

U.S. Border Patrol Abuses, Undocumented Mexican Workers, and International Human Rights

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I. INTRODUCTION

Since the ending of the “Bracero Program” in 1964, Americans have become increasingly accustomed to seeing foreign migratory workers, legal and illegal, become an almost ubiquitous component of the American landscape.

In a simplistic manner, one may say that the labor abilities of these foreign workers generally tend to gravitate towards four key areas of the U.S. economy: 1) food preparation, 2) care for children and the elderly, 3) cleaning of homes, and, especially, 4) arduous agricultural work. For their abilities, they are well recognized as outstanding chefs and waiters, loving babysitters, patient Spanish teachers, and generous providers of care and affection to elderly people. They are also known to be diligent janitors and maids, superior gardeners and nursery specialists, and reliable agricultural workers. Their almost indispensable presence in the fabric of the U.S. society has also served to introduce Americans to the sounds of foreign tongues, music, and the flavors of alien foods and exotic tastes.

From quite a contrasting perspective, Americans have also grown familiar with the dark side associated with foreign migratory workers: the mistreatment, abuse, and exploitation America and Americans are inflicting upon them. Unfortunately, we have become familiar to hearing racial insults being proffered against them or witnessing discriminatory practices affecting them, and remain aloof and indifferent. We, Americans, have witnessed the inhumane and sordid living conditions where these foreign migratory workers live, commonly described as “spider webs” by the local newspapers. It is in these “spider webs” that they not only eat and sleep but sometimes dare to dream, for months and years, suffering through a lack of electricity, running water, and sanitary facilities. America and her Americans have done little to change these appalling conditions. It is almost unbelievable that we have read about the brutal and violent raids that renegade military enlisted personnel (and even teenagers from affluent communities) have committed, attacking, torturing, injuring and killing foreign workers using guns, rifles, pellets, and rocks. We, Americans remain passive and

say nothing about these atrocities. Have we changed our values and traditions so profoundly?

Furthermore, each year, U.S. Border Patrol agents mistreat, abuse, injure, and kill hundreds of undocumented migratory workers along our border with Mexico. Launched in October 1994, the latest immigration enforcement strategy designed by military experts for the Immigration and Naturalization Service (INS) is "Operation Gatekeeper." Since its establishment, the death toll of undocumented migratory workers has risen dramatically.¹

The violence, brutality, and frequent occurrences of these practices are so abhorrent, that one would think and expect that these inhumane actions would trigger a vigorous national outcry of all Americans to put an immediate and permanent end to them. Alas, six years have elapsed since Operation Gatekeeper was initiated and there has been no objection at all.

Have we, Americans, become so insensitive, and America so callous, that we simply do not care about the hundreds of deaths of Mexican migratory workers which are taking place at our very own door every day? Are Americans indifferent to the extreme enforcement and lethal consequences of "Operation Gatekeeper?"

This article addresses poignant questions involving Mexican migratory workers, which touch upon issues close to America's pockets and psyche, and to U.S. immigration law and policies. This work advances the thesis that the mistreatment, abuses, and brutal violations inflicted by U.S. Border Patrol agents against Mexican migratory workers are not only offenses or crimes which must not be tolerated, but are also human rights violations.

Regardless of the immigration status of undocumented persons, any foreign person in this country deserves to be treated with dignity and respect, and afforded humane treatment, with international human rights principles. This article explores sensitive immigration law issues as perceived through the eyes of undocumented persons, not as criminal entrants, but as victims of indignity.

This article criticizes the erroneous *laissez faire* attitude of the U.S. government regarding the problems created by the constant, but irregular, migratory flows of Mexican undocumented workers into this country.

To correct this flawed policy, this article proposes a bilateral U.S.-Mexico agreement be signed to regulate and control these flows in a

1. As of May, 6 2001, in California alone, 624 deaths have been reported, and the total number of Mexican nationals who have perished along the entire U.S. border with Mexico exceeds 1,320, *available at* <http://www.stopgatekeeper.org>.

systematic and practical manner, similar to the "Bracero Program," or the current one for temporary workers between Mexico and Canada.

As a protocol to this eventual international agreement, the author proposes that both the United States and Mexico expressly recognize and uphold, if only on a bilateral basis, international human rights, which would protect Mexican migratory workers while they temporarily reside and work in the United States.

*A. Long Journey From the South to "El Norte" Seeded
with Hope and Dangers*

*1. History, Geography, and Economics: The Three
Fundamental Reasons for Mexican Migration*

History, geography, and economics have combined in the bilateral relations between the United States and Mexico to focus their attention on a most resilient problem: the inveterate and interminable flow of Mexican nationals who come to the U.S. unlawfully in search of jobs, or in their quest to find a better way of life. Over the last decade, immigration has been a burning issue in the diplomatic agenda of these neighboring countries.²

From a historical perspective, the 1848 Treaty of Guadalupe Hidalgo severed Mexico of more than half of her territory,³ as a result of a tragic and unjust war.⁴ The pain of this territorial amputation continues to lacerate the soul of the Mexican nation, despite the fact that more than 150 years have elapsed since the treaty was signed.⁵ Deep inside the heart of Mexicans, the symbolism of that treaty, which is equated with a

2. See U.S. Department of State, *Fact Sheet: Seventeenth U.S.-Mexico Binational Commission Meeting* (Aug. 1999).

3. See Treaty of Peace, Friendship, Limits and Settlement, Feb. 2, 1848, U.S.-Mex., 9 Stat. 922-943, T.S. No. 207. The Treaty was ratified by the U.S. on March 16, 1848, and by Mexico on May 30, 1848. Ratifications were exchanged at Querétaro, Mexico, May 30, 1848. Proclaimed July 4, 1848. See 5 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 207-428 (Hunter Miller ed., 1937). [For Spanish text of Treaty, see TRATADOS Y CONVENCIONES SOBRE LÍMITES Y AGUAS ENTRE MÉXICO Y LOS ESTADOS UNIDOS, *Secretaría de Relaciones Exteriores, Comisión Internacional de Límites y Aguas*, at 9 (CILA) (1957).]

4. See WARD MCAFFEE & J. CORDELL ROBINSON, ORIGINS OF THE MEXICAN WAR: A DOCUMENTARY SOURCE BOOK (1982); JOSÉ MARÍA ROA BÁRCENA, RECUERDOS DE LA INVASIÓN NORTEAMERICANA 1846-1848 (1947).

5. Symposium: Understanding the Treaty of Guadalupe Hidalgo on Its 150th Anniversary, 1 S.W. J.L. & TRADE AM. 3 (1998); see also J.L. SOBERANES ET AL., EL TRATADO DE GUADALUPE HIDALGO EN SU SESQUICENTENARIO (III, UNAM, 1998).

deliberate and most unjust blow by a powerful United States against Mexico, is believed to be a secular driving force which continues to fuel the migration of Mexicans to the U.S. Measuring 1,951.67 miles, according to the International Boundary and Water Commission.⁶ U.S. and Mexico share one of the longest and most complicated international boundaries on a global scale.⁷ From California to Texas, the boundary runs through a variety of climates, as well as, organic and geological features ranging from coastal and estuarine waters, deserts and treacherous canyons to high mountains, cliffs, alluvial valleys, and vast esplanades. There is no other boundary in the world where a major power such as the United States meets a developing country like Mexico. The asymmetries between these two countries cannot be more dramatic in the areas of race, demographic growth, religion, language, history, culture, and legal systems.⁸ However, these differences are exaggerated on the economic front.⁹

These pronounced social and economic differences, jointly with a porous and contiguous border, constitute the two major factors that have induced Mexican nationals in the past, and will continue to encourage them in the future, to migrate to the United States. These economic differences demonstrate that migration of Mexican nationals to the United States is not a unilateral phenomenon. Like any other migration on a global scale, this is an international social phenomenon that transcends national boundaries involving two or more states and,

6. The boundary consists of two types of limits: 1) A *natural boundary* formed by three international rivers: the Rio Grande, Colorado and Tijuana; and 2) An *artificial boundary* established by straight lines which unite specific points defined by their coordinates of latitude and longitude according to the applicable provisions of the 1848 and 1853 Treaties. The Rio Grande portion measures 1,254 miles from El Paso, Texas to the Gulf of Mexico; 179.96 miles in New Mexico; 376 miles (including 24 miles of the Colorado River) in Arizona, and 140.73 miles in California. Metz reports that the "official" (*sic*) length of this boundary totals 1,951.36 miles. See LEON C. METZ, BORDER (2d ed. 1990); see also Jorge A. Vargas, *Is the International Boundary between the United States and Mexico Wrongly Demarcated?*, 30 CAL. W. INT'L L.J., 101-56 (Summer 2000).

7. This boundary was established based on Article V of the 1848 Guadalupe Hidalgo Treaty, and the subsequent changes made by Article I of the Gadsden Purchase of 1853, known in Mexico as *Tratado de La Mesilla*. See Treaty of Peace, Feb. 2, 1848, U.S.-Mexico, Art. V, 9 Stat., 922-943; see also The Gadsden Treaty, Dec. 30, 1953, U.S.-Mexico, Art. I, 10 Stat., 1031-1037.

8. Jorge A. Vargas, *Contrasting Legal Differences between the U.S. and Mexico: Legal Actors, Sources, Courts and Federal Agencies*, in 1 MEXICAN LAW: A TREATISE FOR LEGAL PRACTITIONERS AND INTER-NATIONAL INVESTORS 1, 1-36 (West Group 1998).

9. See generally ENCYCLOPEDIA BRITANICA. For example, *Per capita income* (PCI) in the United States is \$30,000 U.S. dollars, and the California minimum wage per hour amounts to \$5.50 U.S. dollars. Mexico's PCI is \$4,234 U.S. dollars, and the highest mini-minimum wage in Mexico is equivalent to \$5.00 U.S. dollars for eight working hours. *Id.*

therefore, it demands not a national but an international solution.

2. Mexico: The Leading Source Country of Undocumented Immigration to the United States

In a relatively recent study, *Illegal Alien Resident Population* (1996), the INS reports that “about 5.0 million undocumented immigrants were residing in the United States in October 1996, with a range of about 4.6 to 5.4 million. The [illegal alien resident] population was estimated to be growing by about 275,000 each year.”¹⁰ The original INS estimates for October 1992 and October 1998, released in 1994, showed an average annual growth of 300,000.

According to this report, the estimates for states reflect “a well-established pattern of geographic concentration of undocumented immigrants in the United States.” California was the leading state of residence, with 2,000,000, or 40 percent, of the total number of undocumented residents in October 1996. Seven states – California (2,000,000), Texas (700,000), New York (540,000), Florida (350,000), Illinois (290,000), New Jersey (135,000), and Arizona (115,000) – accounted for 83 percent of the population in October 1996.”¹¹ The estimated undocumented population of California has grown by an average of about 100,000 annually since the end of the IRCA legalization program in 1988.

Mexico is the leading source country of undocumented immigration to the United States. In October 1996 an estimated 2.7 million undocumented immigrants from Mexico had established residence here. Mexican undocumented immigrants constituted about 54 percent of the total undocumented population. The estimated population from Mexico increased by just over 150,000 annually in both the 1988-92 and 1992-96 periods.¹²

Although undocumented immigrants come to the United States from all countries of the world, relatively few countries add substantially to the population. According to the INS report, the annual growth of the undocumented population can be grouped into four separate categories: 1) Mexico, with more than half of the annual growth adds just over 150,000 undocumented residents each year, 2) six countries – El

10. INS Releases Updated Estimates on U.S. Illegal Population, available at <http://www.ins.usdoj.gov/graphics/publicaffairs/newsrels/illegal.htm> (Aug. 2, 2000).

11. *Id.* at <http://www.ins.usdoj.gov/graphics/publicaffairs/newsrels/states.pdf>.

12. *Id.* at <http://www.ins.usdoj.gov/graphics/publicaffairs/newsrels/top25> (emphasis added).

Salvador, Guatemala, Canada, Haiti, Honduras and the Bahamas – each adds between 6,000 and 12,000 annually, 3) thirteen countries each add about 2,000 to 4,000 annually, and 4) the approximately 200 other remaining countries (*sic*) add a total of about 30,000 undocumented residents each year. The majority of yearly additions, more than 80 percent, are from countries in the Western hemisphere.¹³

Out of this vastly diverse undocumented immigrant population, this article focuses on Mexican nationals because these nationals represent the largest majority of United States immigrants. As a result, Mexican nationals are the segment of foreign population which has been the most victimized by the offenses, abuses, and violations of U.S. Border Patrol Agents and other INS officials.

Since Congress passed the very first controls restricting the admission of aliens to the United States, undocumented persons have been the object of serious violations and abusive treatment by immigration officials and U.S. border inspectors. The painful narratives describing the abuses to which aliens were subjected to at Ellis Island in New York City and Angel Island¹⁴ in California, are graphic examples of cruel and inhumane treatment of aliens by government officials.¹⁵ However, the injustices and suffering inflicted upon aliens in the late 1880s and early this century belong to a bygone era when U.S. societal values, as reflected in the law and judicial decisions of that era, condoned the mistreatment of aliens under the rationale that aliens simply did not have any rights.¹⁶ The Chinese Exclusion Act,¹⁷ as well as the series of cases

13. *Id.*

14. See generally Estelle T. Lau, *Excavating the Chinese Law: Towards a Socio-Historical Perspective on the Development of U.S. Immigration and Chinese Exclusion*, 92 NW. U.L. REV. 1068 (1998); Kitty Calavita, *The Paradoxes of Race, Class, Identity, and "Passing": Enforcing the Chinese Exclusion Acts, 1882-1910*, 25 LAW & SOC. INQUIRY 1 (2000); Keith Aoki, *No Right to Own?: The Early 20th Century "Alien Land Laws" as a Prelude to Internment*, 19 B.C. THIRD WORLD L.J. 37 (1998); Kenzo S. Kawanabe, *American Anti-Immigrant Rhetoric against Asian Pacific Immigrants: The Present Repeats the Past*, 10 GEO. IMMIGR. L.J. 681 (1996).

15. See generally BILL ONG HING, *MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850-1990* (1993); RONALD T. TAKAKI, *STRANGERS FROM A DIFFERENT SHORE -THE HISTORY OF ASIAN AMERICANS* (1989); MILTON R. KONVITZ, *THE ALIEN AND THE ASIATIC IN AMERICAN LAW* (1946).

16. Michael A. Olivas, *The Chronicles, My Grandfather's Stories, and Immigration Law: The Slave Traders Chronicle as Racial History*, 34 ST. LOUIS U.L.J. 425 (1990); Jan C. Ting, "Other than a Chinaman": *How U.S. Immigration Law Resulted from and Still Reflects a Policy of Excluding and Restricting Asian Immigration*, 4 TEMP. POL. & CIV. RTS. L. REV. 301 (1995).

17. In 1882, the U.S. Congress suspended the immigration of Chinese laborers, but allowed those present in the United States as of November, 1880, to obtain certificates from caucasians exclusively to establish their U.S. presence. These certificates permitted Chinese laborers to make visits to China and then return to the U.S. While many of these Chinese were temporarily overseas visiting their homeland, the U.S. Congress

upholding the absolute and unlimited power of the Federal government over immigration matters,¹⁸ attest to the prevailing legal philosophy during this very dark period of U.S. immigration law.

The evolution of the U.S. legal system, particularly of its immigration laws, has been painfully slow to acknowledge the existence of constitutional, civil, and other rights protecting aliens in the United States. Congress and the federal courts have been decidedly miserly in their efforts to grant, recognize, or extend any legal rights which would favor or protect aliens. However, after a century of legislating and interpreting immigration laws, some progress, albeit modest and erratic, is being made.

U.S. immigration laws have failed to recognize two of the most fundamental principles embedded in any modern and fair legal system: first, the principle of legal equality of all individuals, whether nationals or aliens; and, second, the principle that all individuals, as human beings, deserve to be treated with the utmost respect because of their human rights and human dignity.

In 1980, the United States Commission on Civil Rights supported the rights of aliens. In its final report: *The Tarnished Golden Door: Civil Rights Issues in Immigration*,¹⁹ the Commission recognized that aliens possess civil rights and that these rights are protected by the U.S. Constitution. For the first time, this document included a critical evaluation of the INS procedures on apprehensions, deportations, and, in particular, its flawed Complaint Investigation Procedures.²⁰ Despite the time elapsed, these complaint procedures remain lopsided and highly ineffective today.

The philosophy that aliens have certain rights legally protected by the U.S. Constitution has started to exercise an incipient, but civilizing influence upon immigration law. Under the U.S. legal system, aliens

changed the law. The subsequent law barred their return to the United States and disallowed entry to even those who had obtained the required certificates. See Act of Oct. 1, 1888, ch. 1064, § 2, 25 Stat. 504. In *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), the United States Supreme Court upheld the constitutionality of the statute barring the return of residents with certificates.

18. See generally Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255 (1985); Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047 (1994).

19. U.S. Commission on Civil Rights, *The Tarnished Golden Door, Civil Rights Issues in Immigration* (Sept. 1980).

20. *Id.* chs. 6-8; see also *id.* at 141-43.

continue to have problems since they are perceived as merely possessing limited and tenuous rights. However, a recent development derived from this progressive philosophy is the notion that individual aliens, like any other human beings, are endowed with human rights recognized and protected by international law.

This new philosophy is reflected in recent academic works,²¹ and has also been embraced by well-known domestic and international organizations such as Human Rights Watch/Americas,²² Amnesty International,²³ the American Friends Service Committee, (U.S.-Mexico Program and Immigration Law Enforcement Monitoring Project)²⁴ and the California Rural Legal Assistance Foundation's Border Project.²⁵

3. *The Remote Origins and Periodic Causes of Mexican Migrations to "El Norte"*

Centuries ago, long before the boundaries between the U.S. and Mexico were demarcated by the Treaty of Guadalupe Hidalgo and the Gadsden Purchase, the only natural passage connecting the lower portion of the New Spain (which later became the Republic of Mexico) with its northern territories, known today as Texas and New Mexico, was the location known as "Paso del Norte," or "Passage to the North."

21. See generally Kristina M. Owen, *The Immigrant First as Human: International Human Rights Principles and Catholic Doctrine as New Moral Guidelines for U.S. Immigration Policy*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 499 (1999); Harry Valetk, "I Cannot Eat Air!": *An Economic Analysis of International Immigration Law for the 21st Century*, 7 CARDOZO J. INT'L & COMP. L 141 (1999); Caroline Woodward, *International Human Rights Law—Undocumented Aliens, Limited Effect of International Human Rights Law on Undocumented Aliens' Rights to Free Public Education in the United States*, 18 SUFFOLK TRANSNAT'L L. REV. 811 (1995).

22. Americas Watch was established in 1981 "to monitor and promote observance of internationally recognized human rights." Americas Watch is a division of Human Rights Watch. Since 1992, this Non-Governmental Organization (NGO) has published reports on a periodic basis, documenting egregious abuses by I.N.S. officials and U.S. Border Patrols agents along the U.S.-Mexican border. See, e.g., BRUTALITY UNCHECKED: HUMAN RIGHTS ABUSES ALONG THE U.S. BORDER WITH MEXICO (1992); CROSSING THE LINE: HUMAN RIGHTS ABUSES ALONG THE U. S. BORDER WITH MEXICO PERSIST AMID CLIMATE OF IMPUNITY vol. 7, no. 4 (Apr. 1995).

23. *From San Diego to Brownsville: Human Rights Violations on the USA—Mexico Border* <http://www.amnesty.org/news/1998/25103398.htm> (visited Jan. 31, 2001).

24. *Immigrant Rights are Human Rights: U.S.-Mexico Border Program & Immigration Law Enforcement Monitoring Project* <http://www.afsc.org/border98.htm> (visited Jan. 31, 2001).

25. This Foundation maintains an outstanding web site documenting the deaths of undocumented persons by name, type of death, and location of death in California, Arizona and Texas, as a result of Operation Gatekeeper. The Foundation monitors I.N.S. strategy and documents apprehension and human rights abuses. Available at <http://www.stopgatekeeper.org>.

This route was followed by so many expeditions of soldiers, missionaries, merchants, explorers, and Indians that a small mission was established by Fray García de San Francisco on December 8, 1659.²⁶ Years later, the modest village of *Paso del Norte* changed its name to Ciudad Juárez to honor the visit of President Benito Juárez in late 1864. Juárez also established the federal powers of the Mexican Republic in the village.²⁷

The 1848 Treaty of Guadalupe Hidalgo²⁸ not only severed Mexico from the vast and rich Mexican territories located on the northern side of the Rio Grande and the new international boundary line, (which later became the states of Arizona, California, Colorado, Nevada, New Mexico, Oregon and Utah), but this Treaty also separated Mexican families, physically and legally. Members of Mexican families who found themselves located south of the border started traveling to "The North" (the United States) to be reunited with their families on the other side of the border.

Other Mexicans who did not have families in The North, felt that they had the right to travel, and even reside and work there, because they reasoned that those vast territories were taken away from Mexico by U.S. force. Today, Mexicans still believe the treaty was an arbitrary and illegal act, and that those lands legitimately belong to Mexico. The act by Mexican nationals to migrate in mass to The North, especially to those states, represents only the gradual, quiet, and yet unstoppable, repossession of former Mexican lands: a movement which is referred to as "The Silent Invasion."

Mexico's revolution started in the city of Puebla on November 20, 1910. It may be characterized as that country's most profound social, economic, and political event. It violently destroyed the pre-existing regime and, at the price of one million lives, laid the bases for the emergence and construction of a less dictatorial and more modern Mexico. The revolution swept the country from north to south and from the Pacific Ocean to the Gulf of Mexico. No one escaped its devastating effects.

Again, this truly social eruption, which lasted for over a decade,

26. See Paul Horgan, *Indians and Spain*, in 1 GREAT RIVER: THE RIO GRANDE 237 (1954); see also ARMANDO B. CHÁVEZ, *HISTORIA DE CIUDAD JUÁREZ* 116 (1991).

27. See CHÁVEZ, *supra* note 26, at 255-74. At that time, the name of the town across the Rio Grande was Franklin, Texas. As soon as Paso del Norte changed its name to Ciudad Juárez, Franklin adopted the abbreviated name of "El Paso."

28. See generally *supra* text accompanying notes 3 and 5.

uprooted tens of thousands of Mexicans from their rural shelters and forced them to seek refuge and work in the U.S. Many Mexicans fled to the United States and became migratory workers.

In 1907, the Dillingham Immigration Commission noted that thousands of Mexican workers had traveled "a considerable distance" from their homes in Mexico to Colorado.²⁹ Mexicans not only worked in agricultural farms and ranches in California, Arizona, Texas, and New Mexico, but also in the Cascade Mountains, the Yakima Valley, and the Willamette Valley in Oregon, growing hops, vegetables, fruits, and nut crops. In the Upper and Lower Snake River Valley in Idaho, Mexicans produced specialty crops with strong market values such as potatoes, sugar beets, and peas. They also marched deep into the Pacific Northwest and even to the salmon canneries of Alaska.³⁰ This steady labor crusade of Mexican workers to the U.S. was probably the first transborder labor migration that demonstrated to U.S. farmers and managers the immense benefits that Mexican nationals could provide. Mexican workers were industrious, devoted to their work, honest, easily entertained, and always ready to follow orders. From then on, Mexican migratory workers were perceived as a goldmine for U.S. farmers, ranchers, and company entrepreneurs.

Regarding the advantages of Mexican migration, the Dillingham Commission wrote in 1907:

Because of their strong attachment to their native land. . . and the possibility of their residence here discontinued, few become citizens of the United States. The Mexican migrants are providing a fairly adequate supply of labor. . . While they are not easily assimilated, this is of no very great importance as long as most of them return to their native land. In the case of the Mexican, he is less desirable as a citizen than as a laborer.³¹

World War II offered the unique opportunity of a wide open door for Mexicans and many other nationalities to migrate to the U.S. legally and illegally.³² As labor shortages intensified and threatened crop production, U.S. agribusiness turned to Mexico for help. Young and able-bodied men were needed virtually everywhere; in agricultural places, farms,

29. See generally ERASMO GAMBOA, *MEXICAN LABOR AND WORLD WAR II: BRACEROS IN THE PACIFIC NORTHWEST, 1942-1947* (1990).

30. *Id.* at 7-10. For years, Portland became "the great Mexican peon capital of the United States," along with Denver and Los Angeles, where U.S. farmers, ranchers and company managers found the "principal areas of recruitment for Mexican laborers." *Id.* at 9.

31. Kitty Calavita, *The Immigration Policy Debate: Critical Analysis and Future Options*, in WAYNE CORNELIUS & JORGE BUSTAMANTE, *MEXICAN MIGRATION TO THE UNITED STATES* 151 (1989).

32. See GAMBOA, *supra* note 29, at 22-47; see also PATRICIA MORALES, *INDOCUMENTADOS MEXICANOS* 99-154 (1981).

ranches, and timber areas but also in kitchens, butcheries, bakeries, mechanical shops, restaurant kitchens, hotels, construction companies, and even in the military service. In Europe, Africa, the Pacific Islands, and Asia, Mexican migratory workers provided the support which was so badly needed domestically by the United States to continue to be engaged in its paramount military effort. There is no doubt that Mexican labor support was instrumental in contributing to the Allied victory. However, Mexican labor support of the U.S. is now forgotten.

This urgent need for workers in the fields led to the *Bracero Program*.³³ U.S. Congressman John Tolan, head of the U.S. House of Representatives Subcommittee, who had been investigating national defense migration, recommended that a binational U.S.-Mexico joint committee be established "to supervise the importation of Mexican nationals."³⁴ Because of legal and political reasons, Mexico was initially reluctant to engage in formal negotiations. The Mexican government still had vivid recollections of the mass expulsion of over 50,000 Mexicans following the Great Depression.³⁵ Preliminary discussions were conducted in the Mexican Embassy in Washington, D.C. in May of 1942, and were followed by the formation of an Inter-secretarial Commission appointed by then President of Mexico, Manuel Avila Camacho. A few weeks after Mexico declared war against the Axis Powers, Mexico and the United States signed the first executive agreement establishing a temporary program stationing Mexican agricultural workers in U.S.³⁶

The *Bracero* international agreement included these major features:

Mexican workers were not to be used to displace domestic workers but only filled proved shortages. Recruits were to be exempted from military service, and discrimination against them was not to be permitted. The round trip transportation expenses of the worker were guaranteed, as well as living expenses on route. Hiring was to be done on the basis of a written contract between the worker and his employer and the work was to be exclusively in

33. The name of this program, "Bracero," comes from the Spanish word for arms, *brazos*. It conveys the idea of hiring men who use their arms in performing their work (physical labor). The "Bracero Program" was restricted to temporal agricultural work in the U.S.

