapons of mass destruction. Brownsville Protests Border Wall, YouTube (Dec. 13, 2007), http://www.youtube.com/watch?v=GUMFfV_qbNM&feature=related.
154. Nat'l Comm'n on Terrorist Attacks Upon the U.S., Entry of the 9/11 Hijackers in the United States: Staff Statement No. 1 (2004); see Olivia Albrecht, Border Troubles: Drugs, Immigrants Today; Terrorists, Bombs, Tomorrow, Fox News, Feb 22, 2006, available at http://www.foxnews.com/story/0,2933,185760,00.html (arguing that terrorists will someday exploit the southern border but acknowledging that there is no evidence that “the southern border has been breached by terrorists to gain entry into the U.S.”).
155. See 2007 Border Security Report, supra note 4 (describing unmanned and unmonitored
Nor has the construction of a wall along the Texas-Mexico border been shown to serve as an effective means of preventing or controlling unauthorized immigration. The most recent study by the federal government's General Accountability Office decries the failure of DHS to assess the degree to which the construction of the wall has impeded unlawful immigration. The study notes that DHS has not even developed a strategy or tool for making such an assessment. The government cannot therefore assert that the border wall is an effective means for stemming illegal immigration, much less the only means or a necessary one.

In fact, according to official reports of the U.S. government, prior experiments with the border wall construction have proven ineffective in stemming unauthorized immigration. The original segment of border wall built in the San Diego area "did not have a discernible impact on the influx of unauthorized aliens coming across the border." These government reports particularly question the effectiveness of physical barriers as long as there are gaps in the border wall, because the physical barriers simply redirect attempted border crossings to areas in which there is no wall. There are no plans to build a solid border wall, and it seems unlikely (and undesirable as a human rights matter) that a solid border wall will ever be built given the length of the border between the United States and Mexico, the rough terrain it covers, and the prohibitive cost. These government studies have further noted that, while fences that channel immigration into more remote and rough terrain do not effectively deter immigration, they do lead to more migrant deaths. These analyses, by the U.S. government itself, suggest that the intermittent border wall built along the Texas-Mexico border will have little impact on overall unauthorized entries into the United States and will instead have a deadly effect on immigrants.

Physical barriers are also extremely susceptible to being breached and therefore are not reliable as a means of immigration control. As the wall was under construction, then DHS Secretary Michael Chertoff acknowledged that tunnels had been built to get around fencing already in place in some areas. A study published in 2009 by the government’s General Accountability Office identified 3,300 breaches in the wall.

Perhaps the main failure of the wall as a mechanism of border control, though, is the focus on the southern physical border of the United States. The individual and governmental decisions affecting flows of immigration are actually made inside the United States. For example, many immigrants “become” unlawful once they are within the U.S. Over half of the undocumented immigrants in the United States...
arrive legally by entering at an official land border or airport port of entry\textsuperscript{162} and only later fall out of status and join the undocumented population.

In addition, it is likely, if not certain, that the economy and interior immigration enforcement actions have a greater impact on levels of unlawful immigration across the border than do physical barriers.\textsuperscript{163} Statistical and anecdotal information suggest that unauthorized border crossings decreased along the Texas-Mexico border and elsewhere in recent years as a result of these factors \textit{before} construction of a wall\textsuperscript{164}. In fact, government statistics show that unlawful border crossings and apprehensions have traditionally risen and fallen in a cyclical pattern based on economic and other factors, with the lowest numbers coming in 1976 on the tail end of a serious and prolonged recession.\textsuperscript{165} This trend suggests that physical barriers miss the target in addressing unauthorized immigration issues.

Finally, levels of unauthorized immigration depend on policy decisions made within the United States regarding what types of immigration are permitted. Currently, many immigrants who wish to come to the United States lawfully to work or to rejoin their families have no route available to them\textsuperscript{166}. The few immigrants who are fortunate enough to qualify for lawful status often must wait for decades and are forced through expensive and inefficient immigration processing.\textsuperscript{167}