34. ERNESTO GALARZA, *MERCHANTS OF LABOR, THE MEXICAN BRACERO STORY* 46 (1964).

35. *Id.* at 46-47.

36. *Id.* at 47; see also RICHARD B. CRAIG, *THE BRACERO PROGRAM: INTEREST GROUPS AND FOREIGN POLICY* (1971); see generally PETER N. KIRSTEIN, *ANGLO OVER BRACERO: A HISTORY OF THE MEXICAN WORKER IN THE U.S. FROM ROOSEVELT TO NIXON* (1977).

agriculture. *Braceros* were to be free to buy merchandise in places of their own choice. Housing and sanitary conditions were to be adequate. Deductions amounting to ten percent of earnings were authorized for deposit in a savings fund payable to the workers on his return to Mexico. Work was guaranteed for three-quarters of the duration of the contract. Wages were to be equal to those prevailing in the area of employment, but in any case not less than 30 cents per hour.³⁷

With different amendments and adjustments, the Bracero Program was kept in place from 1942 to 1964. President Roosevelt referred to this program as “an eloquent testimony of the important role Mexico played in the battle for food production, upon which the inevitable success of our military program depends.”³⁸

In retrospect, a quantitative analysis of the implementation and enforcement of the *Bracero* agreements demonstrates that the demand for Mexican labor was so high that, in parallel with the formal agreements, there was an almost as large “Undocumented Bracero Program.” For example, Kirstein reports that from 1942 to 1949 the official number of Mexican nationals that entered the U.S. under the program was 309,538; however, Briggs reports 477,829 undocumented workers during the same period of time, Cornelius indicates that 219,000 were “legal” and 372,922 “undocumented,” and Galarza reports a total of 343,896 were deported by the INS.³⁹ The existence of this parallel “Undocumented Bracero program” resulted in endless abuses inflicted upon Mexican nationals by U.S. citizens and U.S. companies.⁴⁰

During the 22 years of operation of the “*Bracero* Program,” a total of 4,682,835 Mexican nationals were formally hired in contrast to the five million Mexicans who were apprehended and deported by the INS as “undocumented workers.”⁴¹

The end of World War II slammed the U.S. immigration door in the faces of Mexican migratory workers. As millions of U.S. nationals returned home, millions of Mexican migratory workers, jointly with their families, were apprehended and deported back to Mexico.⁴² Did it

37. GALARZA, *supra* note 34, at 37-38; *see also* MORALES, *supra* note 31, at 104-105.

38. KIRSTEIN, *supra* note 36, at 14.

39. *Id.* at 50; GALARZA, *supra* note 34, at 53, 59. The figures by Briggs and Cornelius are cited by MORALES, *supra* note 32, at 108.

40. *See* GAMBOA, *supra* note 31, at 74-90; *see also* KIRSTEIN, *supra* note 36, at 14; MORALES, *supra* note 32, at 109-13.

41. MORALES, *supra* note 32, at 148.

42. Pressured by the increasing number of illegal Mexican immigrants detained in the U.S., in 1954, under the supervision of new Commissioner of the Immigration and Naturalization Service, General Joseph Swing, “Operation Wetback” was initiated. While the official focus of the operation was illegal immigration in general, in practice, the operation specifically targeted Mexicans, including Mexican-Americans who were U.S. citizens as well as Mexican nationals (aliens). Mexican *campes* and *barrios* were

matter that many of those Mexican workers had children who were born in the United States and, as a result, were U.S. citizens? Then, as it is today, this argument was not (and has not been) incorporated in our immigration laws and, consequently, it is not a legal defense to avoid deportation.⁴³

In his conclusions about the Bracero Program, Gamboa writes:

Bracero-assisted record agricultural production translated into economic prosperity in many rural northwestern communities. Even so, the civil and human rights of the braceros were seldom considered by many of the residents of these towns. Braceros were the victims of much social and physical discrimination, which further limited their upward mobility. . . Agriculture rejoiced in the fact that the braceros would enter the country temporarily as cheap laborers and then be ordered back to Mexico. *But it was illogical to assume that former braceros would give up a livelihood upon which they depended and not continue to come to the United States.*⁴⁴ . Many stayed and others returned later as immigrant workers to this country.

The Bracero Program officially ended on December 31, 1964. Not unexpectedly, its termination marked the beginning of a major Mexican border problem. For over two decades, certain border towns in Mexico had been receiving every year the short visits of hundreds of thousands

swarmed *en masse* by state and local officials and I.N.S. personnel, often without checking documentation and disregarding or destroying any documentation actually shown. Undocumented and documented, alien and citizen, were deported within hours to Mexico, often breaking up families in the process. The total number of Mexican workers deported *en masse* during Operation Wetback was estimated by the I.N.S. to be 1.3 million. See Juan Ramón García, *Operation Wetback: The Mass Deportation of Mexican Undocumented Workers in 1954*, THE BORDER: OPERATION WETBACK (1980), available at http://www.pbs.org/kpbs/the_border/historytimeline20.htm; see also "Handbook of Texas Online: Operation Wetback," available at <http://www.tsha.utexas.edu/handbook/online/articles>.

43. While 8 U.S.C. § 1401(A) states that "a person born in the United States, and subject to the jurisdiction thereof" is a national and citizen of the U.S. at birth, and subsequent case interpretations have held that, "Citizenship is so precious that it cannot be taken away . . . except by clear, certain and 'indeed, overwhelming' evidence," *Nieto v. McGrath*, 108 F. Supp. 150, 153 (S.D. Tex. 1951), in practice, U.S. citizen children born of alien parents in the United States are easily deportable. In *Gonzales-Cuevas v. I.N.S.*, 515 F.2d 1222 (5th Cir. 1975), it was held that "Legal orders of deportation to their parents do not violate any constitutional right of citizen children and . . . are valid orders," and such circumstances, "create no extraordinary rights in [alien parents], directly or vicariously through their children, to retain their illegally acquired residency status in this country . . ." *Id.* at 1222. This led to the *de facto* deportation of children, as well as parents, held permissible by the Ninth Circuit in three 1977 decisions: *Mamanee v. INS*, 566 F.2d 1103, 1105-06 (9th Cir. 1977); *Lee v. I.N.S.*, 550 F.2d 554, 555-556 (9th Cir. 1977); *Davison v. I.N.S.*, 558 F.2d 1361, 1363 (9th Cir. 1977), *aff'd* *Zavala v. Bell*, 453 F.Supp. 55, 56 (N.D. Cal. 1978).

44. GAMBOA, *supra* note 32, at 131 (emphasis added).

of workers from the heart of Mexico. These Mexican nationals congregated in a few Mexican border towns such as Tijuana, Ciudad Juárez, Nuevo Laredo, and Ciudad Reynosa, known as “*Centros de Contratación*” or hiring centers. It was in these hiring centers that U.S. farmers and agricultural companies hired Mexican laborers. However, despite the unilateral cancellation of the Bracero Program by President Lyndon Johnson, massive numbers of Mexican nationals aspiring to work as Braceros continued to go to the hiring border towns hoping that the program would be reinstated. This did not happen. After receiving this internal flow of Mexican migrants for weeks, the border towns in question suffered extreme shortages of food, water, shelter, and transportation, thus creating serious problems. Although many Mexicans returned to their places of origin, the majority of them decided to cross the border illegally, knowing that they would be hired in the U.S.

Eventually, as a measure to try to solve this critical problem, the government of Mexico established the National Border Development Program (*Programa Nacional Fronterizo* or PRONAF). This program was directed at attracting U.S. investors to establish assembly plants in towns along the border, where the labor was to be supplied by Mexican workers. Over the years, this program became the “*Maquiladora*,” or Assembly Plant Program.⁴⁵

Based on the preceding discussion, it is evident that the three most enduring factors in triggering the migration of Mexican nationals to the U.S. are history, geographic contiguity, and the economic asymmetries between the U.S. and Mexico. This Mexican migration is likely to continue indefinitely as this triad of dissimilar forces remains in place.

The preceding discussion may have also underlined the inevitable and close involvement that must take place between two or more countries as a triggering force for the unleashing of the trans-border migration. Countries are immersed in a global context which is becoming more intertwined. Thus, migration is *per se* a bipolar or a multipolar concept, a social phenomenon that will *always* involve two or more countries. Therefore, unilateral measures adopted to solve transborder flows of

45. Guillermo Marrero, *What Foreigners Should Know About the Mexican Market* in 699 PRACTICING LAWS INSTITUTE/COMMERCIAL LAW AND PRACTICE COURSE HANDBOOK SERIES 117, 133-39 (1994); Margaret E. Montoya, *The Mexican Maquiladora: Rumors of Its Death Are Premature*, 7 U.S.-MEX. L.J., 203 (1999); Magdeline R. Esquivel et al., *The Maquiladora Experience: Employment Law Issues in Mexico*, NAFTA L. & B. Rev. Am. 589 (1999); see also *Tijuana/San Diego is the Right Strategic Region for you*, http://www.tijuana-edc.com/html/man_info.htm (visited Nov. 14, 2000); Jim Gerber, *The Whiter Maquiladoras?: A Look at the Growth Prospects for the Industry After 2001* (Working Paper #E-99-1) <http://www.sddialogue.org> (visited Sept. 14, 2000).

people remain futile. The wisest and only policy to solve the problems associated with transnational flows of people is simple: a policy designed and implemented with the direct participation of each of the countries affected by this phenomenon.

In conclusion, the chronic and irritating problems of Mexican undocumented migration to the U.S. can only be solved when the U.S. and Mexico prove to have the political will and the sincere determination to address this problem in a joint manner, considering that both countries have contributed to create this problem and both countries have obtained and continue to obtain resulting benefits.

4. Tijuana is the "Magnet City" for Potential Undocumented Entrants

Potential undocumented persons have been arriving at Tijuana, Baja California, for many decades.⁴⁶ Prior to "Operation Gatekeeper," launched in October of 1994, the city of Tijuana, which is located along the border, was the point of entry for a record numbers of undocumented entrants every year, totaling 1.6 million in 1995.⁴⁷ Today, Tijuana boasts a growing population of 1.2 million,⁴⁸ as well as, the highest number of international border crossings in the world. In 1999, the crossings at the San Ysidro port of entry were estimated to be 250 million people!⁴⁹

46. See Steve La Rue, *Small Lots Will Go to Thousands in Tijuana*, S.D. UNION TRIB., Dec. 3, 1989, at B1; Sebastian Rotella, *Station of Dreams: Tijuana Bus Terminal a Haven for Immigrant Smuggler Rings*, L.A. TIMES, May 11, 1992, at B1; Norris Clement and Eduardo Zepeda, *Linked Destiny: Border Cities in transition as old engine of growth stall*, S.D. UNION-TRIB., June 27, 1993, at G1; Anne-Marie O'Connor, *Thwarted Border Crossers Fill Tijuana: Immigration: Bad weather and persistent patrols deter them*, L.A. TIMES, Jan. 17, 1997, at A3; Gregory Ross, *Mexico-U.S. Scholars Attain New Unity on Migration Study*, S.D. UNION-TRIB., Sept. 15, 1997, at B1.

47. *Who Crosses the Border: A View of the San Diego/Tijuana Metropolitan Region*, A Report of the San Diego Dialogue, at 36 (Apr. 1994), available at <http://www.sddialogue.org/pubs/index.html>.

48. Baja California has an estimated population of approximately 2.5 million people, of which Tijuana comprises between 49-50%, or approximately 1.2-1.3 million persons. *Population: Tijuana's Most Valuable Resource is it's People*, available at <http://www.tijuana-edc.com/html/population.htm> (visited on Sept. 14, 2000); see also *Población: Crecimiento de la Población*, available at <http://www.baja.gob.mx/promoción/entorno/población.htm> (visited on Sept. 14, 2000) (illustrating the population growth in Baja, California and Tijuana from 1990-1995); Sandra Dibble, *Tijuana Assesses its Shortcomings and Opportunities for Solutions*, S.D. UNION-TRIB., Aug. 20, 1995, at B1.

49. See Anne-Marie O'Connor, *New Tactics Slash Gridlock at the Border. Mexico: Boost in INS, Customs staffs serve to foster trade, personal ties*, L.A. TIMES, Jan. 27, 1997, at A1; see also *California and Baja California Indicators: Northbound*

Old and new factors have contributed to making Tijuana the city of choice for the overwhelming majority of undocumented persons. Tijuana's physical proximity to the United States is ideal. Its economy is one the very best in Mexico, with the highest minimum salary in the country, equaled only by Mexico City.⁵⁰ Surprisingly, unemployment is relatively low, since hundreds of *maquiladoras*⁵¹ offer higher than minimum salary jobs for both men and women, regardless of formal education or technical training. From a climatological point of view, Tijuana's average temperatures in the summer and winter are not as extreme as those in Mexicali or Ciudad Juárez, or in other Mexican border towns. Other attractions include beaches along the Pacific coast and the fact that in "El Norte," just across the border from Tijuana, the State of California offers very tempting opportunities: (1) it boasts the strongest economy in the U.S.,⁵² (2) it has the largest and fastest growing Latino population in this country,⁵³ and (3) for a long time, California has proven to have an inexhaustible need for cheap manual labor, especially in the agricultural and service sectors.

Thousands of Mexican nationals come to Tijuana in an unstoppable stream from all geographical corners of Mexico.⁵⁴ They come from

Crossings Alone, available at http://www.ccsbres.sdsu.edu/data/mexico_data/mx_data.html (visited Sept. 14, 2000), which estimates the number of northbound crossings into California in 1999 to be approximately 97 million.

50. See *Salaries Best in Tijuana, Worst in Acapulco*, Mexico Business Monthly, Dec. 1, 1999, available in 1999 WL 27624110; see generally *Salaries Best in Tijuana, Worst in Acapulco, Survey Shows*, CORPORATE MEXICO: REFORMA (Nov. 3, 1999), available in 1999 WL 27624110.

51. See *infra* note 54.

52. California had an estimated Gross State Product (value of all goods and services produced by the state, similar to the U. S. Gross Domestic Product (G.D.P.) of \$1.165 trillion in 1999, outperforming the nation as a whole for the past four years, and comprising 13% of the U.S. G.D.P., far exceeding that of New York and Texas, the second and third ranked states respectively. If California were a separate nation, it would rank as the eighth largest economy in the world, following only the major industrialized nations (U.S., Japan, Germany, France, UK, China and Italy), and surpassing Brazil and Canada. Office of Economic Research, *California: An Economic Profile* 6 (Jan. 2000), available at <http://commerce.ca.gov/California/economy> (visited Sept. 14, 2000).

53. See Virginia Ellis and Nicholas Riccardi, *California and the West Study Says State's Population Will Double by 2040; Latinos to be 48%*, L.A. TIMES, Dec. 18, 1998, at A3; *California's Changing Face*, S.F. EXAMINER, Dec. 20, 1998, at C18; Patrick Smith, *Letter From San Francisco: An American City Goes Latino*, BUS. WK., May 22, 2000, at E6; Jill Leary, *California and the West: State Will Test Parties' Appeals to Latinos*, L.A. TIMES, Aug. 16, 2000, at A3; William Booth, *California Minorities are Now the Majority; Non-Hispanic Whites Dip Below 50%*, WASH. POST, Aug. 31, 2000, at A1; see generally *What's News: California - In California, We're All in the Minority*, WALL ST. J., Sept. 6, 2000.

54. See *Migration and Maquiladoras on Mexico's Northern Border*, Migration World Magazine, Jan. 1, 2000, available in 2000 WL 20948118; Maria Elena Fernandez, *In Castoff Doors, the Makings of Castles*, L.A. TIMES, May 30, 2000, at A1; Brendan M.

Indian villages in the mountains of Oaxaca, Puebla and Chiapas, the fertile valleys of Veracruz, Campeche and Michoacán, the cities of Toluca, Querétaro and Torreón, and the beautiful colonial areas of Guadalajara, Zacatecas, and Guanajuato.⁵⁵ They come as individuals, groups, and even as entire families. They are composed of men and women, young and old, catholic and protestant, healthy and sick, educated and illiterate, skilled and unskilled, *mestizos* and indigenous peoples.⁵⁶ Their objective is to cross the international boundary known as *La Linea*,⁵⁷ enter the U.S., and then remain undetected in this country, where they can live, work, and prosper. Most of them will go back to Mexico, to their places of origin, but 275,000 will remain a part of the U.S. workforce.⁵⁸

5. Why Do Mexicans Become "Undocumented Aliens" in the United States?

The answer cannot be simpler: *Mexican nationals come to the United States to construct a better way of life for themselves and for their families*, which appears to be unreachable and unattainable, if they continue to live and work in their country of origin.

The image the U.S. has been sending abroad since the early days of its existence has been a dual image: that of a country, where plenty of opportunities exist, and that of a nation comprised of immigrants who

Case, *Maquiladoras go high-tech, raising wages and profiles*, THE DALLAS MORNING NEWS, June 27, 2000, at 1D.

55. See Gregory Gross, *The New Wave Pesos Crisis Uproots the Settled, Brings First-Timers to the Border*, S.D. UNION-TRIB., Sept. 5, 1995, at A1; Alfredo Corchado, *Migrants are Undaunted by Dangers of Trip to U.S.; Many Mexicans believe they have no choice but to leave*, DALLAS MORNING NEWS, July 8, 1996, at 1A; Anne-Marie O'Connor, *Mexico's City of Promise: Immigrants from across the Country are Pouring into Tijuana, hoping for Better Jobs and Improved Lives*, L.A. TIMES, Jan. 26, 1998, at A1; Sandra Dibble, *Did Migrant Cross Safely?*, S.D. UNION-TRIB., Apr. 24, 1998, at A3.

56. See Katherine M. Donato & R. S. Carter, *Mexico and U.S. Policy on Illegal Immigration: A Fifty-Year Retrospective*, in *ILLEGAL IMMIGRATION IN AMERICA* 112-29 (Haines & Rosenblum eds., Greenwood Press).

57. The term *La Linea*, or "the line," has two meanings: the international boundary between the U.S. and Mexico, and the physical location of the U.S. port of entry, for example San Ysidro, California, or Puente de Córdova and Puente Lerdo, in El Paso, Texas. All U.S. ports of entry are characterized by long lines of cars that form in Mexican territory awaiting to clear the I.N.S. and U.S. Customs inspection to enter the U.S. The waiting time to cross ranges from a few minutes to one or two hours, depending on the time of day, weekends, and holidays.

58. See 1996 I.N.S. Report, *supra* note 10 and the accompanying text.

have come from all over the world. The two *clichés* depicting these two images are that of a country whose streets are paved with gold, and a nation which has become a "melting pot." One must keep in mind that for both lawful immigrants and undocumented persons,

...the golden door of our borders symbolized a spirit of liberty, a spirit which was reflected in the free and democratic traditions of our society. Beyond that golden door, they saw a land of opportunity where *the hopes and aspirations of any individual* could be fully realized. For the world's poor and oppressed, this country represented a refuge in which they could attain a better way of life. To others, passage through the golden door meant escape from either religious persecution, political tyranny, or economic hardships.⁵⁹

Over the years, U.S. immigration laws have become more restrictive.⁶⁰ As a reaction to the Immigration Reform and Control Act of 1986 (IRCA),⁶¹ which provided considerable benefits to unskilled undocumented persons,⁶² subsequent immigration laws tend now to attract professionals, highly trained workers, and investors.⁶³

For the overwhelming majority of Mexican nationals who form the U.S. labor force⁶⁴ and depend on a minimum wage paying job, it should be evident that they will not qualify to obtain an Immigrant Visa to lawfully immigrate to the U.S.⁶⁵ A possible legal avenue for these Mexican nationals to immigrate to this country would be to have a close relative living in the U.S. who is either a U.S. citizen or a lawful permanent resident and is willing to file a family-based application on behalf of a relative living in Mexico. However, depending on the type of family relationship and other economic considerations, this avenue may take as long as fifteen years to complete.⁶⁶

59. See *The Tarnished Golden Door*, *supra* note 19, at 1 (emphasis added).

60. See James F. Smith, *A Nation that Welcomes Immigrants? An Historical Examination of United States Immigration Policy*, 1 U.C. DAVIS J. INT'L L. & POL'Y 227 (1995).

61. See Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in 8 U.S.C., 42 U.S.C. and other titles).

62. By the May 4, 1988 deadline, IRCA provided benefits to 1.4 million people who applied for amnesty through the legalization program and an additional 479,530 people from the program for special agricultural workers. *Commissioner Nelson Holds Press Conference to Mark End of Legislation*, 65 INTERPRETER RELEASES 481 (1988).

63. See Immigration and Nationality Act (INA), 8 U.S.C. § 1153(b) (1994 & Supp. V 2000).

64. See Donato & Carter, *supra* note 56.

65. Evidently, this does not apply to Mexican indigenous peoples who live in small villages or rural communities, away from urban centers. In general, these peoples are in dire poverty and survive by the meager crops they produce in *ejidos*, or small agricultural parcels, in remote rural areas, consisting of corn, beans, peppers, etc. Over the last two decades, indigenous peoples from Oaxaca, Chiapas, Puebla, Tlaxcala, and other states have found their way to the U.S. where they work in agricultural jobs either legally or as undocumented persons.

66. See INA § 203, which discusses allocation of immigrant visas, and INA § 203

Traditionally, the stereotypical "illegal alien" is a Mexican national who crosses the U.S. border in the middle of the night in a surreptitious and unlawful manner. The image of this undocumented migrant in the minds of most Americans is of "a poor, brown, unskilled young male."⁶⁷ However, according to the INS, out of five million undocumented immigrants residing in the United States in October 1996, 2.1 million (or 41%) were non-immigrant overstay.⁶⁸ That is, these undocumented migrants entered into the U.S. in a lawful manner on a temporary basis as tourists, business travelers, and students, but failed to depart as required by the terms of their respective Non-immigrant visas.

B. Two Categories of Undocumented Persons

Sociologically, undocumented persons may be grouped into two informal categories: first, the temporary agricultural worker; and, second, the entrant who intends to remain in the U.S.

1. The Undocumented Temporary Agricultural Worker

This category should not be confused with the Special Agricultural Workers (SAWs and RAWs) authorized to remain and to work in the U.S. as a result of the benefits provided by the 1986 IRCA.

The Undocumented Temporary Agricultural Worker (UTAW) refers to the Mexican national who lives in rural Mexico and is familiar with agricultural work. Usually, UTAWs come to the U.S. and engage in temporary or cyclic agricultural activities, especially when the demand for manual labor is high. In general, this person is male, between 25 to 55 years of age, traveling alone, and with little or no formal education. It has been reported that in the State of Jalisco these Mexicans "are driven by tradition, migration has become so ingrained in the region's rural culture that, for young men, the trek north represents a rite of

(a)(1)-(4), which highlight the preference of location for family-sponsored immigrants.

67. Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender and Class*, 42 UCLA L. REV. 1509, 1545 (1995); see also Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 B.Y.U. L. REV. 1139, 1218, 1227-37 (discussing strategies for correcting public misperception of illegal aliens).

68. See *I.N.S. Release*, *supra* note 10. The total illegal alien resident population (the majority of which are Mexican nationals) accounts for 1.9 percent of the total U.S. population, the highest percentages being in California, Washington, D.C., and Texas.

passage.”⁶⁹

UTAWs usually come from places in Mexico where there is agricultural labor, such as *Jalisco*,⁷⁰ *Guerrero*, *Guanajuato*, *Michoacán*, *Nayarit*, *Sonora*, and *Sinaloa*, or from rural areas inhabited by Mexican indigenous peoples, such as *Oaxaca*, *Chiapas*, and *Puebla*.

UTAWs are completely oblivious and unconcerned about U.S. immigration laws. However, they know that if they are able to enter into the U.S., their chances to be hired to work in an agricultural job picking apples, avocados, broccoli, cantaloupes, celery, flowers, grapes, lettuce, oranges, and strawberries in the Pacific Coast states will almost be a certainty. UTAWs also anticipate that jobs generally last for only a few months, possibly a year. They are ready to work for a lower salary than the federally mandated minimum wage. Experience has taught them not to expect the U.S. employer to provide any living quarters, medical insurance, transportation, or overtime pay. UTAWs have become accustomed to living in irregular shanty towns where flimsy shacks are built of cardboard and plastic. There is no electricity, running water, or sanitary facilities. These shanty towns are located within walking distance of the agricultural fields where they work, or in nearby canyons, streams, lakes, or forested areas.

UTAWs are resigned to work long hours in a very demanding physical jobs. UTAWs work under an intense sun and high temperatures, with no protective equipment and are often exposed to lethal pesticides, toxic substances, and poisonous chemicals. There have been numerous cases of UTAWs who have become poisoned or seriously ill due to the handling or sustained exposure to pesticides and other toxic substances.⁷¹ When this happens, UTAWs can expect to witness what has become for decades the *modus operandi* of U.S. employers in these situations: to fire the worker on the spot to avoid any liabilities, hospitalization, medical costs, press reports, or involvement with the local police when the

69. Diane Lindquist, *NAFTA's Bittersweet Boom. Young Workers still Leaving Jalisco for Higher Wages in U.S.*, S.D. UNION-TRIB., July 31, 2000, at A1.

70. *Id.* at A15. According to Lindquist, Jalisco is the state that has sent more undocumented workers to the United States than any other. “Where would the 15[] and 16 year-olds look for jobs? Nearly all the young men and several of the young women, said they would go to the United States, rather than work in the factories or the region’s many dairy farms. They had relatives in California, Texas, Florida, Nebraska, and the Carolinas, they said, and would join them to toil in fields, factories and meat packing plants.” *Id.*

71. See Guadalupe T. Luna, “Agricultural Underdogs” and *International Agreements: The Legal Context of Agricultural Workers within the Rural Economy*, 26 N.M. L. REV. 9, 27-29 (1996) (see 56 nn.101-10 for primary source information); Kelly L. Reblin, *NAFTA and the Environment: Dealing with Abnormally High Birth Rates Among Children of Texas-Mexico Border Towns*, 27 ST. MARY’S L.J. 929 (1996).

Mexican national dies.⁷²

UTAWs are usually up by the crack of dawn to start working in the fields not later than 6 a.m. to avoid the most intense hours of heat and sun exposure. Sweating profusely and working for hours in a bent position, they have to carry their own water, and sometimes their own food. It is not unusual for them to carry, for relatively long distances, plastic, wooden boxes, or burlap bags, loaded with the agricultural produce, weighing from 25 to 50 lbs., to the assigned collection place. Generous U.S. employers allow UTAWs to have thirty minutes for a quick lunch, around noon, so they will be able to continue working until 5, 6, or 7 p.m., depending on the farmer's urgency to avoid any damage or losses, or to meet contractual commitments.