\begin{itemize}
\item \textsuperscript{162} Pew Hispanic Ctr., Modes of Entry for the Unauthorized Migrant Population 1 (2006).
\item \textsuperscript{164} Archibold & Preston, supra note 160; Nancy Rytina & John Simanski, Dept. of Homeland Security, Fact Sheet: Apprehensions by the U.S. Border Patrol, 2005–2008 (June 2009); see Dan Barry, A Natural Treasure That May End Up Without A Country, N.Y. Times, Apr. 7, 2008, at A14 (quoting the manager of a nature reserve in the Rio Grande Valley as stating that he had seen a notable drop-off in illegal crossings through the reserve in the last decade).
\item \textsuperscript{165} See Rytina & Simanski, supra note 164, at 1 (showing data that reflects a dependent relationship between economic growth and the number of border apprehensions).
\item \textsuperscript{166} See Stephen H. Legomsky & Cristina M. Rodriguez, Immigration and Refugee Law and Policy 251, 253–55 (5th ed. 2009) (noting that individuals who want to immigrate cannot legally migrate to the United States unless they fit within one of the tightly-defined categories of legal admission established by Congress); Doris Meissner et al., Immigration and America's Future: A New Chapter 21–24, 31–43 (2006), reprinted in Thomas Alexander Aleinikoff et al., Immigration and Citizenship: Process and Policy 464 (6th ed. 2008) (noting that for those without previous ties to the United States, there are "few means of legal entry").
\item \textsuperscript{167} See Legomsky & Rodriguez, supra note 166, at 252–58, 261 (explaining the statutory quota and preference process that leads to lengthy backlogs for immigrant visas; noting that administrative processing can add years to the waiting times caused by the statutory quotas); Meissner, et al., supra note 166, at 464 (stating that immigrants who try to immigrate legally are quickly restrained by immigration category and country caps that lead to unreasonable delays); Press Release, Prakash Khatri, President and CEO, KPK Global Solutions, LLC, The Opportunity of Two Lifetimes: U.S. Immigration Process Ensures Disparate Treatment for Mexican Immigrants (May 7, 2010), available at http://www.khatrilaw.us/Articles/Family_Based_Migration_of_Mexicans.pdf (calculating that certain family members of immigrants must wait more than 100 years to come legally to the U.S.); Bureau of Consular Affairs, U.S. Dept. of State, Visa Bulletin for April 2011, available at http://www.travel.state.gov/visa/bulletin/bulletin_5368.html (containing a government chart showing visa eligibility for individuals in specific categories who filed applications by certain cutoff dates showing, for example, that most adult sons and daughters of U.S. citizens must wait at least six years to immigrate while adult sons and daughters of U.S. citizens from Mexico must wait eighteen years or more).
\end{itemize}
Individuals who do not see a viable route to immigrate legally may instead arrive unlawfully.\textsuperscript{168}

The United States failed in its obligation to further its legitimate goals through the adoption of those proportional measures that are least restrictive of rights. The U.S. government has not shown that the wall is an effective and thus necessary tool for controlling the border and halting unlawful immigration.\textsuperscript{169} The United States was therefore obligated to consider and adopt other means of effectuating its objectives that would not have resulted in such grave harm to human rights. Unfortunately, the government did not do so.

2. Article IV of the American Declaration

Article IV of the American Declaration guarantees the right to “freedom of investigation, opinion, expression and dissemination.”\textsuperscript{170} The United States did not act with transparency regarding its plans to build the border wall and has failed to provide information necessary to allow for full investigation of the wall’s impacts and expression of opinion about the wall.

As noted above, the United States has failed to provide specific information regarding the exact locations for the wall or to explain the rationale for those locations. It has been extremely difficult for anybody outside the United States government to determine even how much and what type of wall has been built and where.

A further example of the government’s lack of transparency is found in its failure to respond to formal requests for information about the border wall. The U.S. government failed for almost a year to reply to the Freedom of Information Act Request filed by the Working Group in April 2008 although federal law requires U.S. agencies to release information in response to a request under the Freedom of Information Act in a period of twenty days.\textsuperscript{171} The request sought information essential to understanding the government’s border wall construction project. Among other things, the request sought copies of all maps showing planned locations for the wall along the Texas-Mexico border, documents reflecting the factors used to

\begin{itemize}
  \item \textsuperscript{168} Khatri, supra note 167; Kevin R. Johnson, \textit{Legal Immigration in the 21st Century, in Blueprints for an Ideal Legal Immigration Policy} 37-41 (Richard D. Lamm & Alan Simpson eds., 2001) ("When the demand for migration far outstrips the numbers of immigrants who may be lawfully admitted, undocumented migration... will flourish.").
  \item \textsuperscript{169} As noted above, not even the government’s analyses suggest any meaningful level of effectiveness. See 2009 Secure Border Initiative Report, supra note 61, at 29 (stating that "despite a $2.4 billion investment in this infrastructure, its contribution to effective control of the border has not been measured because CBP has not evaluated the impact of tactical infrastructure on gains or losses in the level of effective control"); Archibold & Preston, supra note 160 (quoting Secretary of Homeland Security Michael Chertoff as acknowledging that the fence is not a “cure-all” and that “[y]es, you can get over it; yes, you can get under it”); Michael Chertoff, \textit{Answers About the Fence, in Department of Homeland Security Leadership Journal Archive} (March 12, 2008) (including statement by Secretary of Homeland Security Michael Chertoff that the fence is not a “panacea” and would at most temporarily slow immigrants in crossing the border); Weisberg-Stewart, supra note 134 (noting that Border Patrol Chief Aguilar has stated that the fence will only delay illegal border crossings by about three minutes).
  \item \textsuperscript{170} American Declaration, supra note 128, art. IV.
  \item \textsuperscript{171} 5 U.S.C. § 552(a)(6)(A) (2009); FOIA Complaint, supra note 64, at 4-12.
\end{itemize}
determine placement of the wall, and information regarding consultations with indigenous tribes.\textsuperscript{172}

The lack of transparency violates the right to freedom of investigation and dissemination protected in the American Declaration as it makes it excessively difficult to obtain and make known information about the wall. Without information, the right to opinion and expression is also hindered. The paucity of information also makes it much more difficult to define the exact contours of other violations of rights and to express an opinion on those violations, since it is not even possible to identify all the victims and impacts of the wall.