Dehydrated and physically exhausted, UTAWs return to their shanty town at the end of a long day. UTAWs wash themselves before dinner using metal or plastic containers, which originally contained pesticides, fertilizer, chemicals, or toxic substances. A most primitive *comal*, consisting of a circle of stones, with burning wood or sticks at the center, and covered by a metal sheet, suffices to warm up tortillas and other food. Either *quesadillas*, roasted chicken, or Mexican canned sardines in tomato sauce, complemented with *frijoles* and jalapeño peppers, or *pico de gallo* make a regular dinner. For UTAWs, it is a luxury to be able to shop at a large supermarket and find all of these Mexican foods in store.

While cooking dinner, or just before going to sleep, UTAWs engage in conversation. Places of origin, family, location of the next temporary job and how to get there, nearby stores to buy food, safest and cheapest ways to send money back home in Mexico, and presence of the Border Patrol in the area or recent raids tend to be recurring topics of conversation.

It is not unusual for UTAWs to live in fear. There are two valid reasons for that. First, they know that on a sporadic basis U.S. Border Patrol agents conduct raids in small or middle size labor fields (seldom in large farms), especially when the agricultural season is coming to an end. If found, they will be deported, even if the farmer who hired them has not paid them for days or weeks. Second, they have heard that with alarming frequency, small groups of U.S. individuals, adults and teenagers, armed with guns and rifles, conduct vicious "raids" with the

72. *Id.* at 26.

purpose of insulting, attacking, beating, and even shooting Mexican nationals. Recent tragic incidents in San Diego, California, for example, attest to these violent and shocking events.⁷³

Living in shanty towns allows UTAWs to save money, which can be sent to their families in Mexico. It is known that many small towns in Mexican rural areas, which have been traditional providers of UTAWs for decades, depend largely on these periodic remittances, estimated to range between four and six U.S. billion dollars per year.⁷⁴

From the preceding discussion, it should be clear that UTAWs do not intend to live permanently in the U.S. Many of them are indigenous peoples who willingly sacrifice themselves in order to help their families. They suffer the harsh physical labor in a foreign country; some contract rare illnesses and the overwhelming majority of them become victims of economic exploitation. A growing number are exposed to physical abuses and violations; others become the target of racial discrimination, or insane violence at the hands of U.S. citizens, and still others end up as part of the soil of this country.

After working in the U.S. for months, a year, or even longer, UTAWs go back to Mexico, to their distant and modest places of origin, to their families, and to their friends.⁷⁵ It is not unusual for some towns lost in

73. Kelly Thornton, *Officials Call Attack on Migrants Shocking. Patrols Increased to Protect Workers in Carmel Valley*, S.D. UNION-TRIB., July 12, 2000, at B1, B6; Alex Roth, Jill Spielvogel and Kim Peterson, *Teens Left Migrant for Dead, Court Told*, S.D. UNION-TRIB., July 20, 2000, at B1, B6; Marjorie Miller and Patrick McDonnell, *Rise in Violence Along the Border Brings call for Action Foreign Relations: Police Shootings Draw Protests from Mexico, Two Presidents Vow to Tackle the Problem*, L.A. TIMES, Dec. 9, 1990, at A4; Bonna M. De la Cruz, *Boy Won't be Charged for Border Games [Sic]*, L.A. TIMES, June 21, 1990, at B4; John M. Glionna, *FBI Investigating Alleged Abuse of Migrant Worker in Carlsbad*, L.A. TIMES, Jan. 18, 1990, at B1, B8; Patrick McDonnell, *Latinos Tell of North County Harassment Migrants: Some U.S. Teenagers Have Taken It upon Themselves to Verbally and Physically Abuse the Workers as They Look for Jobs along the Streets of the Rapidly Growing Area*, L.A. TIMES, Oct. 14, 1989, at B1, B4.

74. See INA, *supra* note 65 § 203(3), (5); *Nations Vow to Protect Migrants in U.S.*, S.D. UNION-TRIB., Mar. 15, 1996, at A18; J. Chris Dobken, *The Story Behind Immigrant Problems*, S.D. UNION-TRIB., Apr. 14, 1996, at G3; Mary Beth Sheridan, *California and the West: Mexican Candidate Vows to Push for Open Border*, L.A. TIMES, May 8, 2000, at A3; David R. Ayón, *Fox's Tunnel Vision of U.S. Mexicans*, L.A. TIMES, July 16, 2000, at M2; see also Marc. R. Rosenblum, *My Neighbor, Myself: Mexican Influence on U.S. Migration Policy*, 3 UCLA J. INT'L. L. & FOREIGN AFF. 527, 531 (1999); Rodolfo Corona Vásquez, *Las Remesas De Dólares Que Envían Los Migrantes Mexicanos Desde Estados Unidos (Medición A Través De La Encuesta De Migración En La Frontera Norte De México)* (a study based on data from the Survey of Migration in NORTHERN FRONTIER REGION OF MEXICO—in Spanish with summary in English), 17 PAPELES DE POBLACIÓN 4 (1998), available at <http://popindex.princeton.edu/browse/v65/n3/h.html>.

75. See Lynn Walker, *Oaxaca dreams: First of Two Parts*, S.D. UNION-TRIB., Dec. 26, 1993, at A1, A13; see Lynn Walker, *Oaxaca dreams: Last of Two Parts*, S.D. UNION-TRIB., Dec. 27, 1993, at A1, A21.

the rugged areas of Oaxaca and surrounded by steep mountains and archeological sites to organize a *fiesta del pueblo* with plenty of *mezcal*, food, music, and fireworks, to welcome a UTAW after a prolonged absence. This is a Mexican way of giving thanks to a UTAW who economically helped build a school, paved a road, introduced electricity to the town, or added new benches to the old church with the U.S. dollars he sent home while working in this country.

2. *The Undocumented Worker Who Intends to Remain in the United States*

This Mexican undocumented migrant is a relatively recent sociological phenomenon. Usually a male in his twenties or thirties, he is the product of an urban environment, single, and with a junior (*Secundaria*) or high school (*Preparatoria*) education. After joining the labor force in Mexico, he has become frustrated by his very modest material accomplishments. Raised in Mexico City, Guadalajara, Torreón, or Toluca, he is somewhat familiar with the United States and admires its standard of living. So, he decides to come to the U.S. hoping to be successful and stay there permanently.

His *modus operandi* is the opposite of the UTAW. In general, he enters the U.S. in possession of a valid Non-Immigrant visa as a tourist or student, which authorizes him a valid stay from 30 days to a year. However, instead of returning back to Mexico at the end of the authorized stay, he remains in the U.S. unlawfully, thus becoming an "overstay."⁷⁶ From a small city in Mexico, he does his best to be transplanted and then blend into the population of a large city in the U.S. He will move to an urban environment where he can blend into a Latino community in a place like Los Angeles, San Francisco, Houston, San Antonio, or Chicago. Aware of the hardships suffered by UTAWs, he will stay away from agricultural areas. His plan is to find a job in the service sector, such as a dishwasher in a Mexican restaurant with the hopes of being promoted to a busboy or waiter. Depending upon his English proficiency, and his familiarity with the urban setting, he will cautiously explore better opportunities outside the Latino neighborhood.

Generally, this type of worker has relatives, friends, or connections in the U.S. Instead of relying on them to help him to immigrate lawfully to

76. See Immigration and Nationalization Service, *supra* note 68 and accompanying text.

this country, since he assumes that his relatives or friends may financially able, he prefers to seek their help and guidance as soon as he is able to enter the U.S. and eventually join them. These relatives, friends, or contacts form one of the most practical and efficient systems of informal networks utilized by recently arrived Mexicans to the U.S. Through this network, the undocumented migrant finds a place to stay, a safe job, information about risks or dangers, and places raided by the U.S. Border Patrol. Thus, the local network offers shelter, support, guidance, and education.

Although this worker's original intention was to remain in the U.S., it would not be unlikely if he is to return voluntarily, or be expelled by the U.S. Border Patrol, back to Mexico.

Contrary to the widespread perception shared by most Americans that undocumented migrants come to the U.S. to take advantage of welfare programs and public benefits (which led to "Proposition 187" in California), recent studies have proven that undocumented migrants come to the U.S. for jobs, higher wages, and familial reasons.⁷⁷

Dr. Wayne A. Cornelius, a leading authority on Mexican undocumented migrants, wrote:

There is no evidence whatsoever that the availability of health care or any other kind of public service in the United States is an important incentive for a Mexican contemplating to move to the U.S. Their motives are overwhelmingly income, job, and family-related. They come to the U.S. to work and get ahead, not to consume public services.⁷⁸

C. Strategies Used by Undocumented Persons to Cross the Border

As soon as Mexican nationals reach the City of Tijuana from inland Mexico, whether by bus, train, bicycle, on foot or (few) by airplane, they start inquiring about where to find a smuggler (popularly known as *pollero* or "coyote") to help them cross the border for a fee. It is not unusual for potential undocumented persons to be immediately approached by these smugglers at bus or train stations, or at the airport, when they arrive in Tijuana. In most cases, the arrangement to cross the border into the United States is entered into in a matter of hours. The major obstacle is the fee and manner of payment.

A few years ago, prior to "Operation Gatekeeper," illegal crossings

77. See Johnson, *supra* note 67, at 1513.

78. See WAYNE A. CORNELIUS, THE FUTURE OF MEXICAN IMMIGRANTS IN CALIFORNIA: A NEW PERSPECTIVE FOR PUBLIC POLICY 47 (1981); RAFAEL ALARCÓN, PROPOSITION 187: AN EFFECTIVE MEASURE TO DETER UNDOCUMENTED MIGRANTS TO CALIFORNIA? 14-23 (1994); MICHAEL J. GREENWOOD ET AL., LEGAL U.S. IMMIGRATION 197 (1999).

from Tijuana into the U.S. required a relatively simple and expeditious effort, although well-coordinated and not devoid of risks and dangers. Then there were no ten-foot tall steel walls, no stadium-like flood lights, and the number of Border Patrol agents was fewer than half of today's number, with much less high-tech equipment and vehicles.

In general, three places or strategies were used in the past to cross the border: "*El Brinco*" (The Jump), "*El Bordo*" (The Levy) and the "*Campo de football*" (The Soccer Field).⁷⁹

1. *El Brinco*

Under this tactic, the smuggler is in charge of a group of undocumented persons, known in the Tijuana lingo as "*pollos*," or chickens, because they are at the mercy of the coyote or *Pollero*, who is the smuggler. The *Pollero* takes them to a particular place along the international boundary, relatively distant from the San Ysidro port of entry, but close to the California town of the same name. The smuggler chooses a location, day of the week, and time of the day that make the odds of a successful smuggle relatively high.

The places chosen for the crossing are close to San Ysidro, so the undocumented persons can hide, run, and eventually reach the town, after some 30 or 45 minutes. Sometimes, the group may be surprised by U.S. Border Patrol agents, who would have to detain a few undocumented entrants of the original group, now dispersed and running, thus allowing other members of the same group to have a successful run into the U.S.

El Brinco was considered the easiest and relatively uneventful tactic to cross the border. Smugglers charged from \$75 to \$100 U.S. dollars to be paid in advance. Organized smugglers had vehicles waiting in the U.S. side to transport the undocumented entrants to Los Angeles for a fee which used to range from \$300 to \$500 U.S. dollars. In most cases, the smuggler's physical and psychological screening of the Mexican national sufficed to set up the fee, subject to the Mexican adage: "*Según el sapo es la pedrada*" (Depending upon the size of the toad, is the size of the rock).

79. These descriptions are based on information provided by Lic. Victor Clark Alfaro, a recognized specialist on undocumented persons after studying for twenty years the sociological aspects of Mexican migration to the United States. Lic. Alfaro is the Director of the *Centro Binacional de Derechos Humanos* (Binational Center of Human Rights), Tijuana, B.C., Mexico.

2. *El Bordo*

The City of Tijuana is crossed by a canal carrying sewage and rain waters that eventually enters into the U.S. territory. This canal is known as “*El Bordo*,” or the levy. Just before the canal crosses into the U.S., numerous undocumented persons congregate there to consider the moment when they decide to run across the international boundary. Smugglers lead the undocumented entrants into the United States, charging a fee that ranges from \$100 to \$200 U.S. dollars.

3. *El Campo de Futbol*⁸⁰

In the past, it was quite a spectacle and a unique experience to go to this esplanade used as a soccer field on a Friday, Saturday, or Sunday. The place and the atmosphere was of a Mexican “*Día de fiesta*” (a holiday): the esplanade was crowded not only with hundreds and hundreds of potential undocumented persons, but also with smugglers and all types of vendors selling food, drinks, caps and hats, used clothes, fake U.S. documents, as well as international journalists, TV and radio crews, sociologists, anthropologists, university professors, and Mexican police.

People would start gathering in the early morning in the soccer field. By the end of the day, around sunset, there were one thousand or more people congregated in the esplanade, which is located a few yards away from the international boundary. The smugglers were in control of the operation: it was common to first send a drunk person into the U.S. territory (in the no man’s land) to create a diversionary incident to involve the U.S. Border Patrol agents. While this was taking place, several *polleros* simultaneously took their groups of undocumented persons across the border. It was a massive run for your life episode, complete chaos, and anarchy. Although dozens were caught by the Border Patrol, hundreds were able to take evasive measures, hiding and vanishing into the darkness of the night that eventually allowed them to escape from the Border Patrol and remain in this country.⁸¹

D. Reflections About Undocumented Migrants

Coming to the United States as an undocumented person is a painful, degrading, and ambivalent experience. The undocumented person is

80. In Mexico, unlike the U.S., a football field (*Campo de futbol*) means a soccer field.

81. Another tactic used was pelting Border Patrol agents with rocks in an attempt to prevent them from chasing or detaining undocumented entrants.

forced to abandon his family for an undetermined period of time. The journey to the U.S. is emotionally draining since the individual is separated from his/her children, spouse, parents, close relatives, and friends. Soon thereafter, the memory of the undocumented migrant's family turns into a faint and distant image, an image that will be idealized against the background of the distinct features of his town, the dusty streets, the old church, and the central main square (*Plaza mayor*) of his place of origin. It is a most powerful moral and sentimental magnet to bring him back to Mexico some day.

On a personal level, being in the U.S. is a painful experience because the undocumented person knows in advance, or otherwise is going to learn rather quickly, that while in this country he will be perceived by the American people as someone different, a stranger that is to be treated accordingly. Eventually, the term "undocumented alien" may be the least offensive and most innocuous term applied to him. Other terms will soon be used to describe him, charged with hate, violence and racial discrimination: illegal entrant, criminal, "wetback," "beaner," "greaser," Indian, and so forth. The collection of pejorative terms, racial slurs, and denigrating epithets appear to have no end.⁸²

In most cases, the racial mistreatment and discrimination against undocumented persons is inflicted upon them for the first time in their lives. In the U.S., racist legislation was first directed against African Americans in the early years of its existence,⁸³ and was later expanded to

82. For a denigrating account of Mexican migrants, and an endless collection of racial epithets, see generally JOHN MYERS, *THE BORDER WARDENS* (1971).

83. Regarding discrimination against those of Chinese ancestry in the U.S., specifically regarding the Chinese Exclusion Act of 1898, see *supra* notes 22, 25. See also *Chae Chan Ping v. U.S.*, 130 U.S. 581 (1889), where the Supreme Court upheld the Chinese Exclusion Act of 1898, barring the entry of all Chinese laborers into the United States; Kitty Calavita, *The Paradoxes of Race, Class, Identity, and "Passing": Enforcing the Chinese Exclusion Acts*, 25 LAW & SOC. INQUIRY 1 (2000), on the topic of discriminatory laws against the Chinese; David E. Bernstein, *Lochner, Parity and the Chinese Laundry Cases*, 41 WM. & MARY L. REV. 211 (1999); Richard P. Cole & Gabriel J. Chin, *Emerging From the Margins of Historical Consciousness: Chinese Immigrants and the History of American Law*, 17 LAW & HIST. REV. 325 (1999); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998); Joyce Kuo, *Excluded, Segregated and Forgotten: A Historical View of the Discrimination of Chinese Americans in Public Schools*, 5 ASIAN L.J. 181 (1998); Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111 (1998); and Annie M. Chan, *Community and the Constitution: A Reassessment of the Roots of Immigration Law*, 21 VT. L. REV. 491 (1996). See Leslie T. Hatamiya, *Understanding the Passage of the Japanese American Redress Bill* in WHEN SORRY

other racial groups.⁸⁴ In contrast to the U.S., where slavery was imposed and existed for a long time as a legally and morally accepted institution, Mexico abrogated slavery beginning 1810, during the time when it was struggling to obtain its political independence.⁸⁵ Mexico's very first Constitution in 1814, as well as its first Federal Constitution in 1824, inspired by the U.S. Constitution, prohibited slavery.⁸⁶

What could be more degrading to a Mexican undocumented migrant than being forced to temporarily abandon his family and country because his country is unable to provide its own nationals with a decent living? A living that guarantees each family member, in particular children and the elderly, daily meals, proper education, a dwelling, adequate health and medical treatment, a safe and clean natural environment, and an honest and permanent job. A country should be seen by its people not with despair and hopelessness, which forces them to abandon it, but with confidence in its present and optimism for its future? A country should provide its own people with adequate jobs and open avenues to prosperity in their lives, so they do not have to immigrate to find a better way of living. What could be more degrading to an undocumented person than to be treated in the U.S., not as a person who deserves full respect for his human rights and human dignity, but rather as an object, devoid of constitutional rights and legal protections?

For the majority of undocumented persons, after they lived and worked in the U.S., their experiences may be characterized as unforgettable. What impresses them the most is the abundance of wealth, the apparent unlimited existence of material possessions, goods and services. In dire contrast to Mexico, they become keenly aware that economic affluence is virtually everywhere. However, it seems to them that in the midst of this material affluence, violence occupies a

ISN'T ENOUGH 190-202 (Roy L. Brooks, ed. 1999).

84. See Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942); see also Keith Aoki, *No Right to Own?: The Early Twentieth Century "Alien Land Laws" as a Prelude to Internment*, 40 B.C. L. REV. 37 (1998); Sumi Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption*, 40 B.C. L. REV. 73 (1998); Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111 (1998). For a general historical analysis and comparison of Asian discrimination to present Latino discrimination in immigration law, see Katherine L. O'Connor, *An Overview of Illegal Immigration Along the United States-Mexican Border*, 4 J. INT'L. L. & PRAC. 585 (1995).

85. See *Sentimientos de la Nación* (Sentiments of the Nation), art. 15 signed by José María y Pavón in Chilpancingo, Guerrero, on Sept. 14, 1813, translated: "Slavery is to be proscribed forever. . ." in FELIPE TENA RAMÍREZ, *LEYES FUNDAMENTALES DE MÉXICO, 1808-1991*, at 30 (1991).

86. Decree of Miguel Hidalgo (*Bando*), dated in Guadalajara City on Dec. 6, 1810, mandated that "[A]ll owners of slaves must set them free within the following ten days, so penalty of death." See RAMÍREZ, *supra* note 85, at 22.

preeminent place. It is hard for them to understand that such an affluent society, where its members are endowed with health, education, jobs, and democratic institutions, can be so violent. And even worse, they are at a complete loss when undocumented migrants try to find a rational explanation as to why certain individual members of this healthy and wealthy society appear so willing to use physical and verbal violence to hurt and harm illegal aliens.

Mexican nationals are very proud people who share deeply rooted sentiments and a sincere admiration for the history, culture, and traditions of their country. While the U.S. looks forward to shaping its own future, and that of the world, Mexico looks at its glorious past and continues to revere its ancient indigenous cultures. Indeed, Mexicans may be described as a teluric race, or people who are closely attached to and inseparable from their land. This may be the key to understanding why, out of those millions of Mexicans who have come to our country to work, many prefer to go back to their country of origin.

II. ORIGIN AND EVOLUTION OF THE U.S. BORDER PATROL

Officially, the U.S. Border Patrol has been in operation for seventy seven years. Established on July 1, 1924 under the authority of the Immigration Act passed by Congress on May 28, 1924,⁸⁷ its primary mission is dual:

...[T]o detect and prevent the smuggling and unlawful entry of undocumented aliens into the United States and to apprehend those persons found in the United States in violation of the immigration laws.⁸⁸

The existence of this enforcement arm of the Immigration and

87. See Act of February 28, 1924, ch. 204, 43 Stat. 204 (1924).

88. Under the heading *Bureau of Immigration*, the 1924 Act allocated a total of \$4.5 million dollars, "all to be expended under the direction of the Secretary of Labor, for enforcement of the laws regulating immigration of aliens to the United States, including . . . enforcement of the provisions of the Act of February 5, 1917, entitled: "*An Act to Regulate the Immigration of Aliens to and the Residence of Aliens in the United States*;" and "*preventing the unlawful entry of aliens into the United States, by the appointment of suitable officers to enforce the laws in relation thereto*. Out of the total amount, at least one million dollars . . . shall be expended for additional land-border patrol; Provided further, that the purchase, exchange, use, maintenance, and operation of horse and motor vehicles required in the enforcement of immigration and Chinese exclusion laws outside of the District of Columbia may be contracted for and the cost thereof [pais?] for the appropriation for the enforcement of those laws . . ." *Id.* at 240 (emphasis added).

Naturalization Service (INS), under the authority of the U.S. Department of Justice, is based upon the fundamental right that any nation has “to protect the integrity of its borders and its laws.”⁸⁹ This right and duty has been expressly recognized since the inception of international law as inherent to the territorial sovereignty of the state. In practical terms, this sovereignty is translated in the right of the state to secure its own existence by means of protecting its territorial boundaries.⁹⁰ Historically, it is difficult to think of a right which may carry a more universal recognition in the law of nations than the right of the state to control, defend, and protect its borders.⁹¹

Given the heightened protection of the U.S. boundaries, it is only to be expected that the mission of the U.S. Border Patrol, and of the 8,549 agents who compose it today,⁹² is clearly perceived as fundamental to the defense of the American people, their values and standard of living, and their form of government and political institutions.⁹³ Moreover, the duties of the Border Patrol agents, protecting our borders against unlawful intrusion may be characterized as an act analogous to the rendering of a patriotic duty, a duty which carries intense emotional undertones.

Today, the Border Patrol conducts its duties “along, and in the vicinity of, 8,000 miles of States [international] boundaries.”⁹⁴ Agents patrol by means of vehicles, boats and vessels, airplanes and helicopters, horses, snowmobiles, motorcycles, bicycles, and on foot, and are divided into 22 Sectors and 148 stations nationwide. Their duties include not only patrolling 6,000 miles of the international boundaries with Mexico and Canada but also 2,000 miles of coastal waters around the Florida

89. See Memoranda of President, 60 F.R. 7885 (Feb. 7, 1995), FEDERAL IMMIGRATION LAWS AND REGULATIONS 63 (1999). This directive provides a blueprint of policies and priorities of the administration of President Clinton to curtail illegal immigration. *Id.*

90. 1 GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL LAW 421. (1973).

91. LOUIS HENKIN ET AL., INTERNATIONAL LAW 308 (1998).

92. The INS Online, Law Enforcement and Border Management, (accessed on July 15, 2000) available at www.ins.doj.gov/graphics/lawenfor/index.htm.

93. See *Becoming an American: Immigration and Immigrant Policy*, U.S. Commission on Immigration Reform 1997 Report to Congress Executive Summary, www.utexas.edu/lbj/uscir/reports/html; see also Testimony of Barbara Jordan, Chair of U.S. Commission on Immigration Reform, before the Subcommittee on Appropriations for the Department of Commerce, Justice, State, the Judiciary and Related Agencies of the Committee on Appropriations, House of Representatives, March 29, 1995, available at www.utexas.edu/lbj/uscir/032995.htm; Hearing before the Sub-committee on Immigration and Claims of the Committee on the Judiciary, House of Representatives, Serial No. 114, May 21, 1998, available at www.commdocs.house.gov/committees/judiciary/hju58801.000/hju58801_0.htm (all websites last accessed Sept. 18, 2000).

94. INS Website, *supra* note 92.

peninsula and the island of Puerto Rico.⁹⁵

A. Origins of the U.S. Border Patrol

During the first hundred years of its existence, the U.S. did not need to establish a border patrol to protect its borders. That was a century characterized by an "Open Door"⁹⁶ immigration policy. Endowed with a geographically vast country and abundant natural resources, the young Republic needed settlers to colonize it first, and then a constant flow of immigrants to populate it and promote the nation's social and economic development. In those years, immigrants arrived freely and were welcomed by other Europeans already settled. The flow of immigrants was principally restricted "by the cost of travel, diseases and conflict with indigenous inhabitants."⁹⁷

As the population gradually increased, immigration restrictions started to appear in order to regulate and control both the number and type of immigrants coming to America. "Quality controls" imposing certain requisites as to the race, age, education, skills, etc. of the incoming immigrants were the first to be enacted. Later, "numerical" or quota restrictions were imposed by legislation.⁹⁸ Legally, there was a long period of uncertainty because it was undecided whether the immigration power rested with the individual states or with the federal government. Based on this ambiguity, states enacted legislation imposing restrictions or economic burdens on arriving immigrants, thus creating a mosaic of heterogeneous regulations, which confused and deterred immigration. It was not until 1875, when the U.S. Supreme Court declared that state restrictions on immigration questions were unconstitutional and a clear infringement on the federal power over foreign commerce.⁹⁹

95. *Id.*

96. See CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, *IMMIGRATION LAW AND PROCEDURE* § 2.02 (1996).

97. See DAVID WEISSBRODT, *IMMIGRATION LAW AND PROCEDURE IN A NUTSHELL* 1 (4th ed. 1998).

98. STEPHEN H. LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY* 99-112 (1997); see also James F. Smith, *A Nation that Welcomes Immigrants? An Historical Examination of U.S. Immigration Policy*, 1 U.C. DAVIS J. INT'L L. & POL'Y 227 (1995).

99. *Henderson v. Mayor of New York*, 92 U.S. (2 Otto) 259, 179 (1875). Emphasizing the need for uniform admission practices within the United States, the Supreme Court stated: "The laws which govern the right to land passengers in the United States from other countries ought to be the same in New York, Boston, New Orleans, and San Francisco." *Id.* In this case, the Supreme Court struck down a New York state statute requiring the master of a vessel to choose between paying taxes on arriving alien

It was the enactment of the country's first racist legislation, *The Chinese Exclusion Act of 1882* by which the U.S. Congress "suspended all future immigration of Chinese laborers, and forbade any court to admit Chinese nationals to U.S. citizenship."¹⁰⁰ Other restrictive legislation¹⁰¹ led to the necessity of establishing a federal enforcement agency. This agency came into existence based on an 1891 Act which added "diseased," "paupers," and "polygamists" to the growing list of "undesirable classes" created by Congress, and established the Bureau of Immigration, a direct precursor to the current Immigration and Naturalization Service (INS). There were 24 ports of entry to the U.S. at that time and the number of immigrants amounted to less than one million.¹⁰²

Prior to the creation of the Border Patrol in 1924, there were a number of small groups of government officials monitoring and protecting the U.S. borders. Early this century, for example, the Commissioner General of Immigration assigned a small group of "mounted guards" to patrol the southern border.¹⁰³ Interestingly, these guards major objective was to prevent violations of the Chinese Exclusion Act. The entire corps of border guards amounted to 75 men and this force was supplemented in 1914 with boats and patrol cars.¹⁰⁴

U.S. borders were militarized and protected by U.S. Army troops during World War I. However, the problem of undocumented entrants resurfaced in 1919 during Prohibition and continued for a number of years as the smuggling of *tequila* and rum reached colossal

passengers or posting bonds. *See id.*

100. *See* Chae Chan Ping v. United States, 130 U.S. 581 (1889). The Chinese Exclusion Act was extended in 1902 and later made permanent. It was finally repealed in 1943 so that Chinese nationals could become U.S. citizens.