In addition, the lack of information negatively affects the ability of impacted individuals to be meaningfully consulted about the border wall. The right of affected individuals and communities to be consulted by the government regarding a massive infrastructure project such as the border wall arises from the right to freedom of information and expression in connection with several other human rights provisions.\textsuperscript{173} The obligation to ensure that no less restrictive alternatives exist cannot be met without meaningful exchange of information and consultation.\textsuperscript{174} In addition, the American Declaration is read in conjunction with other international human rights norms, particularly International Labor Organization Convention No. 169, which safeguard the rights of indigenous communities and explicitly require consultation through appropriate means.\textsuperscript{175} The consultations must be done in good faith with affected indigenous communities before administrative or legislative actions can be taken that will affect them.\textsuperscript{176}

Despite these requirements, the “consultations” carried out by the United States regarding the border wall were characterized by the previously-described lack of transparency regarding critical information as well as by a lack of possibility for exchange and discussion of the relevant issues. Attendees at the handful of public meetings organized by U.S. government officials reported that private citizens had no opportunity to enter into any sort of dialogue or question-and-answer discussion with government officials regarding the border wall. Rather, participants listened to prepared statements by officials, which lacked detail, and then were told to record their comments at computer terminals or in writing.\textsuperscript{177} The failure of the government

\textsuperscript{172} Working Group FOIA Requests, supra note 117.

\textsuperscript{173} See American Declaration, supra note 128, arts. II, XXIII (stating “[e]very person has a right to own such private property as meets the essential needs of decent living”); see also Maya Indigenous Communities of the Toledo District v. Belize, Case 12.053, Inter-Am. Comm’n. H.R., Report No. 40/04, paras. 132, 140, 171 (2004) (stating that the right to property and equality includes right to engagement in effective and informed consultations regarding use of property where government or third parties seek to exploit or take land).

\textsuperscript{174} See American Declaration, supra note 127, art. II (stating “[a]ll persons are equal before the law and have the rights and duties established in this Declaration”); see also supra note 130 (citing cases that require assessment of alternatives wherever right to equal protection or other human rights are implicated).


\textsuperscript{176} Id.

\textsuperscript{177} See Letter from Juliet V. Garcia, President of the University of Texas at Brownsville and Texas Southmost College, to the Inter-American Commission of Human Rights (Oct. 22, 2008), available at http://www.utexas.edu/law/centers/humanrights/borderwall/analysis/iac-Juliet-Garcia-Statement.pdf (emphasizing that there was only one meeting in 2007 where the DHS sought public input into the proposed plan to build the wall); see also Rio Grandeguardian, Brownsville Protests Border Wall, YOUTUBE (Dec. 13, 2007), http://www.youtube.com/watch?v=GUMFFV_qbNM.
to engage in meaningful consultations constitutes yet another violation of human rights.

3. Articles V and XIII of the American Declaration

Article V of the American Declaration provides for the right to legal protection against attacks upon “private and family life.” Article XIII of the American Declaration establishes the right to culture. The construction of the border wall has caused great harm to families and cultural traditions in the communities along the Texas-Mexico border. The wall has irreparably damaged a centuries-old culture in which communities have always viewed themselves as cross-border and transnational in nature. The ties between towns and residents north and south of the Rio Grande River are extremely strong, and residents on the border have traditionally traveled back and forth between Mexico and Texas regularly for social and economic purposes. Many families include both Mexican and United States citizens with family members living on each side of the border and visiting each other regularly. Some border residents even maintain homes in both Mexico and Texas. Others travel back and forth daily to shop and conduct business. Many residents along the Texas-Mexico border see the Rio Grande River “as a meeting point rather than a dividing line,” and they see the wall as an affront to the unique border identity and culture that has flourished in communities along both sides of the border. The wall necessarily makes a powerful statement of separation of a cross-border community. There is no doubt that the wall has disrupted the way of life and culture of many families and communities along the border.

In addition, the wall impacts indigenous culture in violation of the norms guaranteeing special protections to the traditions of Native Americans. For example, the U.S. government’s own analyses recognize that the wall will impinge upon traditional ceremonies conducted by the Ysleta del Sur tribe along the banks of the Rio Grande River. Yet, neither the government’s analyses nor any other studies take steps to identify and ameliorate or avoid the harms caused to the culture of indigenous communities by the border wall. In fact, other than this one mention of the Ysleta del Sur, the government’s studies fail altogether to mention or consider the cultural concerns of the affected Lipan Apache, Kickapoo, and Ysleta del Sur.