101. *See* 8 U.S.C. § 141, Alien Contract Labor laws of 1885 and 1887, outlawing so-called "*coolie labor*" contracts aimed at importing cheap foreign labor and immigration for lewd and immoral purposes; *see also* Immigration Act of 1882, which imposed "a head tax of 50 cents" and excluded "idiots, lunatics, convicts, and persons likely to become a public charge."

102. *See* WEISSBRODT, *supra* note 97, at 12-24, (The ports of entry increased to 186 in 1938 and the volume of immigrants totaled more than 1.5 million. In 1973, there were 1,000 ports of entry where INS officials inspected 250 million persons from 178 million in 1964.).

103. Immigration and Naturalization Service, INS, Department of Justice, *Early History of the Border Patrol*, (Fact Sheet, May 1999), available at <http://www.ins.usdoj.gov>.

104. *Id.* In those days, border surveillance activities centered only on the border itself. When undocumented entrants succeeded in evading the border guards, "they generally melted into the population undetected." In its local San Diego County website, the Border Patrol indicates that the "task" of the mounted guards created in 1904 was not to prevent the Chinese undocumented entrants but "to stem the growing problem of illegal entries from Mexico." *Id.*

proportions.¹⁰⁵ The imposition of a head tax of \$8 U.S. dollars on Canadian and Mexican nationals by the Immigration Act of 1917,¹⁰⁶ as well as the requirement of having to pass a “Literacy Test” imposed by this Act on all immigrants, forced border inspectors to upgrade their immigration and anti-smuggling enforcement efforts. Finally, the passing of the Immigration Quota Acts of 1921 and 1924 led to the official establishment of the U.S. Border Patrol in 1924.¹⁰⁷

Today, the U.S. Border Patrol has close to 9,000 agents and expects to reach 10,000 by the end of 2000.

The primary mission of the Border Patrol is the detection and apprehension of illegal aliens and smugglers of aliens at or near the land border. This is accomplished by maintaining surveillance, following up leads, responding to electronic sensor alarms and aircraft sightings and interpreting and following tracks. Some of the major activities include maintaining traffic checkpoints along highways leading from border areas, conducting city patrol and transportation check, and anti-smuggling investigations. Since 1986, the Border Patrol has made more than 8 million apprehensions nationwide.¹⁰⁸

The activities of this quasi-military arm of the INS have been growing over time. Originally focused on detaining and expelling “undocumented aliens”¹⁰⁹ and smugglers of “aliens,” today “some of the [U.S. Border Patrol] activities include: farm and ranch check, traffic check, traffic observation, city patrol, transportation check [and]

105. See *Early Immigrant Inspection along the U.S./Mexican Border*, available at <http://www.ins.doj.gov>.

106. See Act to Regulate the Immigration of Aliens to and the Residence of Aliens in the United States of 1917. This statute was the result of a most comprehensive revision of the immigration law over the veto of President Woodrow Wilson. The so-called “Literacy Test” –which had been vetoed by Presidents Cleveland, Taft and Wilson–, was the most controversial innovation. The 1917 Act, another racist statute, created an “Asiatic Barred Zone” expressly designed to keep out Asian nationals.

107. *Id.* It is reported that the initial border force was selected from civil service registers, railway postal clerks, and “immigrant inspectors,” which Border Patrol agents were initially called. During the first months of operation, these agents were not in unison and only their shiny badges symbolized their authority. Recognizable authority of Border Patrol agents was made more visible by the U.S. Congress in Dec., 1924, when a military khaki uniform was adopted.

108. See generally *San Diego Field Office of the Immigration and Naturalization Service*, at <http://www.ins.usdoj.gov/graphics/fieldoffices/sandiego/aboutus.htm>.

109. It seems that the 1924 U.S. Border Patrol Act was the statutory source that utilized the term “undocumented alien” for the first time. However, after decades of constant, and sometimes indiscriminate, use, the term today appears to have acquired a rather derogatory or pejorative meaning. It would be ethnically sensitive to consider the substitution of this term with other less offensive terms such as “undocumented entrant” or “undocumented person.”

administrative, intelligence and anti-smuggling activities.”¹¹⁰

A major addition to the duties of the U.S. Border Patrol is its direct involvement in drug interdiction activities.¹¹¹ In 1992, the Office of National Drug Control Policy designated the U.S. Border Patrol as “the primary agency for narcotics interdiction between the ports of entry.”¹¹²

B. Enforcement Powers of Border Patrol Agents

As the enforcement agency of the Immigration and Naturalization Service under the U.S. Department of Justice, and in accordance with the Code of Federal Regulations, Border Patrol agents have ample powers for their enforcement activities. These powers include, *inter alia*, the power to issue detainers in general;¹¹³ to use force (non-deadly force and deadly force);¹¹⁴ to interrogate and detain aliens (not amounting to arrest);¹¹⁵ to conduct arrests;¹¹⁶ to transport persons arrested or detained in vehicles;¹¹⁷ to engage in vehicular pursuits;¹¹⁸ and to conduct site inspections.¹¹⁹

110. See *INS San Diego Office*, *supra* note 108.

111. *Id.* Today, the U.S. Border Patrol characterizes itself as the “primary drug interdiction agency” along the “land borders” (sic) between the United States and Mexico.

112. *Id.*

113. Detainers are issued pursuant to sections 236 and 237 of the Immigration and Nationality Act (INA) on the Apprehension and Detention of Aliens and Deportable Aliens, respectively, and Chapter I, Part 287, of the Code of Federal Regulations. See 8 C.F.R. §§ 236-37. “A detainer serves to advise another law enforcement agency that the INS seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien.” CFR, § 287.7(a). The authority to issue detainers is given to Border Patrol agents, Special agents, Deportation officers, Immigration Inspectors, Adjudications officers and Supervisory and managerial personnel. See CFR, § 287.7(b)(1)-(6).

114. These are standard for enforcement activities. (1) *Non-deadly force* is “any use of force other than that which is considered deadly force.” 8 C.F.R. § 287.8 (a)(1)(i) CFR. (2) *Deadly force* “is any use of force that is likely to cause death or serious bodily harm.” C.F.R. § 287.8 (a)(2)(i)(ii). It may be used when a designated immigration officer, as listed in the respective section of the CFR, “has reasonable grounds to believe that such force is necessary to protect the designated immigration officer or other persons from the present danger of death or serious bodily harm.” *Id.* Only immigration officers “who have successfully completed basic immigration law enforcement training are authorized and designated to exercise the power conferred by section 287(a) of the INA to use deadly force should circumstances warrant it.” This power is conferred upon Border Patrol agents (including aircraft pilots), Special agents, Deportation officers, Detention enforcement officers and Immigration inspectors. C.F.R. § 287.8 (a)(2)(i)(iii)(A)-(E).

115. 8 C.F.R. § 287.8(b)(1)-(3).

116. 8 C.F.R. § 287.8(c)(1)-(2).

117. 8 C.F.R. § 287.8(d)(1)-(2).

118. 8 C.F.R. § 287.8(e)(1)-(2).

119. 8 C.F.R. § 287.8(f)(1)-(4).

C. Training of Border Patrol Agents

The Border Patrol Academy is located in Glynko, Georgia, and trains some 2,000 new agents every year. The new agents must complete a 19-week training program covering eight courses: 1) Immigration and nationality law; 2) Criminal law and statutory authority; 3) Behavioral science; 4) Intensive Spanish; 5) Border Patrol operations; 6) Care and use of firearms; 7) Physical training; and, 8) Motor vehicle operation. The academy has other training sites¹²⁰ in Charleston, North Carolina and Artesia, New Mexico.¹²¹

III. ABUSES AND VIOLATIONS INFLICTED UPON UNDOCUMENTED PERSONS BY U.S. BORDER PATROL AGENTS

From an historical perspective, there is no doubt that undocumented aliens who dared to enter our country in an unlawful manner from Mexico late last century, during the early 1900's when mounted border inspectors were in place, or after 1924 when the U.S. Border Patrol was established, became the victims of violent abuses and inhumane violations inflicted upon them by U.S. Border Patrol agents with total impunity.

Three obvious reasons provide a sound foundation for this assertion. First, during most of its existence, Mexico has been a poor country. Consequently, there is little or no political or diplomatic risk when nationals of a major power in the exercise of official duties, such as U.S. Border Patrol agents abuse or violate the rights of Mexican undocumented entrants.¹²² Evidently, the situation were different if INS

120. The training course may be conducted at the Federal Law Enforcement Training Center (FLETC) in Glynko, Georgia. *See generally at* <http://www.fletc.gov>.

121. INS Press Release, Apr. 13, 2000. In April, 2000, INS announced the appointment of Thomas J. Walters as the new Chief Patrol Agent of the Border Patrol Academy. Walters began his career as a Border Patrol agent in 1975 and has amassed nearly 25 years of Border Patrol experience. He received a master's degree at the National War College in 1995 and prior to becoming the head of the Border Patrol Academy, he worked for 14 years at the Border Patrol's headquarters in Washington, D.C. Walters is one of 23 Chief Patrol Agents who are in charge of the Border Patrol's 21 nationwide sectors.

122. Not only Border Patrol agents, but also U.S. nationals in official capacity, including INS officials, U.S. Customs officers, DEA agents, Highway Patrol Officers, sheriffs, and police officers have committed abuses against Mexican nationals, both legal immigrants and undocumented ones. For a long list of abuses and violations of by these officials, *see* U.S.-Mexico Border Program of the American Friend Service Committee, *Narratives of Abuses* (1995-97, 1998, and 1999); *see also* Human Rights Watch

officials would be abusing the rights of United Kingdom, German, or French nationals.

Second, in the history of U.S. immigration law, unlawful entrants into this country have been legally characterized as devoid of any rights.¹²³ It would seem that undocumented entrants are not legally regarded as human beings. This is reflected in the numerous cases that were decided by our immigration courts, since their establishment last century, and throughout the end of World War II. Although some rights in favor of aliens began to be recognized in the early 1960s, as an extension of constitutional benefits applied to procedural due process, these limited rights almost exclusively benefit aliens who had been residing and working in the U.S. for a relatively long period of time.¹²⁴ However, *procedural* due process is not applicable to undocumented persons detained by the U.S. Border Patrol, while crossing the border or immediately thereafter.¹²⁵ Furthermore, the recognition of *substantive procedural rights* protecting aliens is among the most disputed issues in immigration law.¹²⁶

Third, in 1945, when the Charter of the United Nations was adopted,¹²⁷ the notion of human rights was a very novel and diffuse concept. In the following decade, when our country was heavily involved in revitalizing its economy and promoting international peace and security on a global basis, no American would have questioned the violent behavior of U.S. Border Patrol agents abusing or victimizing Mexican entrants simply because they had entered unlawfully into the U.S., let alone characterize such abuses as “violations of the human rights of Mexicans.”

It must be noted that the argument advanced by human rights advocates that the abuses and offenses inflicted by U.S. Border Patrol agents upon Mexican undocumented migrants are to be considered as “human rights violations,” is as legally inoperative today as it was more than half a century ago. As of today, no U.S. court has rendered a decision declaring that the abusive and violent conduct of U.S. Border

Americas (HRWA), *Crossing the Line: Human Rights Abuses along the U.S. Border with Mexico Persist Amid Climate of Impunity* (Oct. 1993); HRWA *Frontier Injustice* (May 1993); HRWA *Brutality Unchecked* (May 1992).

123. See *supra* text accompanying note 100.

124. See *Yamayata v. Fisher*, 189 U.S. 86 (1903).

125. See *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), holding that “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned”; see also *Lem Moon Sing v. U.S.*, 158 U.S. 538 (1895); *U.S. v. Wong Chow* 108 F. 376 (5th Cir. 1901); *In re Sing Tuck* 126 F. 386 (C.C.N.Y. 1903); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206 (1953).

126. *Id.*

127. U.N. CHARTER, signed June 26, 1945, (effective Oct. 24, 1945) 59 Stat.1031, T.S. No. 993, 3 Bevans 1153 (1969).

Patrol agents directed against Mexican undocumented entrants constitutes an international human rights violation. Considering the painfully slow pace of the U.S. Senate to give its advice and consent to U.N. international human rights conventions, or the development of U.S. immigration law in the area of fundamental substantive rights in favor of aliens, it is expected that any real signs of progress in these areas is still many decades away.

During the 20th century, the number of federal court cases in which U.S. Border Patrol agents were convicted for civil or criminal offenses against Mexican undocumented nationals is infinitesimal, especially when compared to the thousands of complaints that have been filed by victimized aliens, by their children, or families.¹²⁸

Fortunately, it seems that this mantle of impunity which has sheltered U.S. Border Patrol agents, when they abuse and violate the rights of Mexican undocumented workers, is beginning to slowly fade away. In contrast to the notion that undocumented aliens are “criminals,” merely because they entered illegally into the U.S. and, as a consequence, they are mistakenly deemed to have no rights and, even worse, to deserve no rights, the seeds of a new, more humane and international legal philosophy are timidly emerging in our country. This new human rights philosophy is being promoted and advocated by human rights lawyers and non-governmental organizations. The battle for human rights of undocumented Mexican entrants has been an uphill battle, especially during electoral times when U.S. politicians have mobilized the American public opinion to denounce and criminalize undocumented aliens.¹²⁹

Pursuant to this new international human rights legal philosophy, there are several fundamental legal premises, which are to be recognized and fully respected by U.S. authorities and American nationals:

1. *Undocumented persons should neither be reputed nor characterized as “criminals.”* Granted, they have entered into our country without having been invited; they entered into the U.S. in flagrant violation of our immigration laws. However, this violation does not automatically turn them into “criminals” but into foreign persons who have infringed

128. See Abuses Reported by the Office of the Inspector General, Immigration and Naturalization Service, Oct. 1997 – Mar. 2000.

129. Some human rights advocates have received anonymous death threats, directed against them and their families, for their efforts to protect undocumented migrants from the violence and abuse of U.S. Border Patrol agents and other U.S. officers.

our immigration laws. These persons should be characterized, more appropriately, as aliens in violation of U.S. immigration laws.¹³⁰

Technically speaking, undocumented persons may be said to be equal to those foreigners who, abusing the confidence granted upon them by our consular or INS authorities, enter the U.S. lawfully in possession of a valid visa but remain beyond the authorized period of time granted by the INS official (commonly known as “overstays”). They are no different than that other foreigner who enters our country as a tourist, and after being expressly warned that he is not allowed to work here, openly breaks this prohibition and gets a job, in complete disregard of the INS warning and in flagrant violation of our immigration laws.

Looking at this issue from an American perspective, is the undocumented person a “criminal” when he is hired by a U.S. employer or a U.S. corporation to engage in some work which benefits our economy, say, by growing vegetables; picking oranges, apples or avocados; or cleaning school floors or hotel rooms? Or is the real “criminal” the U.S. employer who, in most cases, exploits the labor of the Mexican undocumented worker by paying him less than the minimum wage? Who deserves the label of “criminal” in this case?

Moreover, if the labor of Mexican undocumented workers hired by U.S. employers were an exceptional or sporadic occurrence, it would be surprising and would probably be corrected by labor or INS authorities. However, when this type of exploitation takes place in our country on a continuous and regular basis, without any effective involvement on the part of the U.S. government, and without any sanctions imposed to this kind of U.S. employer, who is the “criminal” in these cases? The U.S. government and the U.S. employers, or the Mexican undocumented workers? It would not be unrealistic to imagine the voices of U.S. employers clamoring: let me continue to use more of these Mexican undocumented “criminals” in our agricultural fields, timber forests, nurseries, hotels, hospitals, schools, offices, wealthy homes, etc.

2. The new international human rights legal philosophy is the mere physical presence of any foreigner in the United States, whether that foreigner is documented or not, is sufficient reason to be treated with full and due respect to his person, his human dignity, and human rights by any U.S. authority, and by any U.S. citizen.

Thus, the physical presence of an alien in our country, regardless of

130. See T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND NATIONALITY LAWS OF THE UNITED STATES, SELECTED STATUS, REGULATIONS AND FORMS 261, (West Group 2000), which contains Immigration and Nationality Act (INA) §§ 275(a)–(b), 8 U.S.C. § 1325 (Improper Entry by Alien), which discusses criminal penalties and sanctions for improper entry by aliens; see *id.* at 47-48 and contains INA §§ 203(a)(1)–(4), 8 U.S.C. § 1153 (Allocation of Immigrant Visas).

how that person happened to enter into the U.S., is a sufficient reason to be treated by U.S. authorities and Americans alike with the same respect due to any other person in this country, whether a U.S. national or a foreigner.

From the viewpoint of human dignity and respect, it does not matter whether the foreigner is in the country legally or illegally. What matters is the incontrovertible fact that the foreign individual in question is a human being. In this context, he or she is exactly the same as any other U.S. citizen. It is abominable to think that because a Mexican national entered our country in an illegal manner, a U.S. authority or a U.S. citizen is free to inflict injuries upon that foreigner in that they are devoid of human rights.

What has recently taken place in Arizona is alarming: groups of ranchers, frustrated to see Mexican nationals who unlawfully crossed into the U.S. ending up in their lands, decided to form several paramilitary groups. Composed of five to ten people and wearing military camouflaged uniforms, these para-military groups are armed with high caliber rifles and guns.¹³¹ These groups constructed surveillance towers strategically located and used night-scopes and hand-held radios, closely following the movements of the Mexican migrants. The ranchers then proceeded to "capture" the Mexican undocumented entrants, holding them as "prisoners," using physical restraint until the U.S. Border Patrol or the Arizona sheriffs arrived to apprehend such Mexican migrants.

It is worrisome to witness¹³² the re-emergence of these unlawful and arbitrary acts of "vigilantism" directed against Mexican nationals. Again, this is another manifestation of the border violence, which is currently present and gradually increasing in the Southwestern region of our country. This kind of vigilantism, on the part of U.S. citizens, should not be condoned by our federal and state authorities. This abusive behavior increases the level of violence already present in that region and further complicates our relations with Mexico.

To continue adhering to the denigrating policy that wrongly predicates that the benefits of international human rights are restricted such that they apply to and benefit only our own citizens, while denying these

131. Valerie Alvord, *Verdict is Split in Beating Trial of Two Ex-Marines*, S.D. UNION-TRIB., July 8, 1998, at B1.

132. See Ken Ellingwood and Esther Schrader, *California and the West Ranchers on Border Raise Tensions over Migrants Property: Some, Saying they are Protecting their Land, Detain Illegal Crosser*, L.A. TIMES, May 17, 2000, at A3.

protections to foreigners, places our country in a most extreme hypocritical position. It is time for this narrow and ethnocentric U.S. policy to change.

Today, international human rights protect the human dignity and promote and encourage respect of all human beings and their fundamental freedoms, whether these individuals are nationals of a given country, like U.S. citizens, or aliens, like Mexican migrant workers. Irrespective of their immigration status and “without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,” as mandated by the Universal Declaration of Human Rights.¹³³

A. Selective Narratives of Abuses Inflicted by U.S. Border Patrol Agents to Mexican Undocumented Entrants

In May of 1992, Americas Watch¹³⁴ shocked the U.S. and the world at large with the publication of its stirring report: *Brutality Unchecked, Human Rights Abuses Along the U.S. Border with Mexico*. The report examines human rights abuses committed by the INS and its agents in the enforcement of U.S. immigration laws. The study, which was the first one to appear worldwide on this previously ignored subject, was limited to the four states that border Mexico: California, Arizona, New Mexico, and Texas. From a substantive viewpoint, the study is also limited “to human rights abuses committed during the arrest and detention of undocumented immigrants. Due process abuses and bureaucratic obstruction during immigration proceedings are not covered.”¹³⁵

Even with its limited scope, the findings discussed in this report are appalling. In one of its opening paragraphs the report reads:

Beatings, rough physical treatment, and racially motivated verbal abuse are routine. Even more serious abuses, including unjustified shootings, torture, and sexual abuse, occur. When they do, investigations are almost invariably perfunctory, and the offending agents escape punishment. The human rights abuses reported here are similar in kind and severity to those about which we have reported in many other countries. Moreover, the response of the U.S.

133. See *Universal Declaration of Human Rights*, Art. 1, U.N.G.A. Resolution 217-A (III), U.N. Doc. A/810 at 71 (1948). The U.S. is a party to this declaration. See *id.*

134. Americas Watch was established in 1981 to monitor and promote observance of internationally recognized human rights. Americas Watch is a division of Human Rights Watch, which is composed of Africa Watch, Americas Watch, Asia Watch, Helsinki Watch, Middle East Watch, and the Fund for Free Expression. Americas Watch has offices in Los Angeles, New York, and Washington, D.C., available at <http://www.hrw.org>.

135. BRUTALITY UNCHECKED, HUMAN RIGHTS ABUSES ALONG THE U.S. BORDER WITH MEXICO, An Americas Watch Report (May 1992) [hereinafter BRUTALITY REPORT].

government is as defensive and unyielding as the responses of many of the most abusive governments.¹³⁶

The report discusses over 300 cases of U.S. Border Patrol abuses divided into seven large categories and twenty two sub-categories.¹³⁷

1. Shootings

The Americas Watch report underlines the fact that from 1980 until 1992, the year the report was published, U.S. Border Patrol agents shot dozens of people along the U.S.-Mexico border, "killing at least 11 and permanently disabling at least ten." In addition, from 1984 to 1989, a joint Border Patrol-San Diego Police Department Task Force accumulated an infamous record: 19 people were killed and 24 were wounded.¹³⁸

According to its regulations, U.S. Border Patrol agents are authorized to carry guns on and off duty.¹³⁹ A considerable percentage of these agents (25 percent) are authorized to carry INS-approved, personally owned, semiautomatic handguns in and out of the field. Occasionally, agents are also authorized to use shoulder weapons, including shotguns and M-16 automatic rifles while on duty. Although agents are required to pass quarterly tests on each of the types of weapons they carry, "this qualification procedure is often breached."¹⁴⁰

The Americas Watch report documents the shooting of five Mexican undocumented entrants by U.S. Border Patrol agents, some wearing their official uniform and one agent out of uniform.¹⁴¹

136. *Id.*

137. The major categories are: 1) Shootings During the Apprehension of Undocumented Migrants; 2) Other Lethal Force Used During Apprehensions; 3) Physical Abuse; 4) Racially Discriminatory Conduct by INS Agents; 5) INS Raids; 6) INS Detention; and 7) Detention of Undocumented Migrant Children. *Id.* (Table of Contents).

138. *Id.* at 9. Because of its violent tactics, the BP-SD task force was disbanded following the January 4, 1989 shooting of two handcuffed undocumented entrants.

139. Chapter I, Part 287 of the Code of Federal Regulations (C.F.R.) states the standard for enforcement activities to which U.S. Border Patrol agents are subject to, including the use of "[D]eadly force," C.F.R. § 287.8(a)(2), and "[N]on-deadly force," C.F.R. § 287.8(a)(1), *see supra* note 115.

140. BRUTALITY REPORT, *supra* note 135, at 9.

141. The names of the victims are: 1) Victor Mandujano Navarro, age 18, September 8, 1990; 2) Eduardo Zamores, age 15, November 18, 1990; 3) Francisco Ricardo Carbajal, age 16; and Rosa Lilliam Pineda (Salvadoran), age 24, May 25, 1990; 4) Humberto Carrillo Estrada, age 12, April 18, 1985; and 5) Francisco Ruiz Chavez and his wife Evelyn Castañeda Serna, March 28, 1989. *See* BRUTALITY REPORT, *supra* note

a. *Case of Victor Mandujano Navarro (September 1990)*

Victor, age 17, his brother, and three others were part of a group that was being led across the international boundary by a 16-year-old Tijuana youth. Close to the border, a man in a commando type jacket and blue jeans shouted at them: "Stop there. I'm from the *migra*." (Slang for "im'migra'cion") The group scattered and Victor attempted to climb the border cyclone fence. The Border Patrol agent knocked Victor down, hit him twice, drew his revolver and, while Victor was on the ground, shot him twice in the stomach. He then aimed his revolver and threatened bystanders. The incident took place on September 8, 1990.

Two Mexican who witnessed the shooting from the Mexican side of the fence gave sworn corroborative statements to Mexican authorities. In his autopsy report, Deputy Medical examiner of the San Diego County Coroner's Office confirmed that the fatal shot was fired point blank. The autopsy revealed that there were soot deposits and abrasions "consistent with a muzzle stamp" on the surface of the wound, and that one of the bullets exploded in the youth's heart.

Despite the incriminating statements and medical evidence, the U.S. Border Patrol quickly determined that the agent had shot Victor in self-defense. The agent alleged that Victor had thrown a rock at him, hit him on the head with his fist while holding a rock, and tried to grab the agent's gun. He further alleged that in the ensuing struggle he twisted the gun around and shot twice, striking Victor in the chest. Despite the alleged violent struggle, the official required absolutely no medical treatment. Only when pressed by reporters, the U.S. Border Patrol acknowledged that the agent was out of uniform, adding that it was "unusual" for an agent to be out-of-uniform.¹⁴² After the agent received psychological counseling, he returned to normal duty the next day.

The FBI opened an investigation into the shooting, but neither the San Diego District Attorney, nor the U.S. Attorney for the Southern District of California brought criminal charges. A wrongful death claim was filed on behalf of Victor's family against the INS.¹⁴³

b. *Case of Eduardo Zamores (November 1990)*

On November 18, 1990, a U.S. Border Patrol agent shot 15-year-old Eduardo, as the youth straddled the border fence near Calexico,

135, at 10-17. The narratives presented in this article parallel the language used in the corresponding report or source cited, sometimes reproducing such language *verbatim* or paraphrasing it, as considered convenient.

142. U.S. Border Patrol agents wear civilian clothes while conducting certain operations, such as airport checks.

143. BRUTALITY REPORT, *supra* note 135, at 10-11.

California. A 9 mm hollow point bullet hit Eduardo in the lower left chest and severely damaged his liver, stomach, intestine, and left lung. Because the gunshot caused Eduardo to fall into Mexican territory, the incident raised sensitive legal and jurisdictional issues, and produced a sharp diplomatic exchange between the two governments.

Eduardo worked on the Mexican side of the border carrying bags for shoppers returning from the U.S. He told an NGO investigator, that a disturbance caused by the U.S. Border Patrol attempt to arrest another teenager attracted his attention, and that he scaled the fence to watch. He claims that he was shot for no reason as he perched atop the fence. According to the U.S. Border Patrol agent, Eduardo and two other youths were observed climbing the fence and entering a parking lot on the U.S. side three times by agents watching remote, non-recording video monitors. Another agent who approached the boys, the first time they entered, alleged that he was "pelted by rocks." The U.S. Border Patrol agent who shot Eduardo alleged that rocks were thrown over the fence, and Eduardo had his arm raised as though to throw a rock.

Calexico's Chief of Police, in a press conference that took place eleven days after the incident, declared that he believed the shooting was unjustified. "During the investigation we conducted," he said. "I don't think it was sufficiently revealed that the [agent's] life was in danger." The Chief of Police suggested a range of possible criminal charges, among them assault with a deadly weapon and assault under the color of authority, both felonies in California.

Skeptical about U.S. willingness to prosecute the U.S. Border Patrol agent, Mexican police conducted their own investigation of the shooting, and the government of Mexico threatened to seek extradition of the U.S. Border Patrol agent to stand trial in Mexico. While Calexico police recommended prosecution, the Calexico District attorney did not take any action. The results of a separate investigation by the FBI were not released, but there was no indication that the U.S. government was considering prosecution. The U.S. Border agent was temporarily reassigned to desk duties pending the results of federal, state, and local investigations.¹⁴⁴

c. Case of Humberto Carrillo Estrada (April 1985)

This is one of the most notorious cases between the U.S. and Mexico

144. *Id.* at 11-12.

because it involves a Border Patrol agent who shot across the fence separating both countries, injuring a Mexican national who was in Mexican territory.

On April 18, 1985, a U.S. Border Patrol agent shot 12-year-old Humberto Carrillo Estrada. Estrada was on Mexican soil when he was shot. Shortly before the shooting, Humberto's brother, Eduardo, climbed the border fence and entered into the U.S. When discovered by three Border Patrol agents, Eduardo retreated. The agents pursued him, dragged him away from the fence, and hit him with a baton. Humberto, coming to his brother's aid, approached the fence from the Mexican side. At this moment, a U.S. Border Patrol agent fired three shots through the fence, one of which struck Humberto in the back, high on the left shoulder. The bullet careened off a rib and lodged near the right shoulder blade.

The San Diego District Attorney rejected witness statements and photographs that contradicted the agent's assertion. Although photographs corroborated witnesses's accounts that a crowd had gathered and began throwing rocks only after the shooting, the District Attorney declined to prosecute. The U.S. Border Patrol agent in question – who had previously come under investigation in 1982 for firing one shot toward a crowd after being struck by a rock – was conveniently cleared of all wrongdoing by the INS. The INS Office of Professional Responsibility took no action. The agent was back in the field within a month.

The willingness of both the District Attorney and the INS to ignore accounts of events that contradicted those of INS officers demonstrate, according to this report, an investigative bias in favor of INS and U.S. Border Patrol agents. However, a subsequent incident suggested that there was “a more active attempt to cover up wrongdoing during the INS's internal investigation.” During civil proceedings brought by Humberto against the U.S. Border Patrol agent, the agent contended that there was a large hole in the fence near where he was struggling with Humberto's brother, through which Humberto was preparing to throw rocks. In preparing the civil suit, Humberto's attorney requested all recorded and written interviews that internal investigators had conducted since the shooting. He received only written transcripts of statements supporting the agent's claim that there was a hole in the fence. As the case was coming to trial, Humberto's attorney received an anonymous call informing him of a taped interview conducted shortly after the shooting by an Office of Professional Responsibility investigator. A subsequent subpoena produced the taped interview, during which the U.S. Border Patrol agent made no mention of a hole in the fence. The agent did not testify at the trial. On July 31, 1987, a U.S. District Judge

awarded Humberto more than half a million dollars for past and future suffering from his back wound.¹⁴⁵

*d. Case of Francisco Ruiz Chávez and Evelyn Castañeda
Serna (March 1989)*

On March 28, 1989, Francisco's wife, Evelyn (a Salvadoran national who was seven months pregnant), crossed the levee of the Tijuana River channel from Mexico into the U.S. According to her attorney, as soon as Evelyn climbed out of the levee on the U.S. side she was spotted by a U.S. Border Patrol agent who caught up with her, jumped from his patrol vehicle, and pulled her to the ground by her hair. Francisco watched his wife's progress from the Tijuana side. Concerned for her safety, he crossed the levee towards her and the agent, who again slammed her head against the ground by her hair. Francisco, now about ten feet away from the U.S. Border Patrol agent, reached for a rock. As he did so, Francisco shouted to the agent to arrest his wife if he wanted to, but not to abuse her. The agent then moved his boot onto Evelyn's pregnant abdomen. When Francisco raised his arm to throw the rock, the U.S. Border Patrol fired. Medical evidence revealed that the first bullet, fired at a distance of about seven feet, struck Francisco in the stomach; the second, fired from about twenty feet, entered into the left buttock.

The FBI investigated the shooting. Francisco was interviewed at the University of California San Diego Medical Center. His wife Evelyn was interviewed in the Metropolitan Correctional Center in San Diego, where she served a sixty-day sentence for misdemeanor illegal entry before being given voluntary departure. Although they were separated immediately afterwards, they both gave investigators almost exactly the same description of the U.S. Border Patrol agent's actions before and during the shooting. The agent's mistreatment of Evelyn was further corroborated by two witnesses.

FBI officials told Francisco's attorneys they were considering recommending that the U.S. Border Patrol agent be prosecuted. Instead, the U.S. Attorney's Office for the Southern District of California charged Francisco with assaulting the agent. When the trial began, government prosecutors offered to drop the assault charges if Francisco

145. BRUTALITY REPORT, *supra* note 135, at 14-15. This case appears in the section titled: *Impunity for Shootings*.

would plead guilty to a lesser charge of illegal entry and accept punishment of time served. Francisco refused. During the federal trial, the U.S. Border Patrol agent testified that Francisco threw a rock that struck him above the right eye, causing him to lose consciousness, but that as he was falling he fired toward Francisco. He then hit the ground and blacked out, and afterwards suffered amnesia. Evidence presented contradicted the agent's story, and the jury acquitted Francisco of assault in less than two hours. Following Francisco's acquittal, the U.S. Attorney's Office made no move to prosecute the U.S. Border Patrol agent for the shooting or for the use of excessive force against Evelyn. The San Diego County District Attorney similarly declined to open an investigation into possible illegal actions by the U.S. Border Patrol agent.

Although evidence presented at the trial suggested the likelihood that the U.S. Border Patrol agent violated agency guidelines that permit the use of physical force only in self-defense, in defense of another person or when absolutely necessary to make an arrest or to prevent an escape, the INS continued to defend the U.S. Border Patrol agent who remained in active duty and was not transferred.

On December 7, 1990, the INS Commissioner announced that the agency would review its procedures and guidelines on the use of lethal force. In September 1991, the Office of the Inspector General of the Department of Justice issued a report on INS firearms policy according to which 112 INS personnel were involved in 90 shooting incidents during 1990 in which five civilians were killed, six civilians were wounded, and two U.S. Border Patrol agents were wounded. The report cited serious deficiencies in compliance with INS firearms policy, the failure of the INS Firearms Review Board to direct Shooting Incident Investigations Teams to review incidents independently of local officials, the lack of a uniform policy for administering disciplinary actions in cases in which INS firearms policy was violated, and the lack of uniform procedures for reassigning an officer after a serious shooting incident.¹⁴⁶

e. Case of Darío Miranda Valenzuela

On June 13, 1992, a U.S. Border Patrol agent reported the fatal shooting of Darío by his partner, another agent. In doing so, he broke the

146. *Id.* at 16-17. This case was also brought to the attention of the U.S. Congress before the House Judiciary Subcommittee on International Law, Immigration and Refugees by Aryeh Neier, Executive Director of Americas Watch. Operations of the Border Patrol, U.S. House of Representatives, 102d Congress, 2d Sess., August 5, 1992 (Serial No. 66) at 9-10

Border Patrol's traditional "Code of Silence" regarding agent abuse. The ensuing investigation and trial revealed the Nogales border region to be a modern day Wild West, where agents with little training and no supervision shoot with impunity at suspected drug smugglers, in violation of INS policy.¹⁴⁷

According to the facts revealed at the trial, on June 12, 1992, U.S. Border Patrol agents E and W and three other agents were patrolling a remote canyon near Nogales, Arizona. Agents E and W pursued three men whom they believed to be lookouts for drug smugglers. W fired warning shots over the head of one of the men they encountered, in violation of INS firearms policy. The three men fled toward Mexico. E shot a dozen times at one of the men, Darío, who was unarmed. Two bullets struck him in the back. According to W's trial testimony, the two U.S. Border Patrol agents did not call for medical assistance, but instead considered planting a weapon on Darío so it would appear to be a legitimate shooting. They also discussed how to dispose of the victim's body. W also testified that, when E told him that he had shot Darío, "he was happy, the best way I could describe it, like somebody that had shot their first deer." After shooting Darío, E shot at one of the other fleeing men. E dragged Darío who doctors estimate may have lived for 30 minutes after he was shot, into a gully and hid his body behind a tree trunk. Agents W and E then joined the three other U.S. Border Patrol agents in the area and returned to the Border Patrol station without reporting the shooting. Instead, after their shift ended, the U.S. Border Patrol agents drank beer and talked in a parking lot across the street from the station. W reported the shooting the next day, June 13, approximately 15 hours after it had occurred. In his statement, W explained that he waited because he was afraid that E would harm him if he reported the shooting the day it happened. E was arrested and became the first U.S. Border Patrol agent to be charged and tried for murder. E's lawyer successfully portrayed E's shooting of the unarmed man as an act of self-defense in a dangerous area of the border. Although acquitted on murder and other charges on December 16, 1992, E had to face further charges stemming from a shooting incident in March 1992. On March 25, 1993, Darío's family brought a wrongful death action against the U.S. government. They also filed a civil rights suit against

147. U.S. FRONTIER INJUSTICE, HUMAN RIGHTS ABUSES ALONG THE U.S. BORDER WITH MEXICO PERSIST AMID CLIMATE OF IMPUNITY, AMERICAS WATCH, Vol. V, No. 4., at 3-6 (May 13, 1993).

the five agents involved in the June 12 shooting.

In April 1993, W was fired by the U.S. Border Patrol for waiting 15 hours before reporting the killing and other violations. He told the *Los Angeles Times*, "It's a big cover-up; I broke the *Code of Silence* and now they want to get back at me. . . I knew I was doing the right thing by turning him in for murder, even though I embarrassed them." The three other agents were not disciplined for failing to report the shooting and remained on duty.¹⁴⁸

The latest *Human Rights Watch/Americas* report (1995), contains an update that U.S. Border Patrol agent E was acquitted on state murder charges in December 1992. In January 1994, agent E was tried in Phoenix, Arizona, on federal civil rights charges for the Darío shooting. Despite the best efforts of Federal prosecutors, the jury found U.S. Border Patrol agent E not guilty as charged, apparently persuaded by the defense that shooting a fleeing man in the back was an act of self-defense. The verdict mystified the prosecutors and outraged human rights advocates. It also reinforced the belief in border communities that the U.S. Border Patrol can get away with anything, including murder.¹⁴⁹

f. Case of Martín García Martínez (May 1994)

In the early morning hours of May 28, 1994, Martín, age 30, and four relatives were crossing the border near San Ysidro, California, when a U.S. Border Patrol agent approached and began apprehending them. Witnesses report that the U.S. Border Patrol agent, a very tall African-American who the witnesses claim was acting "drunk" or "crazy," emerged from his vehicle with his gun drawn and a dark colored bottle in his other hand that he threw to the ground. The agent, without calling for assistance, attempted to arrest the group.

He ordered them to kneel and began to handcuff them; all complied except for Martín's sister-in-law, Teresa, who had undergone surgery and was unable to kneel. Her husband Ignacio told her to sit down. According to family members, the U.S. Border Patrol agent began beating Ignacio, hitting his head against the Border Patrol vehicle and kneeling him in the back. Although accounts differ, Teresa may have picked up a rock and shouted at the agent to stop beating her husband.

148. For detailed information regarding other atrocities committed by U.S. Border Patrol agent E, including the beating of an undocumented person and the shooting of a group of 30 undocumented immigrant people, see *id.* at 5-6; see also Operations of the Border Patrol, *supra* note 146, at 215-16.

149. U.S. CROSSING THE LINE: HUMAN RIGHTS ABUSES ALONG THE U.S. BORDER WITH MEXICO PERSIST AMID CLIMATE OF IMPUNITY, Human Rights Watch/Americas, Vol. 7, No. 4, Apr. 1995 at 6.

The U.S. Border Patrol agent then reportedly pointed his gun at Teresa, instructing her to drop the rock, and she complied. He then began placing handcuffs on her while reportedly pulling her hair and forcing her against the vehicle.

Martín, whose hands were on his head as instructed, urged Teresa to stop resisting, and she told him she was not putting up a fight, but that the U.S. Border Patrol agent was beating her anyway. The agent then turned to Martín, and asked him, "What are you going to do about it?" and Martín replied, "nothing." The U.S. Border Patrol agent then reportedly pointed his gun at Martín's head, then slowly lowered the gun to his stomach and shot Martín. Ignacio reports that the U.S. Border Patrol moved the gun so slowly that Ignacio repeatedly told him not to shoot. Lupe, one of Ignacio's and Teresa's two sons present, tried to catch Martín as he fell, but the U.S. Border Patrol agent reportedly took Lupe by the hair and threw him down.

Martín was taken by ambulance to the University of California, San Diego Medical Hospital and the others were taken to San Diego, where Ignacio received medical attention and all the family members were interrogated by agents from the local police, the INS and the FBI. Ignacio agreed to take a lie detector test after he was questioned about whether Martín had picked up a rock, but claims no test was ever administered.

On July 3, Martín died as a result of his injuries (he had been hit with a *hollow-point bullet*, which expanded on impact). After he died, the assault charges against Teresa were dropped, and the family was allowed to return voluntarily to Mexico.

The Mexican Consulate in San Diego, at the request of Martín's family, sent letters to the relevant INS and U.S. Department of Justice officials on June 6, protesting the shooting. The Office of Internal audit of the INS wrote back on July 8, stating that, "Although my office has no investigative jurisdiction. . .the U.S. Border Patrol agent's actions were in accordance with INS regulations." The U.S. Border Patrol agent involved in the incident was placed on administrative leave, without pay but later returned to the field. All official investigations into the case have been terminated.¹⁵⁰

The preceding cases are only a sample of shooting incidents caused by U.S. Border Patrol Agents using lethal force. These incidents frequently

150. *Id.* at 8-9. In its 1993 (Frontier Injustice) and 1995 (Crossing the Line) reports, Human Rights Watch Americas documents two and four shootings, respectively.

take place along the Mexican border and in many instances result in injuries or death of the undocumented person.

The general public in this country becomes aware of these incidents only when they are reported by major newspapers. Based on this type of information, three shootings were reported in the first five months of 2000;¹⁵¹ one in 1999;¹⁵² five in 1998;¹⁵³ and no shootings reported by the local press in 1997, 1996, or 1995.

2. *Beatings*

Physical abuse and offenses to human dignity are the consequences of excessive use of force utilized by U.S. Border Patrol agents when stopping, detaining, or apprehending undocumented persons. The use of profane, abusive, or offensive language as well as racial epithets, are also most common violations committed by INS officials and Border Patrol agents.

"Beatings" consist of slapping or hitting faces and punching body parts resulting in a victim's broken nose, cheekbones, jaw or the loosening or knocking out of the victim's teeth; also kicking or kneeling of certain body parts, especially the victim's chin, chest, back, knees, or the groin; yanking the victim and throwing him or her against a wall, a vehicle, a bench, or the floor. Another form of beating is stepping on the victim's body: chest, stomach, groin, shoulders, arms, legs, neck, back, or head; injuring, dislocating, or breaking bones and joints; twisting fingers, arms, or legs; and strongly squeezing the victim's jaws, ears, lips, or breasts.¹⁵⁴

151. Gregory Gross, *Thirty Protest Shooting of Mexican at Border, Official Explanation for Action of Agents Produces Skepticism*, S.D. UNION-TRIB., May 27, 2000, at B1; Joe Cantlupe, *Does the INS Culture Shield Misconduct?*, S.D. UNION-TRIB., May 7, 2000, at A19; Joe Hughes, *Border Agent Fatally shoots Prisoner*, S.D. UNION-TRIB., Feb. 5, 2000, at B5.

152. Gregory Gross, *FBI, Mexico Probe Shooting of Man by Border Patrol Agent*, S.D. UNION-TRIB., Nov. 17, 1999, at B2; *Immigrant Fatally Shot by Officer Identified*, S.D. UNION-TRIB., Sept. 3, 1999, at B4; Gregory Gross, *Deadly confrontation in East County, Agent Fatally Shoots Man Wielding Rocks; Border Officer, Reservoir Caretaker Injured in Attack*, S.D. UNION-TRIB., Sept. 1, 1999, at B1; Sandra Dibble, *Three Border Shootings Ruled Lawful, Fourth Incident Still under Investigation*, S.D. UNION-TRIB., Jan. 16, 1999, at B1.

153. Rene Sanchez, *Violence, Questions Grow in U.S. Crackdown on Border Crossers*, WASH. POST, Oct. 3, 1998, at A3; Lola Sherman, *Man Killed at Border Fence by U.S. Agent*, S.D. UNION-TRIB., Sept. 28, 1998, n.p.; Jeff McDonald, *Two Border Agents Fire at car with Migrants, Seriously Hurt Driver*, S.D. UNION-TRIB., Sept. 24, 1998, n.p.; Leonel Sanchez, *Border Agent Fatally Shoots Mexican; Consulate Protests*, S.D. UNION-TRIB., Sept. 11, 1998, at A4; Kathryn Balint, *Border Agents Shoots Man during Struggle*, S.D. UNION-TRIB., Feb. 2, 1998, at B3.

154. Beginning in 1992 when human rights organizations began reporting abuses, the majority of such human rights organizations, domestic and international, have

It is not uncommon for two or more U.S. Border Patrol agents to get involved in collectively inflicting such physical punishment with their fists, boots, elbows and knees, but also using their batons, guns and even flashlights. In this regard, American Friends Service Committee reports that U.S. Border Patrol agents refer to undocumented aliens as “Tonks” because this is the sound made when hit in the head with an agent’s flashlight.¹⁵⁵

To complete the dismal description of the violent physical setting where these brutalities of U.S. Border Patrol agents occur, the reader has to know when the beatings are taking place the undocumented migrant is being bombarded not only with physically devastating blows to vulnerable and delicate parts of his humanity but also with shouts, gun threats, and other intimidating actions, as well as offensive, profane, and abusive language.

Generally speaking, one would expect that these beatings would take place only in a confrontational setting such as in remote and isolated areas along the U.S.-Mexico border. Unfortunately, U.S. Border Patrol agents beat undocumented migrants in the most diverse and unexpected contexts, in remote and isolated areas of the U.S.-Mexico border, at all U.S. ports of entry, local airports, U.S. Customs rooms in secondary inspection, waiting rooms, bus depots, railroad stations, U.S. shopping centers, schools, international bridges with Mexico, pedestrian crossings, agricultural farms and ranches, highways and rural roads, urban areas at border towns and cities, INS detention centers, jails and penitentiaries, and even inside churches.¹⁵⁶

In a remote rural or desert area, distant from towns and urban centers, undocumented persons, usually in groups of three or more, may rely on all their physical and intellectual skills to outmaneuver the experience and training of Border Patrol agents and enter the U.S. The evading pattern is relatively simple: they disperse and run in different directions, they engage in a game of “hide and seek”; they create a diversionary event to attract the agents thus allowing a larger group to evade the agents; or, in extreme cases, when there is no other alternative, they

documented the brutal, unnecessary and regular beatings of undocumented persons – male, female, young and elderly – by U.S. Border Patrol agents. Beating descriptions were taken from *A Report of the U.S./Mexico Border Program* (American Friends Services Committee), 1999 [hereinafter American Friends Services Committee Report].

155. *Id.*

156. These specific examples of locations of abuses were taken from the American Friends Service Committee Report, *supra* note 154.

confront the U.S. Border Patrol agent.¹⁵⁷ This is the situation when Mexican undocumented persons are the most vulnerable.

There are numerous reasons why Mexican undocumented persons are clearly aware that any direct confrontation with a U.S. Border Patrol usually results in the alien losing his life, suffering an injury or being physically and verbally mistreated. Most undocumented Mexican persons are not as large and as physically well-built as Americans.¹⁵⁸ More importantly, Mexicans are not militarily trained in contrast to the U.S. Border Patrol agents who have received special training in one of the divisions of the U.S. Armed forces. One of the core areas of any military training is the ability to physically subdue enemy individuals by sheer physical force or the use of lethal weapons. Even in the case when the Border Patrol agent did not have any training in the U.S. military forces prior to joining the enforcement arm of the INS, every agent receives special training during 19 weeks at the U.S. Border Patrol Academy.¹⁵⁹

So, it should be quite obvious for undocumented Mexican persons, including women and children to anticipate what would happen to them should they decide to engage in a direct physical confrontation with a U.S. Border Patrol agent. "Mexicans do not come to the United States to fight with the Border Patrol agents. They come here to work and to find a better living," said a Mexican Consul,¹⁶⁰ while censuring the violent methods and use of lethal force so often displayed by U.S. Border Patrol agents.

Moreover, the worst scenario is to consider what may happen to that undocumented migrant, unlawfully crossing the border, who can be confronted by U.S. Border agent carrying a 45-caliber weapon, loaded with expanding or hollow-point bullets.¹⁶¹

157. For a description of the strategies used by undocumented persons to cross the border, see *supra* note 81 in this article and the corresponding text.

158. Mexicans average 1.75 meters in height (equivalent to 5 feet, 5 inches) whereas the average height of an American is 1.85 meters (six feet). The average weight of Mexican male adults is 70 kilos (160 lbs.); in contrast, American male adults average 185 lbs.

159. U.S. Border Patrol agents undergo a 19-week training program at their Academy in Glynko, Georgia. Among the eight mandatory courses are the following: 1) Physical training, 2) Care and Use of Firearms, and 3) Motor Vehicle Operations. See FLETC, *supra* note 120 and the corresponding text.

160. Leonel Sánchez, *Gunfire at the Border; Officials Concerned after Fourth Shooting Incident*, S.D. UNION-TRIB., Sept. 29, 1998, at B1.

161. [E]xpanding bullets (called dumdums after the British arsenal in India where they were designed and first manufactured) have a metal jacket open at both ends, so they flatten on contact with living tissue and produce great internal damage. All soft bullets, split-nose bullets, hollow-point bullets, and jacketed bullets with the core exposed at the tip are of this type. They are used for big-game hunting because of their great stopping power. The use of dum dum bullets for war was outlawed by The Hague

It is incomprehensible to an international human rights advocate to be reminded that expanding bullets, which are being used today by U.S. Border Patrol agents, were outlawed for humanitarian reasons by The Hague Convention,¹⁶² in 1899, given the “great internal damage” the bullets inflict upon human beings in a war conflict. Is there a valid reason for U.S. Border Patrol agents to use expansive bullets in their enforcement activities along the border with our neighboring country Mexico, our second largest trade partner, when the U.S. military would not be able to use these bullets in a war situation? Especially when one knows that no federal agency or police department in our country allows any of their agents to use expansive bullets? Has Mexico protested against this antiquated and barbaric U.S. Border Patrol policy?

3. *Selected Narratives of Beatings*

It should be noted that the atrocities and brutal abuses inflicted by U.S. Border Patrol agents upon undocumented Mexican nationals have been so numerous and so egregious, that this untenable situation finally raised the attention of the U.S. Congress. In 1994 and again in 1997, different Committees of the U.S. House of Representatives held special hearings to address these questions, investigate these abuses and propose remedies to correct them.¹⁶³ Some of the following cases were taken from these official hearings.

a. *Case of Ismael Ramírez and other Mexican Victims*

An even more egregious series of cases involving Border Patrol agent ML, underscores what happens when the INS fails to punish abusive agents. On February 2, 1983, agent ML who at the time was stationed in

Convention of 1899. See 4 ENCYCLOPEDIA AMERICANA 762 (1969).

162. See Declaration respecting the Prohibition of the Use of Expanding Bullets, signed at The Hague on July 29, 1899, AJIL at 1002; 187 PARRY, CONSOLIDATED TREATY SERIES 445-450.

163. See, e.g., Border Violence, Hearing before the Subcommittee on International Law, Immigration and Refugees of the Committee on the Judiciary, House of Representatives, Serial No. 14, Sept. 29, 1993; see also What Resources Should be Used to Control Illegal Immigration at the Border and Within the Interior? Subcommittee on Government, Management, Information and Technology, Committee on Government, Reform and Oversight, House of Representatives, June 12, 1995; Border Security and Deterring Illegal Entry into the United States, Hearing before the Subcommittee on Immigration and Claims of the Committee on the Judiciary, House of Representatives, Serial No. 32, Apr. 23, 1997.

Calexico, California, was transporting four undocumented migrants in an INS vehicle when he struck and injured a Mexican man. After receiving medical treatment, the man was immediately deported, as were the passengers in the van. A month later, on March 7, 1983, a vehicle ML was driving struck a Mexican man, this time killing him instantly. ML claimed the victim had been running and suddenly bolted at a 45-degree angle into the vehicle's path. The California Highway Patrol (CHP) noted that ML had been speeding and made a *prima facie* conclusion of misdemeanor vehicular manslaughter.