178. American Declaration, supra note 128, art. V.
179. Id. art. XIII.
180. Brownsville’s Bad Lie, supra note 50; see Schwartz, supra note 2, at A01 (noting border citizens’ attitudes that the wall separates communities).
183. Brownsville’s Bad Lie, supra note 50.
184. See EL PASO ENVIRONMENTAL STEWARDSHIP PLAN, supra note 89, at 1–7 (noting that lighting from fence could interrupt tribal rituals).
185. A word search for Apache, Kickapoo, Ysleta del Sur, or Tigua in the lengthy environmental stewardship plans prepared in relation to the border wall project reveals almost no mention of the affected indigenous communities. See RIO GRANDE VALLEY ENVIRONMENTAL STEWARDSHIP PLAN, supra note 44 (mentioning the Kickapoo Tribe only once in reference to municipal water systems affected by the wall.
Finally, the severe harm that the wall has caused to the environment, to wildlife, and to natural parks and preserves results in a violation of the right to culture. 166 The wall negatively impacts vulnerable and precious wildlife, such as the ocelot, jaguarundi, and unique plant species, such as the sabal palm, found along the Texas-Mexico border. 167 It also sunders nature preserves that have been carefully constructed along the border to protect unique species of plants and animals that make their home along the Rio Grande River and migrate back and forth across the Texas-Mexico border. 168 Through its waivers of environmental laws, the United States eschewed its responsibility to consider environmental harm and to take measures to limit likely damage. 169 The residents of the Texas-Mexico border area, including indigenous communities and long-time residents, have traditionally held an important connection to the natural resources along the Rio Grande River and to the river itself. For example, Dr. Eloisa Tamez has described the river itself as "spiritual" and has identified specific use she makes of plants native to the area. 190 A community leader in south Texas has called the Rio Grande "a river of life." 191 Environmental degradation caused by the wall undercuts the culture of residents of the Texas-Mexico border area in a way that violates their human rights.

4. Article XVIII of the American Declaration

Article XVIII of the American Declaration guarantees the right to judicial protection. 192 The United States has not ensured this right. The U.S. courts have not been amenable to hearing the human rights violations implicated in border wall construction. In addition, the legal provisions that normally require the government to follow careful processes and to take precautions to avoid harm when undertaking a project such as border wall construction have been stripped away.

Under U.S. law, a constitutional challenge to border wall construction would be exceedingly difficult to pursue because evidence of intentional discrimination based on race or national origin would be required. 193 Nor have the courts been open to challenges based on federal statutory law. The Consolidated Appropriations Act for construction); DEPT. OF HOMELAND SEC., ENVIRONMENTAL STEWARDSHIP PLAN FOR CONSTRUCTION, OPERATION AND MAINTENANCE OF TACTICAL INFRASTRUCTURE: U.S. BORDER PATROL, MARFA SECTOR, TEXAS (Aug. 2008) (no mention of affected indigenous communities). These plans represent the most in-depth analysis published by the government regarding impacts of the border wall on the environment and communities. Id. They should therefore include references to any consideration given to the affected indigenous communities. In addition, the Freedom of Information Act requests filed by the Working Group specifically sought documents including governmental analyses of the potential impact of the border wall on Native American communities. Working Group FOIA Requests, supra note 117. The government's responses have not included information about the three affected indigenous communities. See FOIA Complaint; Responses to Working Group FOIA Requests (on file with the author).

166. American Declaration, supra note 128, art. XIII.
167. Eriksson & Taylor, supra note 29.
168. Id. at 5; Hylton, supra note 2.
169. Id. at 5; Hylton, supra note 2.
180. See Maya Indigenous Communities of the Toledo District, Case 12.053, supra note 173, para. 147 (discussing how Belize's failure to properly oversee the logging concessions caused environmental damage to Maya lands).
190. GUZMAN & HURWITZ, supra note 140, at 15–16.
191. Weisberg-Stewart, supra note 169.
192. American Declaration, supra note 127, art. XVIII.
FY 2008 required consultation with property owners, Indian tribes, and local governments regarding the impact of the wall. However, the same provision clarified that the consultation mandate creates no enforceable rights.94 Meanwhile, federal law gave DHS the authority to invoke the importance of border wall construction to overlook a long list of federal statutes that would normally apply to protect indigenous rights and the environment.95 DHS Secretary Michael Chertoff exercised this authority to waive all applicable environmental laws and several laws guaranteeing indigenous rights.96 The U.S. Supreme Court has declined requests by indigenous communities and environmental groups to analyze the constitutionality of the broad grant of authority to the Secretary of DHS to issue these waivers.97 Legal recourse for human rights violations has thus not been available, leading to a violation of the American Declaration.