Calexico District Attorney (DA) rejected the CHP's conclusion and refused to prosecute ML. Acknowledging that the death would not have happened had ML not been speeding, the DA dismissed the incident, saying the mistake was "not criminal in nature." Shortly thereafter, *ML was promoted to a position teaching vehicle handling to junior agents.*¹⁶⁴

In June 1993, ML was transferred to Fresno, where his record was equally troublesome. In December 1985, he and other agents were involved in two incidents in which Fresno County farm workers – one of whom is a U.S. citizen and the other a lawful permanent resident – were mistreated. The victims claimed in a lawsuit against the agents and the INS, that (1) the agents used excessive force, and that they (2) kidnapped, (3) falsely imprisoned, (4) assaulted, and (5) battered them. The federal government settled their suits in February 1990; it agreed to pay \$18,000 dollars in damages to the victims *but did not admit any wrongdoing.*¹⁶⁵

On February 15, 1988, ML and his partner ET were conducting a neighborhood sweep in Madera, California, having already detained four others, the U.S. Border Patrol agents spotted 17-year old Ismael Ramírez and pulled their van in front of him. ET, the van's driver, asked Ramírez if he had papers to prove that he was legally in the U.S. Ramírez ran, and ML pursued him on foot. *When ML, who stands over six feet tall, caught up to the approximately five-foot, one-hundred pound youth, he seized him by the collar and the back of one leg. Lifting him horizontally to shoulder height, he threw Ramírez to the pavement. Ramírez landed on the back of his head and neck. ML turned him face down, put his foot on Ramírez back, and handcuffed him.* He then picked up Ramírez and pushed him into the van. A short time later, Ramírez began to vomit. ML stopped the van and ML checked his eyes, *but the U.S. Border Patrol agents drove the van to Fresno and dropped off the four other*

164. See Border Violence, *supra* note 163, at 212-13. This testimony was submitted by Aryeh Neier, Executive Director of Human Rights Watch (Aug. 5, 1999) (emphasis added).

165. *Id.* at 213 (emphasis added).

detainees to be processed before taking Ramírez to the hospital. The U.S. Border Patrol agents told emergency room personnel that Ramírez had fallen, thus misleading them about the possible severity of his injuries. Ramírez lapsed into a coma and died of a skull fracture and brain hemorrhage.

In public comments, after Ramírez's death, U.S. Border Patrol officials reiterated ML's insistence that Ramírez fell and hit his head while being chased. As conflicting witnesses statements surfaced and public protests grew, an INS official would only comment: "The Madera incident is an extremely regrettable and unfortunate accident. We are extremely remorseful that the incident occurred, but unfortunately during law enforcement activities accidents do happen." Public pressure mounted, and in January 1989, the U.S. Border Patrol transferred ML to Florida, *a move that involved a promotion to the rank of Senior Border Patrol Agent.*

Although local law enforcement, the FBI, and the Office of the Inspector General investigated the Ramírez's killing, *no indictment was issued against ML.* Three days before the second anniversary of the killing, the U.S. Justice Department announced in a letter to the Mexican Consulate in Fresno that their investigation had been completed and that "*...we have concluded that there is insufficient evidence to prove a violation of criminal or civil rights statutes beyond a reasonable doubt.*" (Note that the standard cited is what is required for criminal conviction and is much higher than ordinarily required as a basis for prosecution or for departmental discipline). *The INS recently settled a lawsuit filed by Ramírez's family, but ML was not disciplined.* To the best of our information, the only time ML was ever disciplined was in the early 1980's, when he received a thirty-day unpaid suspension for taking a bicycle and throwing it into the river while on duty.¹⁶⁶

b. Case of Mario Ramón Fernández Martínez

On April 8, 1994, 37-year old Mario jumped a fence and crossed into Calexico, California.¹⁶⁷ A U.S. Border Patrol agent spotted him and then detained him. Mario's hands were handcuffed behind his back and his

166. *Id.* at 214-15.

167. See *Crossing the Line* (Human Rights Watch/Americas) (Apr. 1995). This account was based on interviews with the victim, the Office of the Inspector General (OIG) and INS personnel, as well as the Mexican Consulate's staff. *Id.* at 10.

feet were cuffed together as he was placed in the back of the agent's vehicle. As they drove east, Mario was tossed about in the back of the empty Bronco as the agent sped up and then stopped suddenly. The agent parked, then came around to the back of the jeep and laughed while he pulled Mario out by his shirt. By then, Mario was lying flat on his back, on his handcuffed hands, on the dirt road. Mario claims that the agent then kicked him hard in the jaw, and he lost consciousness for a short time. When he awoke, he was in the back of the Bronco again.

The agent took Mario to the Calexico Border Patrol station. *His ribs hurt and his jaw was visibly injured, but agents at the station ignored his repeated pleas for medical attention.* The agents did remove his leg cuffs, but his hands remained cuffed as he was processed. After about an hour, another agent took him to El Centro, *where agents ignored his request for medical attention.* Two days later, U.S. Border Patrol agents moved him to the Imperial Beach station, and a day later agents transferred him to the Metropolitan Correctional Center (MCC) in San Diego. MCC officials took X-rays soon after his arrival, but did not admit him to a hospital for another week. In addition to ignoring his requests for medical assistance, *no U.S. Border Patrol agent ever advised the injured man that he could file a complaint.*

Mario underwent three operations to repair his badly damaged jaw; in one operation, a piece of his hip was transferred to his jaw. Doctors told him that the injuries were exacerbated by the long period without medical treatment, which led to serious infections. Mario told Human Rights Watch/Americas (HRWA) that some of his jaw will always be wired. He reports that eating and speaking are still difficult, and the bottom row of his teeth are missing. HRWA's investigators could see the damage to his mouth, which made it difficult for him to speak.

The INS reportedly attempted to deport Mario while he was hospitalized, but the Mexican Consulate intervened and he was allowed to receive adequate treatment. Mario stated that *the FBI had not interviewed him* and that only the Mexican Consulate had taken his statement. As of January 1995, nine months after the incident, the Office of the Inspector General (OIG) reports that the FBI was investigating the case and that this case might be strong enough for the Civil Rights Division to pursue. The OIG reports that lawyers representing Mario filed a one million dollar civil suit.¹⁶⁸

c. Case of Daniel Rodríguez

On February 14, 1997, Daniel crossed illegally with a group of

168. *Id.* at 10-11.

migrants at a spot known as “Nido de Aguilas,” in East San Diego County. He said they were quickly apprehended by the U.S. Border Patrol and when he tried to run away, *they beat him with their batons*. Later, he was separated from the rest of the group, and deported at Calexico, allegedly *without being processed, photographed, or fingerprinted*. Daniel believes this was done because of his visible injuries (*broken nose, heavy bruising to his face, body, and legs*). A complaint was made through the Mexican Consulate by the *Casa de Apoyo al Migrante* in Tijuana, B.C., Mexico.¹⁶⁹

d. Case of Unnamed Mexican Woman

According to U.S. Border Patrol policies, injured detainees are supposed to be given medical assistance and transported to the closest hospital. However, in several cases collected by Amnesty International, *injured detainees not only had their medical needs ignored, but were expeditiously returned to Mexico*.

According to a sworn affidavit given by a nurse on duty in the emergency room at Douglas Hospital, Arizona, a 26-year old woman was brought into the hospital with her four-year old boy and her one-year old daughter, on April 5, 1997. The woman said she had fallen into a hole while being chased by the U.S. Border Patrol. She told the nurse that she had been left in the desert by the U.S. Border Patrol, who called the Douglas fire department to transport her and her two children to the hospital.

The Mexican woman could not walk and X-rays showed she had a broken leg requiring orthopaedic attention and a cast. *But before she could receive any treatment “four men were getting ready to lift the woman off the X-ray table. They said she was being discharged.”* The nurse remonstrated with them stating that the Mexican woman was in acute pain, her knee was grossly distended, and she could not walk. However, *the four men carried the woman out to a taxi; she had no splint, cast or other immobilizing device on her leg*. The nurse asked the taxi driver to take the woman to the house of a friend of hers, and gave him money for the fare, but the injured woman never arrived. Instead, “the driver took her to the international line and essentially dumped her there with the two children.”

169. See *Rights concerns in the Border region with Mexico*, Amnesty International, at 13, AMR 51/03/98 (May 1998).

According to the nurse's affidavit, this was not the first time she had seen the U.S. Border Patrol release injured migrants back into Mexico without medical attention. Her nursing supervisor had allegedly spoken to the U.S. Border Patrol about the practice but received the reply that the U.S. Border Patrol "can do what they want."¹⁷⁰

The data contained in the four reports used as a source for this article¹⁷¹ provide pathetic narratives of hundreds of cases of brutal beatings of undocumented persons by U.S. Border Patrol agents. For example, in the 1997 report of the American Friends Service Committee (AFSC),¹⁷² 204 cases were chosen randomly by AFSC investigators after undocumented persons were apprehended by U.S. Border Patrol agents and deported to Mexico. Out of this total, 43 percent suffered excessive use of force, 46 percent were denied food and water and 21 percent were the victims of reckless and violent transport. Moreover, 11 percent were racially insulted, 23 percent were verbally abused and offended, including 18 percent who were lawful permanent residents in the U.S. Some of these involved cases of physical and sexual abuse, 15 lawful permanent residents received threats, and 14 were denied medical attention.¹⁷³

Selective narratives of shootings and beatings have been reproduced here simply in order to give an idea of the egregious nature of abuses committed by U.S. Border Patrol agents against undocumented persons in general and, occasionally, against lawful permanent residents and even U.S. citizens who, because of their Hispanic/Latino ethnic appearance, agents had believed to be undocumented persons.

Interestingly, one of the very first reports discussing the abuses and offenses of U.S. Border Patrol agents inflicted upon Mexican migratory workers, characterized at the time as "human rights violations," was a study published in English by Mexico's National Human Rights Commission (*Comisión Nacional de Derechos Humanos*) in 1991.¹⁷⁴ The cases describing "violence by U.S. law enforcement officers against

170. *Id.* at 15.

171. See *supra* note 122 and the corresponding text.

172. See *Human and Civil rights Violations on the U.S.-Mexico Border* (1995-1997) (American Friends Services Committee).

173. *Id.* Of the 204 cases chosen by the AFSC, 94 cases (46 percent) included immigrants denied food or water, 88 cases (43 percent) included excessive use of force, and 43 cases (21 percent) involved reckless transport. There were also 22 individuals (11 percent) that were racially insulted, 47 individuals (23 percent) were verbally abused, and 37 individuals (18 percent) were in the United States legally. Twelve cases (6 percent) involved physical/sexual abuse, 15 (7 percent) immigrants were threatened, and 14 (7 percent) were denied medical attention.

174. See *Report on Human Rights Violations of Mexican Migratory Workers on Route to the Northern Border, Crossing the Border and Upon Entering the Southern United States Border Strip* (National Human Rights Commission, Mexico City) (1991).

Mexican migratory workers are divided into six categories.¹⁷⁵

4. Factual Conclusions Derived from the Analysis of Abusive Narratives

Based on the classification and analysis of the hundreds of narratives contained in the reports of these human rights entities: i) American Friends Service Committee; ii) Amnesty International; and, iii) Human Rights Watch/Americas, the following conclusions may be drawn:

The most egregious abuses and violations committed by U.S. Border Patrol agents usually take place in isolated or remote areas where no witnesses are present. Moreover, since the undocumented person is in violation of U.S. immigration laws, the undocumented individual is in an indefensible position considering, that his declaration carries less weight before a U.S. court of law than the declaration made by a federal border agent, even where the statements made by these agents are fabricated or outright false.

Once an abuse or violation is committed upon an undocumented person by a U.S. Border Patrol agent, generally the same agent becomes directly involved in deporting to Mexico (or voluntarily sending back to that country) any incriminating witnesses. Having no witnesses (especially foreign ones) enhances the position of the U.S. Border Patrol agent, who will be able to make a declaration to the FBI, the U.S. Attorney, the OIG or the local police, without being rebutted by a contrary statement. U.S. Border Patrol agents know that their best defense in the case of an accusation filed by an undocumented person against them for an alleged civil rights violation or the commission of a criminal offense is to have no witnesses, American or foreign. This strategy also protects them before a U.S. court of law, regardless of the veracity of their declaration. Thus, when a U.S. Border Patrol abuses an undocumented migrant worker, the first official action by that agent is to get rid of that victim and any foreign incriminating witnesses as soon as possible.

U.S. public official entities, ranging from the FBI, the U.S. Attorney, the Office of the Inspector General, and the local Police Departments (including the Highway Patrol), tend to be biased in favor of the U.S.

175. The six categories are: 1) Mexican citizens killed; 2) Mexican citizens injured; 3) Mexican citizens subjected to mistreatment and abuse by authority; 4) Mexicans illegally deprived of their freedom; and, 6) Mexican victims of sexual abuse. *Id.* at 49-66.

Border Patrol agent. The legal standards to prosecute U.S. Border Patrol agents are so difficult to establish, that U.S. Border Patrol agents are seldom subject to prosecutorial action. Evidently, to prosecute a U.S. Border Patrol agent the abuse or violation committed upon an undocumented person must not only be egregiously offensive but must also be supported by the necessary evidence, especially incriminating witnesses. It is truly disappointing for aggrieved undocumented persons, their families and lawyers, as well as for human rights advocates, to ascertain that in comparison to the large number of complaints constantly reported by undocumented persons,¹⁷⁶ only an insignificant number of them eventually serve as the basis to prosecute U.S. Border Patrol agents.

In the counted cases, when a U.S. Border Patrol agent is criminally prosecuted, notwithstanding the seriousness or gravity of the crime (i.e., unjustified use of lethal force, brutal beatings, sexual assaults, etc.), *U.S. prosecutors tend to be lenient with the U.S. Border Patrol and appear to be most willing to accept a plea bargain, which would result in the imposition of the lightest sentence to the U.S. Border Patrol agent (generally not having to serve any time in jail) or in his/her exoneration.* Undocumented migratory victims, and their families, who witness these criminal trials are under the perception that the U.S. judicial system is biased in favor of the U.S. Border Patrol agent and at the same time clearly unfair to undocumented persons, who are the victims of the atrocities committed by U.S. Border Patrol agents.

The U.S. Border Patrol protects the individual members of the force by applying the "Green Code" (or Code of Silence). Border agents like other enforcement agencies, such as the Police, for example are known for their tight-knit community, united by a *sprit de corps*, which aggressively shelters and protects its members from any "outside attacks." An accusation against any of its members is perceived as an accusation against the entire force. When this occurs, all the members of the force unite to protect the accused agent. Experience has proven that the best defense against this type of external attack is to create an impenetrable "barrier of silence." *No member of the U.S. Border Patrol will say anything which may incriminate another individual member of the same force, even when this member acted in flagrant violation of the*

176. It should be clarified that Mexican migratory workers sometimes complain of the abuses, by U.S. Border Patrol agents or INS officials, to U.S. authorities while being detained or deported by the INS. However, as soon as they return to Mexico, they often also complain to Mexican authorities as well as Mexican human rights or charitable organizations such as *Casa de Apoyo del Migrante*, *Centro Binacional de Derechos Humanos*, etc. Narratives presented to Mexican entities are much longer and more detailed than those presented while physically present in the U.S.

law.¹⁷⁷ In exceptional cases, when a given U.S. Border Patrol agent “breaks” the “Green Code,” say by publicly denouncing the commission of an abuse or violation committed against an undocumented person by other fellow U.S. Border Patrol agent, the agent who breaks the “Code” immediately becomes “ostracized,” excluded, and castigated by the other members of the force.¹⁷⁸ The reprisals against the whistle blower agent can be so extreme that his own personal life, or that of the members of his family, can be at risk. As a result of this “Code,” once an agent makes a statement or declaration in relation to an undocumented person (*i.e.*, how that foreign person was injured, in what conditions was that person shot; whether the agent was in a life-threatening situation or in a certain place at a given time, etc.) that statement or declaration (regardless of its veracity) will be fully and officially supported by any and all other members of the U.S. Border Patrol. When the “Green Code” is applied “to institutionally shelter” a given U.S. Border Patrol agent, regardless of the infamous offenses committed by this agent, the undocumented victim will always be on the losing side.

In the overwhelming majority of incidents involving abuses or violations inflicted by U.S. Border Patrol agents upon undocumented persons, the victims of these abuses do not file any complaint against the U.S. Border Patrol. There are three reasons for this. First,

177. See, e.g., Joe Cantalupe, *Does the INS Culture Shield Misconduct?* S.D. UNION-TRIB., May 7, 2000, at A19; Sebastian Rotella, *Case Highlights Alleged Abuses at Border*, L.A. TIMES, Jan. 14, 1996, at A3; Sebastian Rotella and Patrick McDonnell, *A Seemingly Futile Job Can Breed Abuses by Agents Border Patrol*, L.A. TIMES, Apr. 23, 1993, at A1.

178. In an excellent series of articles about the U.S. Border Patrol, reporters Rotella and McDonnell wrote: “Such seemingly contradictory attitudes are ingrained in Border Patrol culture, as is the intimidating code of silence that punishes perceived turncoats and interferes with internal brutality investigations. ‘There is a fortress mentality,’ said Hunt, who left last fall to become an immigration service examiner. That’s one of our failings. Agent S, one of the few women at the Imperial Beach station, broke the unwritten code and paid the price. She testified last year against fellow Agent FJ, who had been indicted on federal charges of assaulting a U.S. resident. S began fearing for her safety after she received intimidating notes in her station mail drawer. Fellow officers disrupted her radio calls in the field. . . . During the trial, S testified that the accused agent had a well-known reputation for abuse. Apprehensive about retaliation, S testified: ‘There is a code that we are not supposed to tell on other agents.’ The harassment was reported to the FBI. . . . The jury acquitted FJ of the brutality charges. . . . An internal inquiry also cleared FJ, now back at work. . . authorities were unable to track down the agents behind the retaliation. S was transferred at her request. See Rotella & McDonnell, L.A. TIMES, *supra* note 177 (emphasis added).

undocumented persons believe that the abuses and offenses inflicted upon them by the U.S. Border Patrol agents is “the price” they must pay for entering unlawfully into the U.S. *Second*, undocumented persons are of the opinion that if they file a complaint against a U.S. Border Patrol agent to U.S. authority, this authority will be biased in favor of the agent. This perception applies to the U.S. court system. Moreover, if they complain, the agent may retaliate in a harsher manner against the undocumented person by filing criminal or other charges. *Third*, an undocumented person usually has no knowledge that in the U.S. (contrary to what may happen in his/her country of origin), a foreigner can file a complaint against a U.S. federal agent who has victimized him. In general, an undocumented worker believes that upon unlawful entry into the U.S., that person loses any rights. It is unimaginable that a foreign person who is an illegal entrant is given the opportunity to denounce a U.S. Border Patrol agent, who works for the wealthiest and the most powerful government on earth. And even if this is the case, is this complaint going to bring any reparation or any benefits to him, an undocumented alien in a foreign country?

IV. OPERATION GATEKEEPER AND ITS TOLL: 624 DEATHS. . .AND STILL COUNTING

The U.S. Border Patrol formulates, organizes, and implements enforcement “operations,” to curb the flow of illegal immigrants to the United States. These operations are usually a response to political pressure or anti-immigrant public sentiment. International human rights activists and immigration lawyers remember “Operation Wetback,”¹⁷⁹ in the Nixon era, and more recently, “Operation Safeguard,”¹⁸⁰ “Hold the Line” and “Rio Grande,”¹⁸¹ and in July of 2000, “Sky Watch.”¹⁸²

None of these INS enforcement strategies have proven more devastating for Mexican migratory workers than “Operation

179. See *supra* note 42.

180. Described by the INS as an “aggressive initiative. . .to heighten deterrence and improve control along the nearly 300 miles of international border with Arizona,” the operation was launched in 1994. See Immigration and Naturalization Service, *Immigration Enforcement in Arizona 1997-2000* (May 12, 2000); see also *INS Announces New Permanent and Temporary Resources For Southeastern Arizona*, INS News Release (May 12, 2000).

181. These two operations launched in Texas are part of “an INS comprehensive border enforcement effort . . .to reduce the adverse effects of illegal immigration and improve the quality of life for residents along the immediate border and throughout the nation”(sic). See *Immigration Enforcement in Arizona*, *supra* note 180, at 1.

182. See *Border Patrol Enhancing Border Safety in Tucson, Seven Additional Aircraft Deployed as Part of ‘Operation Sky Watch,’* INS News Release, July 7, 2000.

Gatekeeper.”¹⁸³ In essence, this operation consists of a series of enforcement measures to force undocumented persons towards the western end of the international boundary with Mexico, in the San Diego-Tijuana region and then to be driven into the eastern inland portions of the border, known for its perilous natural barriers. These barriers consist of vast deserts, the All-American Canal which runs on the U.S. side along the international boundary for sixty miles, and the treacherous high-altitude mountains of “*La Rumorosa*,” along the Mexican side of the international boundary.

Since Operation Gatekeeper was adopted in 1994, the number of deaths of undocumented persons have grown considerably every year. The first year, 23 undocumented persons died along the California-Mexico border. Between 1995 and 1997, the deaths increased from 61 to 89. In 1998, annual deaths climbed to 145, “exceeding the number of migrants who died along the border in the entire decade of the 1980s.”¹⁸⁴ As of September 2000, Operation Gatekeeper has cost the lives of 575 undocumented persons, including babies, children, women, and elderly people. The causes of death include hypothermia, heat stroke, drowning, heart attack, accident, and homicide.¹⁸⁵ According to Mexico’s Secretary of Foreign Affairs (SRE), during the first eight months of 2000, a total of 334 Mexican nationals have died, in comparison to 356 in 1999.¹⁸⁶ Between 1995 and August 2000, 1320 Mexican nationals have perished along the U.S.-Mexico boundary in California, Arizona and Texas.¹⁸⁷

183. See Diana Marcum, *Risk of Desert Deaths Rises as More Illegal Crossers Avoid Checkpoints*, L.A. TIMES, June 15, 1997, at A3; and Leonel Sanchez, *Border Crackdown Pushed Illegal Traffic East*, S.D. UNION-TRIB., Jan. 3, 1998, at B2.

184. See Jordan Budd and Claudia Smith, *CRLAF and ACLU File Petition Charging that Deadly U.S. Border Enforcement Strategy Violates International Human Rights Law*, at 94-95 (American Civil Liberties Union) (May 1999).

185. See *Operation Gatekeeper Fact Sheet*. This is an excellent binational and bilingual web site sponsored by the American Friends Service Committee, San Diego; ACLU of San Diego and Imperial Counties, San Diego; Albergue del Desierto, Mexicali, B.C.; Casa YMCA, Tijuana, B.C.; Casa del Migrante, Tijuana, B.C.; Casa de la Madre Assunta, Tijuana, B.C.; Centro de Apoyo al Migrante, Tijuana, B.C.; and Centro Pastoral Migratoria Scalabrini, Tijuana, B.C., Mexico. It contains text, maps, charts, and statistics about the initiation and current implementation of Operation Gatekeeper. It also contains a regular count of the number of deaths of undocumented persons since Oct. 1994, based on information provided by each of the sponsoring institutions and the Mexican Consulate General in San Diego, California, available at <http://www.stopgatekeeper.org> [hereinafter Stopgatekeeper].

186. Boletín de Prensa, *En lo que Va de Este Año, Han Muerto al Menos 334 Mexicanos en la Frontera Entera*, at 2 (Aug. 23, 2000).

187. *Id.* at 1.

It comes as no surprise that the Hon. Mary Robinson, United Nations High Commissioner for Human Rights, during her visit to Mexico and the city of Tijuana, B.C., in November of 1999, called the figure of 458 deaths of Mexican migrant workers as “shocking.”¹⁸⁸

“Operation Gatekeeper” was formulated by a group of military planning experts from the U.S. Department of Defense, Center for Low Intensity Conflict (CLIC), and Chief Patrol Agents from all regions and selected headquarters staff in July of 1994.¹⁸⁹ This “Strategic Plan” was produced based on the premise that “the absolute sealing of the [U.S.-Mexico] border is unrealistic...the border can be brought under control.” The Plan not only strengthens control of the border by means of restricting the passage of illegal traffic, but also intends to “sharpen the U.S. Border Patrol focus,” improving its “public image and employee morale,” in order “to facilitate justification for allocation of resources and encourage legal entry as the preferred method to enter the United States.”¹⁹⁰

Accordingly, the military experts from the Pentagon analyzed the problem at hand (*i.e.*, how to deter the unrestricted flow of Mexican migrant workers). The experts took into consideration the physical environmental conditions along the U.S.-Mexico international boundary and the substantially increased political, financial, technological, and manpower resources made available to the U.S. Border Patrol. The “theater of hostilities” prior to 1994 appeared to these military planners to respond to these considerations:¹⁹¹

(a) For a successive number of years, some 80 to 85 percent of the illegal crossings of Mexican undocumented entrants had been taking place at the western end, or San Diego-Tijuana area of the international boundary. The area of maximum conflict intensity was identified as that segment of the border which extends for 120 miles, to the Pacific Ocean towards El Centro, California, and Mexicali, B.C.;

(b) The physical environment of the boundary beyond those sixty miles consisted mainly of “mountains, deserts, lakes, rivers and valleys [which] form barriers to passage. Temperature ranging from sub-zero along the northern border to the searing heat of the southern border affect illegal entry traffic as well as enforcement efforts. *Illegal entrants crossing through remote, uninhabited expanses of land and sea along the border can find themselves in mortal danger;*”¹⁹²

188. See letter, California Rural Legal Assistance Foundation sent to the Special Rapporteur on Migrants, Office of the U.N. High Commissioner for Human Rights, Dec. 14, 1999, at 1 (on file with author).

189. See *Border Patrol Strategic Plan 1994 and Beyond*, U.S. Border Patrol (July 1994).

190. *Id.* at 1.

191. The data is taken verbatim or paraphrased from *Border Patrol Strategic Plan 1994 and Beyond*, *supra* note 189.

192. *Id.* at 2.

(c) Most of the aliens apprehended by U.S. Border Patrol agents in FY (some 97 percent out of 1,263,490) are Mexican nationals, under the age of 25, some 20 percent were women and children attempting to reach their husbands and/or fathers who are already in the U.S....Most of the aliens are poor, looking for work and have incurred transport and smugglers fees.

(d) Undocumented entrants intend to enter the U.S. unlawfully because of the "weak controls" exercised in recent years by the U.S. Border Patrol in the southwest border with Mexico. "Strengthening border control is a critical component of improved border management and will provide the U.S. government [with] the opportunity to deal with powerful global immigration pressures in a reasoned (*sic*), systematic manner."

"Operation Gatekeeper" was launched in phases. The objective of the first phase, launched in October 1994, was to seal the westernmost 14 miles of the border. Migrants began using more desolate and dangerous routes (mainly the Otay mountains), and began dying of exposure and exertion. In a report by the U.S. Justice Department's Inspector General on Gatekeeper, the Otay Mountains are described as being "extremely rugged, and includ[ing] steep, often precipitous, canyon walls and hills reaching 4,000 feet." In the words of an assistant Border Patrol Chief for the San Diego sector, those mountains are "some of the roughest [terrain] I've ever been in."¹⁹³

Phase II began in the Spring of 1996. Operation Gatekeeper was extended to the entire 66 miles of border in the San Diego sector. This effort to reroute the migrant foot traffic was stepped up in response to an outcry by East San Diego County residents over the massive illegal crossings which had materialized there. Some sixty days before the 1996 election, the Border Patrol came up with a "\$2 million-a-month proposal designed to get results within 60 days."¹⁹⁴ Next, the migrants were, in the words of the Clinton Administration's so-called border czar, "*forced to enter into a much more inhospitable terrain, i.e., the Tecate Mountains.*"¹⁹⁵ Its peaks rise over 6,000 feet and the snow can fall at altitudes as low as 800 feet. From mid-October to mid-April, there is a greater than 50% probability of below freezing temperatures. *In January 1997, sixteen migrants froze to death.* The Border Patrol acted surprised despite having anticipated deaths in its blueprint for Operation

193. Gregory Gross, *All Too Often Trek Ends in Death: Illegal Immigrants Fight Hunger, Thirst and Rough Terrain*, S.D. UNION-TRIB., Mar. 10, 1996, at B1.

194. Marcus Stern, *INS Weighs Stepped-Up Effort in East County*, S.D. UNION-TRIB., Oct. 17, 1996, at A1.

195. *INS Press Release on Operation Lifesaver*, Aug. 24, 1998 (on file with author).

Gatekeeper.¹⁹⁶

Phase III began in the Fall of 1997. As the Immigration Commissioner explained, "the next real step in moving east gets you into the desert and [like the mountains, it is] very formidable territory."¹⁹⁷ *The shortest route that migrants hike in the Imperial desert is ten miles.* Moreover, migrants going the desert route will have already been hiking through the Baja California side of the desert when they arrive at the border. *In August 1998, thirty three migrants died. Most succumb to the heat.* An Immigration and Naturalization Progress Report issued at the beginning of Phase III saying that "[f]orced out of Imperial Beach, potential illegal crossers encounter considerable personal adjustments as they move eastward towards Tecate or Mexicali," is quite an understatement.

The Border Patrol Chief has stressed that although the distances migrants must traverse in places like Texas are enormous, California has the most difficult terrain. In fact, the San Diego and El Centro sectors encompass three of the four places considered by the Border Patrol as "the most hazardous areas," *i.e.*, East San Diego County, the Imperial desert and the All-American Canal.¹⁹⁸ Apparently, the search and rescue campaign that the Border Patrol finally got underway 18 months ago has resulted in 1,042 rescues by the nine Border Patrol sectors on the Southwest border in fiscal year 1999. Meantime, over 100 migrants died just in California, where Operation Lifesaver was concentrated. Border Patrol press releases talked about making "the protection of human life the highest priority of our border activities," notwithstanding, there is no intention of rolling back Gatekeeper or its counterparts.¹⁹⁹

Since late 1994, when Operation Gatekeeper was initiated, a growing number of human rights advocates, non-governmental organizations and Latino civil rights organizations, in particular the California Rural Legal

196. As pointed out in earlier correspondence, the agency's *Strategic Plan: 1994 and Beyond*, *supra* note 189, recognizes that "illegal entrants crossing through remote, uninhabited expanses . . . can find themselves in mortal danger" and assumes that the "influx will adjust to Border Patrol changing tactics." *Id.* at 4.

197. *Q's and A's, An Interview with INS Commissioner Meissner*, S.D. UNION-TRIB., July 21, 1996, at G5. A supervisory agent from the San Diego sector was quoted as stating that "[e]ventually we'd like to see them all out in the desert out in isolated places where we've got the upper hand, and where they're not running into traffic and causing problems." See Gregory Gross, *Shifting to the East*, S.D. UNION-TRIB., May 26, 1996, at A1.

198. See March 10, 1995 testimony of Gustavo de la Viña before the Committee on Criminal Justice, Drug Policy and Human Resources of the U.S. House of Representatives; see also April 23, 1997 testimony of former border czar Alan Bersin before the Subcommittee on Immigration and Claims of the U.S. House of Representatives. Bersin served as a representative of and reported to the Attorney General on border issues.

199. Immigration and Naturalization Service, INS News Release, Aug. 24, 1998.

Assistance Foundation, the American Friends Service Committee/San Diego (U.S.-Mexico Border Project), Amnesty International, the Mexican American Legal Defense and Educational Fund (MALDEF), the National Council of La Raza (NCLR), ACLU of San Diego and Imperial Counties, as well as Mexican organizations, including Casa del Migrante (Tijuana), Casa YMCA (Tijuana), Casa de la Madre Asunta, Centro de Apoyo al Migrante and Casa Pastoral Migratoria Scalabrini, and Centro Binacional de Derechos Humanos, etc., have been most active in denouncing in the U.S. and Mexico. Mary Robinson, the United Nations High Commissioner for Human Rights, has severely denounced the tragic and inhumane implications of this immigration enforcement policy.²⁰⁰

These documents argue that Operation Gatekeeper, as an enforcement immigration policy financed and politically supported by the U.S. government, flagrantly violates international human rights because this policy was deliberately formulated to maximize the physical risks of Mexican migrant workers, thereby ensuring that hundreds of them would die.

It must be made clear that the 1994 U.S. immigration strategy does not only violate international law, but it is also perverse and inefficient. It violates international law because it constitutes an official governmental strategy, which is not being implemented in a reasonable manner showing due respect for the lives of undocumented entrants. No one questions the right of the U.S. to protect its borders. What is questionable is the abusive and inhumane manner through which the U.S. is enforcing this policy. When this policy is taken to the extreme, which occurs when it causes deaths of persons, in a most indiscriminate manner. This unreasonable, abusive, and sustained implementation of a U.S. governmental action then becomes a flagrant violation of the most fundamental principles of international human rights. These rights include the right to respect all human life, regardless of nationality, ethnicity, race, age, sex, religious creed, political ideas or immigration status. As a signatory of the Universal Declaration of Human Rights, the U.S. government is to give most serious consideration to Article 3 of this Universal Declaration, which predicates: "*Everyone has the right to life, liberty and security of person.*"²⁰¹ Or Article 2 of the International

200. Letter from Claudia Smith to Mary Robinson, High Commissioner for Human Rights, Mar. 3, 2000 (on file with author).

201. See Universal Declaration of Human Rights, art. 3, *infra* n.202.

Covenant on Civil and Political Rights, which reads: "Each State Party to the present Covenant, *undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.* . . ."²⁰²

Operation Gatekeeper is perverse because it was formulated by a group of military experts with the deliberate and specific purpose of channeling the flow of Mexican undocumented entrants to a physical environment in remote, uninhabited expanses of mountains, desert and rugged terrain which, in the words of these military strategists, is definitely going to place the Mexican nationals both in the summer as well as in the winter in mortal danger. What could be more perverse than to formulate a policy with the intent to lead people to their own death, and then implement it in the most inhumane, cruel, and painful manner? Is this policy in compliance with the international "Principle of Good Neighborliness," as our country applies today to its southern "friend"? Or, as argued by international human rights advocates, is this not immigration policy, and its barbaric implementation, a clear *Abus de droit*, penalized by international law?

Operation Gatekeeper is inefficient because, as demonstrated by the figures released by the U.S. Border Patrol, this enforcement immigration strategy has not slowed down the flow of Mexican migrant workers. For example, during FY 1999, the apprehensions in the San Diego and El Centro, California, sectors, fell 26 and 0.5 percents, respectively. But in the Yuma and Tucson, Arizona, sectors, the apprehensions rose by 23 and 21 percents respectively. The upshot is that from October 1, 1998 to September 30, 1999, there were 65, 134 fewer apprehensions at the California border and 100,234 more apprehensions in the Arizona border. This represented an overall increase of 35,100 apprehensions. The INS sold the Gatekeeper idea of prevention through deterrence to Congress by predicting a big fall in the apprehension figures along the entire Southwest border at the end of five years. Supposedly the risk of apprehension was going to be raised high enough to be a deterrent. In fact, apprehensions along the entire Southwest border climbed by 57 percent between FY 1994 and FY 1999 from 979,101 to 1,536,947 apprehensions. The jump cannot be explained by saying that the U.S. Border Patrol arrested the same people more times. There is only anecdotal evidence to support such assertion because the electronic fingerprinting and computer-stored photographs system for detecting

202. As of June 3, 2000, according to the Office of the United Nations High Commissioner for Human Rights, 143 member states of the U.N., and 3 non-member states, are parties to this covenant, including the United States as of June 7, 1992.

those apprehended is repeatedly plagued with glitches.²⁰³

Regardless of the principle of territorial sovereignty, no policy of a given state is to be implemented within the territory of that state if the domestic implementation of such a policy – in this case, the U.S. immigration strategy Operation Gatekeeper – inherently endangers the lives of foreign nationals. In a case such as this one, international law can be clearly invoked to demand: (a) the immediate suspension of the policy in question; and, (b) the conduct of direct consultations and/or negotiations between the affected parties in order to formally explore the formulation of a new policy that is more humane and reasonable, according to principles of international law and international human rights.

It has been stated that “the position of the Mexican government is that it cannot complain about the design of Gatekeeper, citing the Principle of Non-interference.”²⁰⁴ True, the Principle of Non-Intervention is a “normative principle” which guides Mexico’s foreign affairs policy, as enunciated by Article 89, paragraph X, of Mexico’s 1917 Federal Constitution.²⁰⁵ In its bilateral relations with the U.S., this principle assures Mexico that the U.S. is not going to intervene or interfere within Mexico’s domestic affairs. Allegedly, whatever happens within Mexico’s territorial boundaries is a matter of domestic policy, outside the realm of foreign countries, especially the U.S.²⁰⁶

203. Data taken *verbatim* from the letter sent to the U.N. High Commissioner for Human Rights by the California Rural Legal Assistance Foundation on Nov. 19, 1999, at 5 (on file with author).

204. See testimony of the Hon. Rosario Green, Mexico’s Secretary of Foreign Affairs, before the Mexican Senate on Sept. 2, 1999. See also letter of the California Rural Legal Assistance Foundation to the U.N. High Commissioner on Human Rights, Nov. 19, 1999, at 6.

205. MEXICAN CONSTITUTION, art. 89, § X, which enumerates the powers and obligations of the President, provides:

X. To direct the foreign policy and enter into international treaties, to be submitted to the approval of the Senate. In the conduct of said policy, the holder of the Executive Power is to observe the following normative principles: self-determination of the peoples; *non-intervention*; peaceful settlement of controversies; proscription of the threat or the use of force in international relations; legal equality of States; international cooperation for development; and the struggle for peace and international security (emphasis added).

CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS. Ed. Porrúa, México, 1998 at 76 (trans. by author).

206. See *Seeking Safe Ground* (UNAM/Mexico-U.S. Law Institute, University of San Diego) (1984). This non-intervention principle appears to be quite convenient when, for example, the United States attempts to look into Mexico’s record on human rights or

However, rather than adopting a passive attitude towards the hundreds of Mexican nationals that are dying because of the unreasonable and extreme U.S. immigration policy enforced in an inhumane and barbaric manner, the government of Mexico should adopt a strong and active policy *vis a vis* the U.S. in vigorous defense of its own nationals.

Like the U.S., France, the U.K., Germany, Spain, or any other country, Mexico should realize that in attacking an inherently lethal policy, which was formulated by the U.S. to specifically target its own nationals, Mexico has the support of international law and international human rights, as well as the backing of the international community. Under international law, Mexico has the right, as well as the obligation, to protect its own nationals, within Mexico and abroad, especially when the physical integrity, well-being, and the very lives of Mexican migrant workers are at stake as a result of a flawed, unlawful and irrational immigration policy.

It may be appropriate to transpose certain international environmental law principles to the realm of fundamental international human rights. For example, the principle derived from the 1938 Trail Smelter Case,²⁰⁷ *Sic utere tuo ut alienum non laedas*,²⁰⁸ may acquire a new meaning when applied to Operation Gatekeeper, in the realm of U.S. immigration law. As it is known, the quoted Latin maxim provides that a State has the duty to refrain from acts that would cause injury to persons or property located in the territory of another state. This principle served as the legal basis to regulate and control the polluting activities of a Canadian enterprise whose activities, clearly within the territory of Canada, polluted and damaged the well-being of Americans, their assets and property, located in the U.S.

Turning to Operation Gatekeeper, it is only natural to think that if this principle was utilized six decades ago by an international arbitral court to curb the trans-boundary polluting activities of a Canadian company, it would certainly be valid to apply the same principle when a barbaric immigration policy of the U.S. is being enforced and utilized in a most deliberate manner to inflict damage not to property or other inanimate objects, but to the nationals of Mexico.

Moreover, applying such immigration policy with the specific objective of maximizing the environmental dangers and risks to inflict injuries to Mexican nationals, and even death, as anticipated by U.S.

the immigration policies and treatment of undocumented workers who, coming from Central America, enter Mexico unlawfully seeking work in Mexico.

207. See Trail Smelter Case (U.S. v. Canada) (1941), 3 U.N.R.I.A.A. 1938 (1949).

208. BLACK'S LAW DICTIONARY 1380 (6th ed. 1990). The old Latin principle prescribes "[O]ne should use his own property in such a manner as not to injure that of another." *Id.*

military experts, is an abuse of the right of the U.S. to protect its borders. It is also a flagrant violation of the Principle of Good Faith that should inform and govern the bilateral relations between U.S. and Mexico, as a permanent and inherent principle, that has traditionally governed such relationship.

The Principle of Non-Intervention should not apply as an obstacle for Mexico to protect the human dignity and the fundamental human rights of its nationals abroad. It is ironic that a nation that poses as a global paladin who champions and advocates full respect for international human rights in far away countries such as the People's Republic of China, Myanmar, North Korea, Afghanistan, Pakistan, Rwanda, Croatia, Chile, and Cuba, fails to do so within its own territory. Nothing could appear more hypocritical to foreign nations then to see the U.S. behave such a fashion.

Mexico should also consider changing its traditional interpretation of the Non-Intervention Principle as a normative guide to its foreign affairs policy, including its bilateral relations with the U.S.

In a more vigorous diplomatic stance, Mexico should have already lodged numerous diplomatic notes against the U.S. denouncing Operation Gatekeeper and demanding its immediate abrogation. This question should have been raised immediately at the bilateral, regional, and multilateral levels.

In the likely event that these diplomatic protests may have been disregarded by the U.S. Department of State, Mexico should have brought the case before the United Nations High Commissioner on Human Rights and the Inter-American Commission of Human Rights of the Organization of American States (OAS), pressuring the U.S. at these international fora to recognize the lethal character, abusive nature, and inhumanity of this immigration policy.

Diplomatically, the case could have been raised at the regional meetings of the Latin American Group, the African Group, and the Asian Group at the United Nations, especially when one takes into account that the immigration problems associated with migratory workers are of a global scope.

At the bilateral level, Mexico had the opportunity to address this delicate question at the U.S.-Mexico Bilateral Commission which has been operating for the last two decades, or discussing the issue at a special, *ad hoc* meeting convoked to address this problem.

Mexico's tragic history of its long but asymmetrical diplomatic

relations with the U.S. The contrasting scientific, economic, and industrial asymmetries between the two countries; and its permanent geographical contiguity with the only leading power in today's world, have transformed Mexico into a master of diplomacy and international law. When permanently confronted with a vigorous nation richly endowed with tremendous power and wealth, Mexico quickly learned the value of the respect for the law. There is no doubt that Mexico will soon turn its vast expertise and keen attention to international law principles and global diplomacy to strongly defend the fundamental human rights of its Mexican migratory workers in the United States.

V. INTERNATIONAL HUMAN RIGHTS AND UNDOCUMENTED MEXICAN WORKERS

In 1980, a boat lift from the Cuban port of Mariel brought some 125,000 Cuban asylum seekers to the U.S., later known as *Marielitos*.²⁰⁹ Starting then, international human rights advocates have made numerous but rather unsuccessful attempts to rely on the application of international human rights to protect aliens from the actions of U.S. officials in immigration law cases.²¹⁰

The American Civil Liberties Union of San Diego & Imperial Counties and the California Legal Assistance Foundation filed a petition to the Inter-American Commission on Human Rights, an organ of the Organization of American States (OAS), charging that "the United States is violating international human rights law by deliberately driving illegal border crossers into harm's way."²¹¹ More specifically, the petition advances the argument that "Operation Gatekeeper,"²¹² breaches the OAS Charter²¹³ and the American Declaration of the Rights and

209. THOMAS A. ALEINIKOFF ET AL., *IMMIGRATION: PROCESS AND POLICY* 446-51, 873-84, 896-98 (1995).

210. See *Garcia-Mir v. Meese-Smith*, 788 F.2d 1446 (11th Cir. 1986). Advocates for the *Marielitos* invoked the petition process of the Inter-American Commission on Human Rights in April, 1987; Inter-American Court of Human Rights, The Law Group Docket, at 5 (Summer 1988).

211. Jordan Budd and Claudia Smith, *CRLAF and ACLU File Petition Charging that Deadly U.S. Border Enforcement Strategy Violates International Human Rights Law*, ACLU INTERNATIONAL CIVIL LIBERTIES REPORT 94-95 (May 1999).

212. "Operation Gatekeeper" is a four-year border enforcement strategy initiated by the INS in October of 1994 to force undocumented immigrants out of the San Diego region and into the treacherous desert and mountain areas to the east to deliberately expose them to the inclemencies of the weather and the rugged terrain. Since it was established, a total of 553 undocumented persons have perished (Aug. 16, 2000).

213. CHARTER OF THE OAS, signed Apr. 30, 1948, entered into force Dec. 13, 1951, amended by the Protocol of Buenos Aires, signed Feb. 27, 1967, and the Protocol of Cartagena de Indias, approved Dec. 5, 1985, 119 U.N.T.S. 3.

Duties of Man.²¹⁴

In particular, the Petition claims:

[T]he United States has organized and implemented its immigration and border control policies in a way that has knowingly and ineluctably led to the deaths of an ever increasing number of immigrants seeking to enter the United States to obtain jobs or family reunification. Operation Gatekeeper has steered this flow of immigrants into the harshest, most unforgiving and most dangerous terrain on the California-Mexico border. The United States has purposefully done this knowing that the policy would dramatically increase the number of illegal border crossers who die without taking adequate steps to prevent these deaths. In acting this way, the United States violated and is violating Article I of the American Declaration and has abused its rights and the principle of good faith underlying the obligation⁵ of all states' parties to the [OAS] Charter And the [American] Declaration.

Despite the fact that international human rights advocates have been asking U.S. courts to decide cases by applying international law norms, the results have been largely disappointing.²¹⁶ In general, U.S. courts appear to be timid, unconvinced, or simply uninterested to rely on the application of international human rights law as a basis for deciding cases before them.²¹⁷

Several reasons support this assertion: first, it should be evident that U.S. courts tend to be familiar only with U.S. law. Therefore, it may not be unusual for a U.S. court to be somewhat uncomfortable when it has to

214. American Declaration of the Rights and Duties of Man, OAS Res. XXX, adopted by the Ninth International Conference of American States, Bogotá (1948).

215. Petition to the Inter-American Commission on Human Rights of the Organization of American States Alleging Violations of Human Rights of persons placed in danger at the U.S.-Mexico Border by Actions and Inaction of the United States of America pursuant to its "Operation Gatekeeper." Submitted on behalf of Petitioners American Civil Liberties Union of San Diego and Imperial counties and California Rural Assistance Foundation against the United States of America (dated Feb. 25, 1999) (on file with author).

216. See Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective*, 14 MICH. J. INT'L L. 1 (1992); Richard Bilder, *Integrating International Human Rights into Domestic Law – U.S. Experience*, 4 HOUSTON J. INT'L L. 1 (1981); Gordon A. Christenson, *The Uses of Human Rights Norms to Inform Constitutional Interpretation*, 4 HOUSTON J. INT'L L. 39 (1981); Alan Brudner, *The Domestic Enforcement of International Covenants on Human Rights: A Theoretical Framework*, 35 U. TORONTO L.J. 219 (1981); Alexander Tsesis, *Toward a Just Immigration Policy: Putting Ethics into Immigration Law*, 45 WAYNE L. REV. 105 (1999); Fang-Lian Liao, *Illegal Immigrants in Garment Sweatshops: The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights*, 3 SW. J.L. & TRADE AM. 487 (1996).

217. See Richard Bilder, *supra* note 216, at 1. Writing in 1981, it was noted: "The attitude of the United States government, of the courts, and of the public in general, toward the international human rights concept is still evolving and ambivalent." *Id.*

decide a controversy based on the application of a foreign law. When a U.S. court is confronted with the delicate question of deciding a case based on international human rights norms, it may not be a hyperbole to suggest that for most U.S. courts placed in that predicament, the identification, selection, and legal analysis of principles of international law in general, or even worse, of specific international human rights law norms, may be as unfamiliar as discussing arcane rules of foreign law.

Second, without mentioning its reluctance to apply international law principles to a given case, or confess its ignorance of the subject matter, a U.S. court confronted with international law questions clearly prefers to raise the issue as a political question and defer the matter to the branch of the Executive in control of such matters (i.e., the Executive through the U.S. Department of State in Foreign Affairs, or the U.S. Department of Justice through the INS in immigration cases). Accordingly, any discussion of international law is omitted.

Third, the possible consideration and application of international law by a U.S. court tends to be generated by these two basic sources: conventional law and customary law. International conventional law is represented by those treaties and international agreements to which the U.S. is a party, and which are recognized by the U.S. as legally binding. Customary law, on the contrary, is not reflected in a material document like a treaty or a convention; it is an intangible notion, an ethereal concept. Customary international law is defined as those principles, rules, or norms which the prolonged and consistent practice of states recognizes to be legally binding to all states out of legal obligation.²¹⁸

The mere identification of principles or rules of customary international law poses serious problems to international law specialists, not to mention the insurmountable difficulties it presents to U.S. courts.²¹⁹ Since customary international law rules are not found in written documents such as treaties or conventions, to determine their existence it becomes indispensable to gauge the practice of individual states, evaluate the degree of symmetry between such practice and the customary rule in question, and finally, reach a fair and objective conclusion. When one considers that the international political area is composed today by more than 190 nations, reaching such a conclusion is by no means an easy task.

Turning to international conventional law, our country has a less than mediocre record of not having signed, let alone ratified, most of the

218. Bayefsky et al., *supra* note 216, at 29.

219. See Jack Goldsmith & Eric Posner, "A Theory of Customary International Law," 66 U. CHI. L. REV. 1113 (1999); see also S. James Anaya "Customary International Law," 92 AM. SOC'Y INT'L L. Proc. 41 (1998).

current international human rights conventions.²²⁰ Since the U.S. is not a formal party to most international human rights agreements, the U.S. is not formally obligated to uphold them. The most recent case concerns the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.²²¹

In the relatively few international human rights conventions to which the U.S. did sign and the Senate gave its advice and consent,²²² in these instances the U.S. decided to make such specific reservations, declarations, or statements, as mandated by its national interest. The end result has been to create virtually ineffective instruments at the domestic level.

A. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 1990

Irregular immigration is not an isolated phenomenon. Rather, it is an old and relatively constant socioeconomic trend, which in recent decades has developed into an international problem of global proportions. Especially since the end of World War II, flows of undocumented migratory workers started moving in increasing numbers from economically depressed countries to developed nations. The interactions between sending and receiving states have already generated a panoply of emotional reactions and a variety of problems of the most diverse nature: legal, economic, ethnic, cultural, religious, and political. In turn, these problems have led to a series of open confrontation between these two types of states with, apparently, two opposing sets of interests.

Whereas the receiving states are seriously preoccupied with territorial sovereignty, ethnicity, and culture, and national security questions, the sending states are increasingly concerned with the precarious situation

220. *Id.*

221. See *The Rights of Migrant Workers, Fact Sheet No. 24*, United Nations (1996), adopted by U.N. General Assembly Resolution 45/158 (Dec. 18, 1990).

222. The U.S. has signed but never ratified the International Covenant on Economic, Social and Cultural Rights, U.N. GAOR, U.N. Doc. A/RES/2200 A (XXI) (which entered into force on Jan. 3, 1976); the U.S. ratified with qualification the International Covenant on Civil and Political Rights, U.N. GAOR, U.N. Doc. A/RES/2200 A (XXI) (which entered into force on March 23, 1976); the U.S. is the only country which signed but did not ratify the American Convention on Human Rights (which entered into force on July 18, 1978); the U.S. signed but did not ratify the Convention on Elimination of all Forms of Discrimination Against Women (which entered into force on Sept. 3, 1981) and the Convention on the Rights of the Child.

and well-being of irregular immigrants. More specifically, with the deplorable working conditions and the overt and chronic violation of their fundamental human rights by the receiving states.

Although questions associated with these human migratory flows have reached critical levels in several developed countries in very recent years,²²³ the interest of the United Nations and its specialized agencies to protect migratory workers and their families, can be traced back to the 1920s, when it attracted the attention of the International Labor Organization (ILO). ILO's contribution to achieving greater justice for "migrant workers" takes two forms: first, certain ILO conventions and recommendations set the pattern for domestic laws, as well as judicial and administrative procedures relating to migration for employment purposes, and second, through its technical cooperation projects, ILO helps to secure human rights of migrant workers.²²⁴

In 1974, the ILO adopted the Convention Concerning Migrations in Abusive Conditions.²²⁵ This international instrument was the first one to underline the adverse societal effects caused by irregular migratory flows. A few years later, in 1978, the United Nations General Assembly adopted a Resolution calling for the improvement of the precarious situation of transnational migrant workers.²²⁶ Later that year, the United Nations Secretary General produced a report which detailed the human rights problems affecting undocumented migratory workers and their families.²²⁷

In 1979, all of these diplomatic developments at the multilateral level led to the appointment of a Working Group to prepare an International Convention on the Protection of the Rights of All Migrant Workers and Their Families.²²⁸ After difficult negotiations which lasted for over a decade, the final text of the Convention was completed and approved in December of 1990.²²⁹

As of today, this international convention is the most comprehensive

223. Mario de Cautín, *Population: Experts Urge Protection for Immigrants*, INTER PRESS SERVICE, Aug. 14, 1984, n.p.

224. See *The Rights of Migrant Workers*, *supra* note 221, at 9.

225. See ILO's Convention No. 143: *Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers* (June 24, 1974), Geneva.

226. U.N. GAOR, U.N. Doc. A/RES/32/120 (1978).

227. 26 U.N. ESCOR Commission for Social Development, U.N. Doc. E/CN.5/568 (1978).