III. EVALUATING THE HUMAN RIGHTS STRATEGY

It is always extremely difficult to evaluate the merits or level of “success” of a human rights strategy. This is partly because it is not simple to define success in this context in the first place. It is nonetheless valuable to inquire into the human rights strategy deployed against the border wall. An assessment of the strengths and limitations of the human rights approach should foster thinking about future strategies that might be developed for addressing the border wall and possibly immigration and security issues in the United States more generally. At the same time, it may lead to the development of important understandings about international human rights legal advocacy in the United States with the goal of identifying the most feasible and effective means for addressing human rights concerns in this country.

The decision to adopt a human rights approach came largely because of the limitations for effective advocacy under U.S. law. While non-legal strategies, such as marches and rallies, played an important role in making the harms caused by the border wall visible, they alone did not seem to have the muscle necessary to impact the onward march of wall construction. Yet, U.S. law did not seem to provide a better tool. As just discussed, given the strictures and limitations on U.S. statutory constitutional law, it seemed unlikely when the wall project began that litigation strategies in U.S. courts would be successful in challenging the wall.98 In the end, that expectation proved true. Almost all of the litigation, including both affirmative legal challenges to wall construction and defensive claims against the taking of property, went nowhere or resulted in rulings against those challenging the wall.99

196. DHS WAIVER DETERMINATION, supra note 2.
198. See supra text accompanying notes 192–96 (noting that lawsuits based on existing laws did not successfully challenge the wall).
As described above, constitutional claims were extremely difficult to make, the protective statutes normally in place had been stripped of all teeth, and the government’s broad power to condemn land was jealously guarded by the courts. Rather than serving as a meaningful mechanism for challenging the wall, the U.S. legal framework became a new source of violations through its failure to protect rights.

In this context, international human rights law provided an alternative legal framework for confronting the harm caused by the border wall. International human rights law provided a set of norms for assessing the impacts of the border wall, making it unnecessary to abandon a legal rights-based analysis altogether. But, international human rights law norms provide more expansive understandings of rights than U.S. law. As one scholar put it, the international norms and pertinent fora allow for “more generous reasoning” regarding the rights violations implicated in the border fence. 200 Thus, for example, under international human rights law, an equal protection violation takes place where the government’s actions have a disparate impact or effect on particular categories of people or groups. 201 And discrimination is cognizable when government actions harm certain classes of individuals even if those individuals are not identified by traditional equal protection categorizations such as race, ethnicity or gender. 202 It therefore is not necessary under human rights law to meet the strict standards of U.S. law regarding intentionality and protected categories in order to make out an equal protection claim. International human rights law also permits direct challenges to government actions that violate human rights even when they come in the form of legislation or take place in full compliance with domestic law. 203 This approach stands in contrast

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201. See Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, para. 103 (Sept. 17, 2003) (“States must abstain from carrying out any action that, in any way, directly or indirectly, is aimed at creating situations of de jure or de facto discrimination.”); see also UN Hum. Rts. Comm., CCPR General Comment No. 18: Non-discrimination, para. 6 (Oct. 11, 1989) (describing discrimination as including both “purpose” and “effect” discrimination).

202. Article II of the American Declaration explicitly protects against discrimination not only the basis of “race, sex, language [and] creed” but also prohibits discrimination on the basis of “any other factor.” American Declaration, supra note 128, art. II. In addition, the Inter-American Court of Human Rights has made clear that non-discrimination principles extend to categorizations such as class and immigration status. See, e.g., Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H. R. (ser. A) paras. 112–13, 148 (Sept. 17, 2003) (noting that States sometimes engage in prohibited discrimination against migrants, as compared to nationals, and reaffirming that States should uphold human rights regardless of “status as nationals or aliens”).

to U.S. law, which insulates legislative action and agency implementation of law from challenge except in special circumstances.\textsuperscript{204} The approach is particularly relevant in the context of the border wall given that border wall legislation functioned to disarm other federal laws that would have provided some rights protection. Use of international human rights law thus allowed the harms caused by the border wall to be described as rights where they were felt and seen that way but were not recognized under U.S. law as such.\textsuperscript{205}

The international human rights norms, with their more expansive understanding of rights, enjoy credibility as a codification of the expectations of the international legal order regarding human rights.\textsuperscript{206} The government's actions in constructing the border wall could be and were measured against these norms and specific violations pointed out. For both the U.S. government and the communities affected by the wall, the analysis that led to concrete and reasoned conclusions regarding legality potentially had a greater impact than general policy or moral arguments.

The use of international human rights law also created an opportunity to highlight important issues that did not otherwise receive significant attention in the debate around the border wall. For example, the waiver of environmental and indigenous laws precluded any serious litigation around indigenous rights or environmental damage in the U.S. courts. Yet, the impact of the border wall on indigenous communities took on a central role in the human rights analysis because of the expansive protections guaranteed to native communities under international human rights law.\textsuperscript{207} Similarly, under U.S. law, there was no conceivable way of shoehorning the harm caused by placing a border wall down the middle of a cross-border and cross-cultural community into a cognizable legal right. But, the right to culture protected in international human rights law presents the perfect platform for profiling this important impact of the border wall.\textsuperscript{208} The adoption of a human rights approach thus created a previously unavailable legal space in which to raise some of

\textsuperscript{204} Generally, legislation is constitutional if there is a rational basis for adoption of the statute to meet any possible governmental objective. U.S. v. Carolene Prod. Co., 304 U.S. 144, 152 (1938).

\textsuperscript{205} Morales argues that the harms caused by the border wall, particularly relating to the discriminatory impact of the wall, are properly conceived of as unjust equal protection violations but asserts that they are not cognizable as such under the law. Morales, supra note 200, at 51. The value of the international human rights approach is exactly that it does recognize these harms in their proper light.

\textsuperscript{206} See, e.g., American Declaration, supra note 128 (adopted by the member states of the Organization of American States to set out specific human rights norms for the member states of the intergovernmental alliance).

\textsuperscript{207} See supra notes 140, 176 and accompanying text.

\textsuperscript{208} American Declaration, supra note 128, art. XIII.
the harms that went to the core of the border wall’s impact and seemed most important to those affected, yet were otherwise largely invisible, at least in the legal discourse.209

The particular human rights approach employed, calling on academic experts from disciplines ranging from law to anthropology and geography, also permitted a more meaningful look at the multi-faceted problems created by the border wall. Construction of the border wall resulted in consequences that called for an analysis that incorporated mapping and statistical measures, an understanding of indigenous and other communities located along the border, knowledge of natural resources along the Texas border and environmental harms as well as other expertise. The human rights framework provided a means for successfully marrying analysis under international human rights law with the work of non-law disciplines to develop a much more comprehensive and clear picture of the impact of the border wall than allowed through other strategies.

The human rights challenge to the border wall attracted international attention and even official condemnation by the Inter-American Commission on Human Rights. The hearing before the Inter-American Commission attracted significant U.S. and international media attention.210 In addition, the U.S. government saw itself obligated to respond formally to the Working Group’s charges of human rights violations before the Inter-American Commission on Human Rights. The U.S. sent several high-level government representatives to respond to the findings of the Working Group at the general hearing held in October 2008.211 Then, on January 14, 2009, the U.S. government filed a written response with the Commission.212

After the general hearing at which the Working Group testified, at the end of its period of sessions, the Commission expressed concern about the “troubling information” it had received about the human rights impact of the Texas-Mexico border wall.213 The Commission emphasized that the wall project likely involved discrimination because of its disproportionate impact on “people who are poor, with a low level of education, and generally of Mexican descent, as well as indigenous communities on both sides of the border.”214 The validation by an intergovernmental human rights body at the supranational level of the legitimacy of

209. Despite his critique of the international human rights approach, Morales does recognize that the strategy allowed for greater consideration of the more complicated and possibly more profound issues not cognizable in U.S. law. See Morales, supra note 200, at 48–52.


214. Id.
claims of human rights violations perpetrated by the U.S. government cannot be dismissed.

Despite these "successes" in obtaining a favorable statement from the Commission and focusing attention on the human rights violations involved in wall construction, the human rights approach did not, of course, succeed in halting the taking of property or the construction of the wall. Yet, it likely had a difficult-to-measure effect on more recent handling of the border wall issue by the United States. The Department of Homeland Security has finally taken steps to ensure somewhat greater transparency. As noted above, the agency has now made more maps and information available on its website and has finally begun to provide meaningful responses to Freedom of Information Act requests regarding the border wall. Most importantly, recent efforts to build further segments of wall have failed. Numerous factors undoubtedly influenced these subtle shifts, including the change in administration. But, addressing the border wall issue in terms of international law violations of human rights almost certainly increased the pressure for modification of the approach to the wall.

Most importantly, any future proposals for extension of the border wall will be introduced into a context in which the relevant issues have already been framed as human rights concerns. If President Obama moves forward in pushing immigration reform as promised, it is likely that there will be renewed efforts to mandate additional border wall mileage. The current political environment will probably require that any plan to legalize undocumented immigrants be balanced with new border enforcement measures. However, when the border wall is debated this time around, it will be more difficult to ignore the human rights law concerns since the real, extensive, and multiple impacts that the wall presents have now been documented and described in human rights terms. If meaningful deliberation takes place, policymakers in the U.S. government may well conclude that the political gains


216. See supra notes 93–96 and accompanying text (noting that, while there have been issues with transparency related to the physical construction of the wall, the government has provided general information about the cost and the construction of the wall).