228. See U.N. GAOR, U.N. Doc. A/34/46 (1979).

229. See James A. Nafziger & Barry C. Bartel, *The Migrant Workers Convention: Its Place in Human Rights Law*, in 4 INTERNATIONAL MIGRATION REVIEW, VOL. XXV 771; see also Linda S. Bosniak, *Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers Convention*, in 4 INTERNATIONAL MIGRATION REVIEW, VOL. XXV 737.

and systematic instrument, which enunciates the human rights of migrant workers and their families. These include, *inter alia*, rights to due process of law in criminal proceedings, free expression and religious observance, domestic privacy, equality with nationals before the courts, emergency medical care, education for children, respect for cultural identity and due process rights in the detention and deportation context. Specifically, in the labor area, the convention also includes the right to enforce employment contracts against employers, the right to participate in trade unions, and the right to enjoy the protection of wage, hour and health regulations.²³⁰

Mexico is party to this Convention; the U.S. is not. The Convention truly represents the epitome of international human rights. It is likely that the principles, rules and norms contained in this international instrument are going to influence future international efforts in this international law area and, in particular, those bilateral and regional agreements to be eventually negotiated between sending and receiving states, as well as substantive principles to be incorporated into domestic legislation designed to protect these workers.

Based upon the substantive principles, rules, and norms of this global Convention, an effort has been made to produce a less comprehensive and ambitious, but more realistic and practical, "*Protocol which Enunciates the International Human Rights That Protect Mexican Migratory Workers in the United States as Agreed by the Governments of the United States of America and Mexico*" (See APPENDIX I). This "Declaration" may be used as a reference work to be included as a Protocol or an Annex forming a part of formal bilateral agreements entered between sending and receiving countries of temporary migratory workers.

B. At the Bilateral Level Between the United States and Mexico

For decades, irregular migration of Mexican undocumented persons crossing unlawfully into the United States has been not only a chronic problem but an emotional irritant in the diplomatic relations of these two countries.

According to the INS, from 1990 until September 2000, the U.S. Border Patrol has apprehended a total of 14,304,934 undocumented

230. See Bosniak, *supra* note 229, at 740-41.

persons in all U.S. sectors, for an annual average of 1,300,448.²³¹ Although 15 countries were each the source of 50,000 or more undocumented immigrants,²³² according to INS, "Mexico is the leading source country of undocumented immigration to the United States."²³³

Mexico benefits from this chronic immigration principally because of these two reasons: first, the hundreds of thousands of Mexican nationals who leave their country every year to work temporarily in the U.S. (even assuming that most of them return to Mexico later) serve as an escape valve for their country of origin. This is a fair assumption, considering that one million Mexicans enter the job market every year. If all the Mexican migratory workers remained in Mexico instead of coming to the U.S., they would become a very heavy burden upon the country's economy which is still in the process of recovering from its serious financial collapse in 1994.

Second, Mexico receives between four to six billion dollars every year from the personal remittances of Mexican migratory workers in the U.S. According to information compiled by Mexico's Secretariat of Foreign Affairs (*Secretaría de Relaciones Exteriores* or *SRE*), 1.1 million homes located in nine states benefit from these remittances in Mexico whose monthly flow amounts to \$468.9 million.²³⁴ SRE points out that the economic value of these "financial transfers" is equivalent to 79 percent of Mexico's oil exports, 55 percent of that country's foreign investment and 93 percent of the income generated by tourism.²³⁵

The U.S. is also a beneficiary of the constant human flows of irregular Mexican migratory workers. Principally, they provide cheap and reliable labor force which is highly needed by certain segments of the U.S. economy, in particular in the agricultural and service sectors.

231. Data provided by facsimile to the author from the INS Office of Public Affairs (on file with author).

232. See *INS Illegal Alien Resident Population*, *supra* note 10, at 5.

233. *Id.* "In October 1996 an estimated 2.7 million undocumented immigrants from Mexico had established residence [in the United States]. Mexican undocumented immigrants constituted about 54 percent of the total undocumented population. The estimated population from Mexico increased by just over 150,000 annually in both 1988-92 and 1992-96 periods."

234. See *Secretaría de Relaciones Exteriores (SRE), Mexicanos en E.U./Numeralia*. Data taken by SRE from Banco de México indicators in 1999. "Impacto de las Remesas en la Economía Nacional es cada vez más importante" (The Impact of the Remittances is becoming increasingly important for Mexico's national economy). The states receiving these remittances are: Aguascalientes, Colima, Durango, Guanajuato, Jalisco, Michoacán, Nayarit, San Luis Potosí and Zacatecas. *Id.* at 13.

235. *Id.* SRE reports that, of all Mexican homes, only 5.3 percent receive these transfers, 10 percent of which are located in rural areas and 3.8 percent of which are in urban areas, covering 230 municipalities (*i.e.*, similar to U.S. counties). These remittances have increased substantially since 1995 from \$306.1 million that year to \$468.9 million in August, 1999.

Notwithstanding, in 1986 the Immigration Reform and Control Act (IRCA) imposed sanctions on U.S. employers who “knowingly” hired undocumented persons.²³⁶ This section of IRCA has only received token enforcement by the INS since its inception. For example, the California Rural Legal Assistance Foundation reports that “during the last five years (1995-1999) the United States Immigration and Naturalization Service has done virtually nothing to counteract the employer magnet that pulls migrants here. Since the *start of Operation Gatekeeper*, only a half-dozen employers of undocumented laborers have been prosecuted in either of California’s border counties.”²³⁷

Although the presence of Mexican undocumented workers in the U.S. has been both a sensitive issue and an irritant between the two countries, for many years this issue remained *outside* their bilateral agenda.²³⁸ It was not until 1997 that the “immigration” issue was included in the U.S.-Mexico annual bilateral meetings. In the U.S.-Mexico Declaration signed on June 9, 2000 during Former President Ernesto Zedillo’s official visit to the United States, Point 5 of the Declaration reads:

5. In the Joint Declaration on Migration signed in 1997 we recognize that the migration of Mexican nationals to the United States constitutes a priority in our bilateral agenda. For the first time, we have a high level group who has specialized in the knowledge and handling of the different aspects of this complex phenomenon. Coordination and linking mechanisms along the border and to the interior of the United States have been established. These mechanisms allow to give more and better protection to Mexican migrants.²³⁹

We established a Regional Conference on Migration to address, from Canada to Central America, migratory problems which today is a model

236. See Immigration and Nationality Act (INA) § 274A(e)(4), 28 CFR § 68.52. Civil penalties for each offense of employing unauthorized aliens range from \$250 to \$2,000 for a first offense (for each alien) and \$3,000 to \$10,000 for third or more offenses (for each alien).

237. See Letter from California Rural Legal Assistance Foundation (CRLAF) to Gabriela Rodríguez Pizarro, Special Rapporteur on Migrants, Office of the High Commissioner for Human Rights, Sept. 23, 1999, at 5 (on file with author). In this letter, CRLAF also points out that the INS devoted only 2 percent of its FY98 man-hours to work site enforcement — a misallocation that badly undermines border enforcement; see also Richard M. Stana, *Illegal Aliens — Significant Obstacles to Reducing Unauthorized Alien Employment Exist*, Gen. Accounting Off. 3, April 2, 1999 (emphasis added).

238. A similar policy was followed at the annual meetings of U.S. and Mexican governors of border states. In their recent Joint Communique issued at Sacramento, California, June 2, 2000, U.S.-Mexico Border Governors Joint Communique, no immigration questions, issues, or concerns appeared in the final text.

239. See United States-Mexico Joint Declaration, Washington, D.C. (June 9, 2000) (emphasis added).

of dialogue and cooperation that has been emulated in other regions of the world.

Interestingly, in the immigration area, cooperative arrangements are beginning to appear between the INS and federal agencies from the government of Mexico. On June 16, 2000, INS Commissioner Doris Meissner reported these unprecedented developments in relation with the "Border Safety Initiative," a 1998 strategy designed to make the border safer for migrants, officers, and border residents. The initiative covers the areas of Prevention, Search and Rescue and Identification.²⁴⁰

Prevention. The INS is working with Mexican officials to identify dangerous crossing points inherent along the entire Southwest border and address safety problems. INS is monitoring and reporting data on border deaths, analyzing the data, and taking steps to address safety problems. INS is also deploying more personnel to hazardous crossing points along the border. In a coordinated effort, *Mexican Consuls have arranged for warning signs to be posted in Mexico much like the warning signs posted by the INS in dangerous areas along the border.* INS expanded and coordinated public service announcements along the border where migrants are located to warn them about the hazards in crossing the border illegally. Efforts included national public service announcements developed in conjunction with the Mexican government and news releases from U.S. and Mexican newspapers, as well as radio and television spots. The INS continued its media outreach efforts to Mexico and Central America through telephone press conferences and television broadcasts.²⁴¹

Search and Rescue. Several U.S. Border Patrol sectors have developed local toll-free hotlines for people to call if they believe friends or relatives who recently crossed the border may be in danger so that INS can initiate a search/rescue. Border Patrol vehicles are equipped with extra water, electrolyte drinks and medical trauma bags to assist migrants found in the desert suffering from dehydration and/or hypothermia. U.S. Border Patrol agents have specialized training in water rescue techniques, and advanced first-aid.²⁴²

Identification. INS Border officials are working with *Mexican Consuls* and local medical examiners to share information to identify deceased individuals.²⁴³

The INS has reported that in accordance with a *Memorandum of Understanding with the Mexican Government*, INS will participate "in

240. Immigration and Naturalization Service, *INS Border Safety Initiative Fact Sheet* (June 26, 2000).

241. *Id.* at 1-2.

242. *Id.* at 2.

243. *Id.*

joint training exercises with their Mexican counterparts in order to keep agents on both sides of the border prepared and trained in public safety measures.²⁴⁴ The INS and the Mexican government “will continue to share critical information and, where appropriate, equipment that will allow both governments to increase public safety along the border.”²⁴⁵

In addition, in early 2000 the INS and Mexico tested a “Video Link” between Mexican Consulates and INS detention facilities.²⁴⁶ This technology was demonstrated in conjunction with a binational meeting in San Diego involving high-level officials from both countries.²⁴⁷ The video conferencing system makes it possible for officials at participating Mexican Consulates to conduct remote video interviews with Mexican nationals being held at INS detention facilities. The system is expected to aid INS, “by enabling the agency to obtain travel documents for detained Mexican nationals in a more timely manner, speeding the repatriation process.”²⁴⁸

The recent binational cooperation has also led to the establishment of a Mexican Consular Office at the San Ysidro Port of Entry. That office, the first of its kind in the nation, handles inquiries on a wide variety of issues, ranging from unaccompanied juveniles to complaints about INS personnel.²⁴⁹

Finally, another benefit of this cooperation has been the expanded use of dedicated commuter lanes (DCL) along the southern border. San Diego, which boasted the southern border’s first DCL at Otay Mesa, just recently inaugurated a DCL at the San Ysidro border crossing in September, 2000.²⁵⁰

This increased level of bilateral cooperation is not limited to the immigration area but also includes a growing number of important interests shared between both countries, such as judicial cooperation,

244. Immigration and Naturalization Service, *News Release: INS Intensifies Life-Saving Measures Along the Southwest Border*, June 26, 2000, at 1.

245. *Id.*

246. Immigration and Naturalization Service, *News Release: INS and Mexico to Test Video Link between Mexican Consulates and INS Detention Facilities*, April 14, 2000.

247. *Id.* at 1. Participants included INS Executive Associate Commissioner for Field Operations, Michael Pearson; Mexico’s Undersecretary for North America and Europe, Juan Rebolledo; and Mexico’s Ambassador to the United States, Jesús Reyes Heróles.

248. *Id.*

249. *Id.*

250. Leonel Sánchez, *Fast Border Lane Opens with Fanfare*, S.D. UNION-TRIB., Sept. 8, 2000, at B1.

customs arrangements, environmental protection, international trade, drug monitoring and control, binational parks, protection and conservation of wildlife, tourism, academic programs and student exchanges, joint projects in science and technology. This strongly suggests the rationality and convenience of extending these bilateral efforts to the area of temporary Mexican migratory workers.

It is absurd to continue to support the irrational and anarchic state of affairs that has prevailed over the last three decades regarding the steady, but irregular flows of Mexican migratory workers to the U.S. Evidently, IRCA's employer sanctions to curb these flows have been a resounding failure because U.S. employers (as well as Mexican workers) have grown heavily dependant on these unlawful but mutually beneficial labor interactions. It is hypocritical to continually deny that U.S. employers do not need the temporary labor provided by Mexican migratory workers, especially in the agricultural sector. Condoning the irregular status of these migratory flows of Mexican nationals only exposes these migrant workers to abuses and human rights violations by U.S. Border Patrol and customs agents, sheriff and police departments, U.S. citizens organized in heavily armed para-military groups acting as "Vigilantes," and agricultural and service employers.

Recently, Dr. Rosario Green, Mexico's Secretary of Foreign Affairs, visited Arizona and held conversations with its governor and other officials to explore the feasibility of a possible formal agreement for Mexican migratory workers in Arizona and other U.S. states.²⁵¹ Vicente Fox, while President-Elect of Mexico, in his recent trip to Canada and the U.S. in late August of 2000, asserted that, in his opinion, opening the U.S. border to Mexican labor, and immigration, are two of the most important topics in the bilateral agenda of both countries.²⁵²

It seems that conditions in both countries appear to be ripe for the signing of such an agreement. What should be clear is that the anarchy and irrationality of these irregular flows of Mexican temporary migratory workers must cease.

251. See Martin Sepulveda, *Its Time to End Tariff on Mexican Cement*, THE ARIZONA REPUBLIC, Aug. 14, 2000, at B7.

252. See Justin Brown, *Open Talk of an Open U.S. Border*, CHRISTIAN SCIENCE MONITOR, Aug. 23, 2000. It was neglected that Fox, and his advisers, "want the U.S. to raise the annual number of legal immigrants to 350,000 from 75,000 - an increase that would probably face stiff opposition in Washington." Fox is reported saying that reducing [unlawful] emigration to the U.S. "is the fundamental problem in this [bilateral] relationship." "See also *Mexico's Fox Rules Out Dollarisation*, AFX EUROPEAN FOCUS, Aug. 25, 2000. In contrast, U.S. Secretary of State Albright is reported telling Vicente Fox over lunch that "the U.S. has the most generous immigration policy in the world." "At the same time, she said, "the nation must protect its borders." See also George Gedda, *Bush, Gore Generous in Words About Fox*, THE NEWS AND OBSERVER (Raleigh, N.C.), Aug. 25, 2000, at A7.

Should this agreement be signed, a detailed enunciation of the fundamental human rights that protect Mexican migratory workers and their families, may be attached to this bilateral agreement as a Protocol or Annex. The purpose of this Protocol (or Annex), which is to form an integral part of the agreement, is to produce a legal document which, in an explicit manner, enunciates the specific human rights that both the U.S. and Mexico agree to apply to Mexican migratory workers working in the U.S., as well as to any foreign migratory workers working in Mexico, in particular those from Central and South America, including Caribbean countries.

Since the U.S. and Mexico are parties to different global international conventions on human rights, and considering that the U.S. has formulated numerous reservations, declarations or statements with respect to human rights conventions, the mechanism of having a mutually agreed Protocol enunciating the human rights that both parties expressly agree protect Migrant workers would appear to offer a more satisfactory solution.

The international human rights that protect migratory workers enunciated in the Protocol would be legally binding on the U.S. and Mexico because they agreed as a result of a formal bilateral agreement and not because of the individual relationship each of these countries has *vis à vis* the respective international convention or covenant.

VI. CONCLUSIONS

Abundant evidence has been gathered for over a decade by international human rights organizations documenting, in a methodic and systematic manner, the mistreatment, abuses and human rights violations inflicted upon undocumented migratory workers by U.S. Border Patrol agents. There are abuses and violations which include beatings; threats and intimidation of aliens; abusive language; excessive use of force; denying aliens blankets and food, or medical attention; border patrol vehicles used as weapons; destroying and confiscating documents from aliens; sexual harassment; inappropriate body searches; sexual assault; acts of oral copulation; rapes; shootings and inappropriate use of lethal force.

Most of these abuses and violations neither result in convictions nor in prosecutions of the U.S. Border Patrol agents or the INS officials directly involved in these incidents. As a matter of fact, the overwhelming majority of these incidents go legally unpunished. An

administrative sanction, usually consisting of a suspension with pay while the incident is investigated or a transfer to another Border Patrol sector after the investigation is concluded, tends to be the only punishment imposed on these federal workers.

To human rights advocates and academia, it seems incomprehensible that U.S. Border Patrol agents are allowed to continue to use today, in the year 2000, "expansive bullets," when these projectiles were expressly outlawed by The Hague Peace Convention of 1899. Nothing can be more barbaric than using these projectiles against undocumented persons, mainly Mexican migratory workers, especially when one realizes that these bullets are prohibited to be utilized by the lethal arsenal of the U.S. Army and other military forces, as well as, by all the police departments throughout the U.S.

Although Mexican undocumented persons may file formal complaints to denounce the abusive or violent behavior of U.S. Border Patrol agents, most of these foreign persons remain ignorant of this fact. Given the cultural differences between the U.S. and Mexico, most Mexican nationals who attempt to unlawfully cross the border into the U.S. believe that the abuses or arbitrary behavior on the part of U.S. Border Patrol agents is the price they must pay for their unlawful conduct. These foreign undocumented persons do not know that while in this country they have the right to denounce the abuses and human rights offenses committed by U.S. Border Patrol agents. Furthermore, despite the statements by the INS that the complaint forms are readily available in all U.S. Border Patrol facilities (in English and Spanish), these claims are not always accurate.

As currently structured, the complaint system is not only flawed but a complete failure. A more efficient and objective system would be to turn these complaints over to a third, non-partisan body, composed of U.S. citizens who have had a prominent role in the locality where they serve. This body ought to be independent and impartial, truly interested in accomplishing these three objectives:

- (1) To educate undocumented persons on how to fill out and file these complaints, explaining to them the eventual outcome of the complaint proceedings, as well as the sanction or punishment likely to be imposed on the offending U.S. Border Patrol agent or INS official, when the merits of the case so require;
- (2) To deter or eliminate any verbal or physical mistreatment, abusive behavior and criminal conduct by U.S. Border Patrol agents directed against any foreigners, in particular undocumented migratory workers; and,

- (3) To refer cases to competent U.S. authorities for the imposition of the corresponding administrative sanction or the initiation of criminal proceedings.

Under the current complaint system, complaints are filed with OIG which is principally composed of retired U.S. Border Patrol agents.

An analysis of past abuses by U.S. Border Patrol agents and INS officials indicates that these incidents were more frequent and more egregious a decade ago than they are today. Human rights organizations have suggested that the abuses taking place during 1993 and 1994 were mainly the result of the poor training of agents. At that time, the INS was under pressure to use or lose the Congressional allocation of funds destined to substantially strengthen the U.S. Border Patrol by increasing the number of its agents and their technical systems. This pressure led to hiring candidates who were not duly qualified to become agents.

The most flagrant and egregious violations to the human rights of Mexican migratory workers in the history of the U.S. Border Patrol are those being caused by "Operation Gatekeeper," an enforcement immigration strategy planned and designed by a group of military strategists from the U.S. Department of Defense. As of September 15, 2000, close to 600 undocumented persons have died attempting to cross the U.S.-Mexico international boundary. Their deaths have been gruesome: dehydration, heat stroke, hypothermia, drowning, fatal accidents and even homicides. Human rights advocates are of the opinion that "Operation Gatekeeper" violates the international law principles of good neighborliness and, at the same time, constitutes an abuse of humanrights.

Rather than continuing to witness an increase in the number of casualties resulting from the inherently lethal enforcement of this immigration strategy, it is hoped that the INS would adopt a more rational and more humane way of protecting our borders. No one questions the sovereign right of the U.S. to protect its borders and safeguard its territory against unlawful intrusions; however, what is challenged is the deliberate and extreme tactic adopted by the INS to enforce an immigration strategy in a most brutal and inhumane way.

A relatively simple legal strategy to avoid the lethal consequences of Operation Gatekeeper, as well as, the myriad of problems associated with the irregular flows of Mexican migrant workers to this country, would be the signing of a *U.S.-Mexico Bilateral Agreement on Temporary Agricultural Workers*, similar to the agreement Mexico has

had in place with Canada for years. The proposed agreement would regulate the hiring, transportation, agricultural sites, salary and working conditions, housing, medical services, and the safe repatriation of the workers. As an annex to this agreement there would be a Protocol enunciating the fundamental human rights that protect these Mexican migratory workers while in the U.S.

Evidently, the central objective of this bilateral agreement and its protocol is to guarantee that Mexican migratory workers in the U.S. are not going to be subject to any abuse, violence, or exploitation. The contracting parties would expressly recognize that while these migratory workers are physically present in the U.S., they shall be protected by a specific set of mutually agreed upon international human rights and that the U.S. court system and the U.S. authorities will be ready and prepared to protect these workers and enforce their human rights.

The U.S. simply cannot continue to condone the absence of a formal U.S. policy to control and regulate the irregular flows of Mexican undocumented workers, especially when this lack of policy enriches our country. The U.S. cannot continue to tolerate the abusive working and living conditions, as well as the cruel and open exploitation of Mexican undocumented workers which have been taking place in our country not for a short period of time but for decades. It is impossible for Americans to continue to witness the suffering, to see and hear the discrimination, and to read about the exploitation of these undocumented persons, who are virtually everywhere in our country, and say or do nothing about it. The time has come for the U.S. government to take the initiative and address this delicate and embarrassing question with Mexico in an open and direct manner, and proceed to negotiate a mutually beneficial arrangement.

ANNEX
PROTOCOL WHICH ENUNCIATES
THE INTERNATIONAL HUMAN RIGHTS THAT PROTECT
MEXICAN MIGRATORY WORKERS IN THE UNITED STATES,
AS AGREED BY THE GOVERNMENTS OF THE UNITED STATES
OF AMERICA AND MEXICO*

1. The right of undocumented migratory workers to be recognized as a persons under the law;
2. The right to nondiscrimination on the basis of sex, race, language, religion or religious conviction, political or other opinion, ethnic or social origin, economic position, or marital status;
3. The right to life, protected by law;
4. The right to be free from torture or to cruel, inhuman or degrading treatment or punishment;
5. The right not to be held in slavery or performed forced or compulsory labor;
6. The right to freedom of thought, conscience, and religion, and the freedom of expression thereof, and the right to freely pursue his/her economic, social, and cultural development;
7. The right to be free from arbitrary or unlawful interference with his/her privacy, family, home, and personal communications;
8. The right not to be arbitrarily deprived of property;
9. The right to liberty and security of person;
10. The right to protection from the state against violence, physical injury, threats or intimidation, whether by public or private sources;
11. The right to be free from arbitrary arrest, or detention; no one shall be deprived of his/her liberty except as rightful and necessary according to law;
12. If arrested, the right to be informed at the time of arrest, in a language that he/she understands, the reasons for the arrest and any

* These rights were taken from these international instruments: 1) *International Convention on the Protection of the Rights of Migrant Workers and Their Families*; 2) *United Nations Declaration of Human rights*; 3) *International Covenant on Economic, Social and Cultural Rights*; 4) *International Covenant on Civil and Political Rights*; and 5) *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

- charges against him/her;
13. If arrested and detained on a criminal charge, the right to appear promptly before a judge and to stand trial within a reasonable time or to be released;
 14. After arrest, the right
 - a. To have the consular or diplomatic officials of his/her country or origin informed of the arrest and the reasons for it;
 - b. To communicate with those officials; and
 - c. To be informed at the time of arrest of the above two provisions;
 15. If arrested or detained, the right to be treated with humanity and with respect for his/her cultural identity and for the inherent dignity of the human person;
 16. The right to equality with U.S. citizens before a competent, independent, impartial tribunal;
 17. The right to a fair and public hearing before a competent, independent, impartial tribunal;
 18. If charged with a criminal offense, the right to be presumed innocent until proven guilty according to law;
 19. The right to due process of law, including the right
 - a. To be tried in his/her presence and to defend his/herself personally or with the legal assistance of his/her own choosing; to be informed of this right if he/she does not have legal assistance; and to have legal assistance assigned to him/her if justice so requires and if he/she cannot afford such assistance;
 - b. To examine the witnesses against him/her and to obtain the attendance and examination of witnesses on his/her behalf;
 - c. To have the free assistance of an interpreter if he/she does not speak English;
 - d. To not be compelled to testify against him/herself or to confess guilt; and
 - e. If convicted of a crime, to have the conviction and sentence reviewed by a higher tribunal according to law; no death sentence is not to be applied when the country of origin does not recognize this punishment in its domestic legislation;
 20. The right of equality with U.S. citizens in terms of employment, including minimum wage, fair and equal wages, minimum age of employment, overtime, hours of work, weekly rest, vacation and sick leave, safety and health considerations, and termination of the employment, without distinction of any kind;
 21. The right to receive any medical care that is urgently required for the preservation of life or the avoidance of irreparable harm to his/her health, and the medical care shall be administered on the basis of equality with U.S. citizens;

22. In case of expulsions or deportations, the right to be expelled from the territory of the United States only in pursuance of a decision rendered by a competent immigration judge, according to the law; in this case, the undocumented migratory worker shall have a reasonable opportunity before or after departure to settle any claims for wages and other entitlements due him/her and any pending liabilities; further, the costs of expulsion may not be borne by him/her;
23. Expulsion, deportation or any physical removal from the United States shall not in itself prejudice and rights of an undocumented migratory worker acquired in accordance with the law of the U.S., including the right to receive wages and other entitlements due to him/her;
24. The United States undertakes to prevent any other acts of cruel, inhuman or degrading treatment or punishment of undocumented migratory workers which do not amount to torture, as defined in the applicable U.S. legislation; this obligation applies to any and all conditions of detention or confinement so deplorable, unsanitary, abusive or neglected would rise to the level of cruel, inhuman or degrading treatment, including the availability of adequate and sanitary food, clothing, living spaces, recreation, medical and dental care;
25. No undocumented migratory worker shall be subject to the use of lethal or excessive force by any U.S. law enforcement personnel, civil or military, federal agents or public officials and other U.S. citizens who may be involved in the detention, custody, interrogation or treatment of an undocumented migratory worker subjected to any form of arrest, detention or imprisonment, unless said U.S. citizen is faced with a reasonably-interpreted immediate use of deadly force or serious bodily injury by the undocumented migratory worker or member of his/her family;
26. Recognizing that the family is the natural and fundamental group unit of society and is entitled to protection by society and state, the United States shall take appropriate measures to ensure the protection of the unity of the family of undocumented migratory workers;
27. Each child of an undocumented migratory worker shall have the right to a name, to registration of birth, to a nationality, and to such measures of protection as are required by his/her status as a minor

- without distinction for parentage or other conditions;
28. Each child of an undocumented migratory worker shall have the basic right of access to education on the basis of equality with U.S. citizens;
 29. The right to living and working conditions in keeping with the standards of fitness, safety, health and principles of human dignity;
 30. The right to protection and assistance from the consular or diplomatic authorities from his/her country of origin if the rights guaranteed here are in any way impaired or violated.