217. Id.; Responses to Working Group FOIA Requests (on file with the author); see also Carol D. Leonnig, More Than 300 Public-Records Lawsuits Filed in Obama's First Year, WASH. POST, Jan. 27, 2010, at A3 (noting that the U.S. government was finally sending large volumes of records in response to the Working Group's requests under the Freedom of Information Act).

218. See supra notes 62–62 and accompanying text (noting that new plans for fence construction stalled in Congress).


220. Hylton, supra note 2.

221. See id. (clarifying that reform will include "serious and effective enforcement" along with improved legal flows for immigrants and a way to address undocumented immigrants already in the United States).
of additional border wall construction are outweighed by the cost of potential further embarrassment and condemnation under international human rights law.

Of course, critiques of the international human rights law approach to the border wall have been posed. The critiques often follow two slightly contradictory paths. The first line of critique argues that the human rights law approach is undesirable, because it is ineffective in achieving change in the United States. The critique focuses on the unenforceability in the U.S. of international human rights law and the rulings of human rights bodies.\footnote{222} It contrasts that unenforceability with the decisions of U.S. courts, which are binding and almost always respected.\footnote{223} The second line of critique asserts, on the other hand, that international human rights law claims are undesirable, because human rights law is not essentially different from U.S. law. Rather than positing human rights law as different from and inferior to U.S. law, this critique suggests that human rights law is too similar to U.S. law. The critique suggests that the use of law and courts to challenge injustices committed by the government fails to force systemic change. As this argument goes, legal systems are inherently biased toward the government and other sources of power, and litigants only reify existing power structures by agreeing to the rules of legal challenges and litigation even at the international level.\footnote{224} In the case of the international human rights challenge to the border wall, the lack of direct enforceability of international human rights law certainly was a significant limitation.\footnote{225} It meant that there was never any expectation that the Commission would order the U.S. government to stop border wall construction and that the United States would deem such a decision as binding and follow it.\footnote{226} The goal was always one of naming the harms as human rights violations and obtaining official international approval of such naming for the purpose of exercising pressure for change.\footnote{227} Of course, U.S. litigation was also unsuccessful in halting wall


\footnote{223. See, e.g., id. (noting that U.S. attorneys argue over the utility of international standards and whether international law will be recognized in U.S. courts).

\footnote{224. See, e.g., Morales, supra note 200, at 51–53 ("the structure of the suits only reinforces the existing power relationships that lead to . . . problem[s] in the first instance"); see also, e.g., TIMOTHY J. DUNN, BLOCKADING THE BORDER AND HUMAN RIGHTS 10, 49–50 (2009) (asserting that U.S. litigation on border issues tends to reinforce existing distinctions and marginalize immigrants and Mexican-Americans while human rights analyses of issues relating to immigration and the border do not sufficiently address "bureaucratic power structures").

\footnote{225. See HENKIN, ET AL., HUMAN RIGHTS 617–20 (2d ed. 2009) (describing the debate about the nature of the Inter-American Commission's decisions applying the American Declaration and the U.S. position that such decisions are not binding); RESTatement (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 (1987) (describing the presumption in U.S. law that treaties are not self-executing); Bettinger-Lopez, supra note 122, at 581, 585 (describing the self-executing and non-self-executing nature of international agreements).


\footnote{227. See id. at 585, 590 (enumerating strategic justifications for invoking international human rights law in relation to U.S. issues).}
SEEKING BREACHES IN THE WALL

The U.S. litigation failed not because of problems of enforceability but because unfavorable decisions were obtained in U.S. courts due to the limitations of U.S. law and legal process. So, it is not the case that a U.S. litigation strategy is always more effective than an international human rights strategy and therefore worthy of more or exclusive attention. In this case it was not. For the individuals and communities affected by the border wall, it was rational to invest effort and time in collaborating with the Working Group to develop a human rights strategy that had the potential to influence border wall construction through means other than a binding court decision. The fact that the effort did not succeed in stopping the wall does not mean that the strategy was misguided.

As for the non-enforceability critique, there is some validity to the critique focused on the lack of transformative capacity of the human rights approach. International human rights do not dramatically differ in their basic shape from rights guaranteed under the U.S. Constitution. And certain concessions must be made to the basic legal order in order to put forward a claim based on law, whether international or domestic. Thus, for example, the human rights analysis accepted traditional definitions of property to assert violations of property rights along the border. The analysis also did not question in any profound way the legitimacy of the governmental goals of controlling migration and protecting national security. As commentators have suggested, the analysis thus accepted basic principles relating to nation-state boundaries. It possibly even countenanced the labeling of some individuals as outsiders who must be excluded and the labeling of others with similar characteristics (such as Mexican roots) as insiders entitled to protection based on U.S. citizenship and residence.

Specifically, as the critique urges, the human rights strategy did focus on the plight of residents living along the Texas-Mexico border. It did not directly address the situation of immigrants facing the border wall in their efforts to enter the United States. The border wall certainly creates great harm to immigrants by forcing them to divert their journey to ever more dangerous crossing points in the desert and mountains. Those adopting the human rights strategy would also agree that the wall creates more subtle harms relating to the negative racialization of Mexicans and fear of outsiders. Wall construction taps into and simultaneously reinforces the belief that only a physical wall can stop hordes of dark-skinned immigrants from

228. See supra notes 190–89 and accompanying text.

229. See supra note 198 and accompanying text.


231. See Morales, supra note 200, at 53–55 (stating that the fence only reinforced the negative racialization of Latinos and Latinas).

232. See CRS BARRIERS REPORT, supra note 3; Spencer Hsu, Border Deaths are Increasing, WASH. POST, Sept. 30, 2009, at A9 (stating that while the numbers of individuals seeking to cross the border has dropped in recent years, the number of those who died while trying to cross increased in 2009 and was at its highest since 2006).

233. Morales, supra note 200, at 53.
entering the United States.\textsuperscript{234} The immigrant side of the coin is by no means irrelevant to the human rights harms caused by the border wall.

However, few challenges to abusive government action address every macro and micro harm that may result. In the case of the border wall, the human rights strategy analysis was initiated at the behest of residents and activists along the border, and was motivated by the threat they faced. It thus focused on the harms to those living on the U.S. side of the border. Those residents along the Texas border also had very strong claims based in international human rights law, given that connection to the land and environment was affected, making the human rights challenge more effective overall. Of course, the human rights briefing papers to the Inter-American Commission did raise the issue of migrant deaths.\textsuperscript{235} And, if the challenge had stopped border wall construction or if it has succeeded prospectively in making future construction less likely, that result inures to the benefit of prospective migrants as well as to property owners along the border.

Even without focusing on migrants, the human rights strategy functioned to challenge the racializing and exclusionary aspects of border wall construction. Residents along the Texas-Mexico border are marginalized and treated much like outsider immigrants simply because they are largely Latino and live along the border in a region so closely connected to Mexico. The wall project was supported by politicians and residents who could benefit from alleged border control at the cost of harm only to largely Latino residents and communities along a border that is distant in real and imagined terms. Nothing makes the racialized reality of the border wall clearer than the words of pro-fence Congressman Tom Tancredo. At a Congressional hearing held in the Rio Grande Valley in April 2008, then-Representative for Colorado responded to Brownsville residents who opposed the fence by saying, "[i]f you don’t like the fence...between the city and Mexico, I suggest that you build the fence around the northern part of the city."\textsuperscript{236} Tancredo, other politicians, and constituents around the country see the Latino residents of the border region as undesirable because of their heritage and connections with Mexico. Not only do they seem to be unconcerned about rights violations imposed on border residents, but they apparently would be just as pleased to see these residents pushed into the outsider category through construction of a physical wall.

The Working Group’s human rights challenge demanded that attention be paid to this reality of marginalization of residents along the border. In fact, the Working Group’s statistical study on the impact of the border wall showed a direct connection between the taking of property for construction of the wall and race, class and immigration background.\textsuperscript{237} In this context, the human rights claims asserting violations of the border residents’ rights to equal protection, respect for their unique culture, and connection to their property constituted a direct challenge to the racial and exclusionary policies implicated in the border wall.

\textsuperscript{234} \textit{Id.}

\textsuperscript{235} See Gilman, \textit{supra} note 87, at 10 (noting the “deadly effect” of the border wall on immigrants).


\textsuperscript{237} WILSON, ET AL., \textit{supra} note 135, at 8.
More broadly, a human rights strategy that seeks a response from an international human rights body will generally not be a radical strategy leading to major shifts in culture, rights, and the legal order. Again, the individuals affected by the border wall had every reason to use all tools at their disposal, including international human rights law, to seek to stop the border wall, and the Working Group was willing and poised to help in that effort. It seems deeply disempowering of individuals and communities suffering government abuse to suggest that they should not deploy human rights or other law-based strategies to seek protection. It may be true that their deployment of human rights law might work against a more transformative long-term change, at least in some minds. But, even if that is true, it seems fundamentally unfair to ask human rights victims to abstain from taking action available to them and insist that they instead wait for the opportunity to join or form a new reality. The choices of academics and other proponents of more radical long-term strategies should not outweigh the decisions made by impacted individuals seeking to develop an immediate response to harm they face.

IV. CONCLUSION

For those who have seen their property taken and their ways of life forever changed by the bulking wall placed along the Texas-Mexico border, there is little solace. Yet the international human rights law challenge to the wall at least provided a tool for viewing and addressing the border wall in all its odiousness. Hopefully, the lessons learned from the efforts to bring international human rights law to bear on the U.S. government's actions in constructing the wall may provide a platform for more meaningful challenges to government abuse in the United States in the future.

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238. See id. at 55 (arguing that the decision of Dr. Tamez to pursue U.S. and international human rights legal strategies "limit[ed] whatever cultural destabilization a person like Dr. Tamez might perform").