

**BROADENING HORIZONS: THE EXPANDING
SCOPE OF MEXICAN MIGRATION LAW**

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I. Introduction

Each country tailors its immigration policies based on its cultural identity, governmental framework and its neighboring countries. A country's sovereignty is at the forefront when immigration policy decisions are developed.¹ Economic and political considerations are given weight when a country structures and implements its immigration policies. When a bordering country functions under a disparate economy or a specific political situation occurs, a natural tension develops.

Historically, immigration was considered a national issue.² A paradigm shift has occurred due to globalization, resulting in immigration also being viewed through this global lens.³ A country must not look only to its own health as a nation, but must also consider its inter-relationship with those countries around it. Countries may be not just neighbors, but also trading and/or treaty partners. Competing interests must be weighed and a comprehensive immigration policy must be developed to most effectively fit the needs of a country so that it remains a sovereign country and a viable member of the world community. Immigration and Mexico are commonly linked together, but in only one regard: the flow of migrants from Mexico into the United States and the resultant policies and situations developing from that occurrence.⁴

This article focuses on the development of Mexico's immigration policies and migration issues with its neighbors. Mexico has incorporated various levels of its government to create a comprehensive migration policy. Binational agreements have

¹ Christopher W. R Rudolph, *Globalization, Sovereignty, and Migration: A Conceptual Framework*, 3 UCLA J. Int'l L. & For. Aff. 325, 327 (Fall 1998/Winter 1999) (discussing the effect of globalization on trade, migration and international relations).

² Rudolph, *supra* note 1, at 327.

³ *Id.* at 328.

⁴ Francisco Alba, *Mexico: A Crucial Crossroads* (July 2002), available at www.migrationinformation.org/Profiles/display.cfm?ID=211.

been used to settle migration tensions and disputes with its neighbors. When a dispute necessitates a neutral arbitrator, Mexico has utilized an international court.

This paper will first set forth a general overview of Mexico's legal framework. Second, the economic and/or political situation of Mexico and its neighboring countries will be discussed. Third, Mexico's immigration policy will be analyzed; including the preceding factors which have shaped it, such as economic considerations and the particular conditions of Mexico's neighboring countries. Finally, binational and international agreements in which Mexico is a partner will be addressed, including a discussion of how those agreements have affected migration issues.

II. Mexico's Legal Framework

The United States of Mexico is comprised of twenty-nine (29) states that have a federal, democratic and representative republican government.⁵ There is a federal constitution, which sets forth three branches of government: executive, legislative, and judicial.⁶ The executive branch is led by the president and also includes a cabinet, similar to the United States of America.⁷ The legislative branch is comprised of two houses: 1) the Congreso de la Union, which is the Senate, and 2) the Camara Federal de Diputados.⁸ The judicial branch includes: a Supreme Court of Justice, circuit courts, and district courts.⁹

Although the Mexican legal system has a similar framework to the United States, there are two main distinctions. First, unlike the United States, a civil law system is used

⁵ S.A. Bayitch & Jose Luis Siqueiros, *Conflict of Laws: Mexico and the United States* 3 (University of Miami Press 1968).

⁶ *Id.* at 3. *See also* <http://www.cia.gov/cia/publications/factbook/geos/mx.html>.

⁷ *See* <http://www.cia.gov/cia/publications/factbook/geos/mx.html>.

⁸ *See* <http://www.cia.gov/cia/publications/factbook/geos/mx.html>.

⁹ Bayitch, *supra* note 5, at 4.

in Mexico.¹⁰ In a civil law system, laws are codified, not determined by common law through judges.¹¹ The United States is a common law system.¹² In the United States, *stare decisis*, the doctrine of precedent that requires a court to follow earlier judicial decisions, is followed.¹³ Mexico does not accept *stare decisis*, but it does accept a more narrow form of precedent for decisions of the Mexican Supreme Court of Justice.¹⁴ When the Supreme Court of Mexico has decided five consecutive cases on a specific legal issue in the same manner, this constitutes *jurisprudencia*, a form of precedent.¹⁵

The second distinction from U.S. law is *amparo*, a type of proceeding that is unique to Mexico.¹⁶ An *amparo* proceeding may be brought for the following reasons: to protect any violations or infringements of constitutional rights committed by a public authority through an official act, to challenge federal actions/laws that restrict the sovereignty of the states, or to challenge a state or federal law or action by a public authority which invades an area of federal jurisdiction. *Amparo* proceedings on which the federal Supreme Court has made five consecutive decisions are then listed as *jurisprudencia*.¹⁷ Immigration issues that need clarification have been addressed by the Mexican Supreme Court through *jurisprudencia*.

¹⁰ Civil law and common law, along with socialist law are the three most influential legal traditions currently used. The oldest and most popular tradition of the three is civil law. The dominant legal tradition of civil law is used, among other countries, in Western Europe and all of Central and South America. John H. Merryman, *The Civil Law Tradition* 1-3 (Stanford U. Press 1996).

¹¹ See <http://www.duhaime.org/dictionary/dict-c.htm>

¹² Merryman *supra* note 10, at 3.

¹³ Black's Law Dictionary 1443 (Bryan A. Garner, ed., West Publishing Co., 2004).

¹⁴ See <http://library.law.smu.edu/resguide/mexico.htm>.

¹⁵ *Id.*

¹⁶ Jorge Vargas, *Mexican Legal Dictionary and Desk Reference* 20 (Thomson West, 2003).

¹⁷ Vargas *supra* note 16, at 20.

As is the case in the United States, Mexico is not bound solely by its own laws. Mexico has gone beyond its boundaries and become a member of the United Nations.¹⁸ As a member of the United Nations it is *ipso facto* a party to the International Court of Justice.¹⁹ Mexico has agreed to accept the jurisdiction of the International Court of Justice, with reservations.²⁰ Therefore, international as well as national law is enforceable in Mexico. One must look beyond Mexico's legal system to other factors to comprehensively understand the development of its immigration policy.

III. Economic and Political Factors on Mexico and Its Neighbors.

The economic situation of Mexico, compared to its neighboring countries has impacted immigration patterns and policy. Mexico is bordered on the north by the United States; on the south by Guatemala; and on the east by Belize. The gross domestic product of Mexico is \$941.2 billion; of the United States is \$ 10.99 trillion; of Guatemala is \$56.5 billion; and of Belize is \$1.28 billion.²¹ The percentage of the population which lives below the poverty line in each country is illustrative of each economic situation: Mexico 40%; United States 12%; Guatemala 75%; and Belize 33%.²² These statistics parallel immigration patterns. The largest number of immigrants received by Mexico from a neighboring country is from Guatemala.²³ Mexicans who emigrate from Mexico

¹⁸ <http://www.un.org/english/> See also *Torres v. Mullin*, 540 U.S. 1035, 1036 (2003). The United States is also a member of the United Nations and has consented to the compulsory jurisdiction of the International Court of Justice over [Vienna] Convention-related disputes.

¹⁹ See <http://www.un.org/aboutun/charter>.

²⁰ See <http://www.cia.gov/cia/publications/factbook/geos/mx.html>.

²¹ The real growth rate of Mexico is 1.3%; the United States is 3.1%; Guatemala is 2.1% and Belize is 3.7% at <http://www.cia.gov/cia/publications/factbook/geos/bh.html>.

²² Unemployment rates are as follows: Mexico 3.3%; United States 6%; Guatemala 7.5%; Belize 9.1% at <http://www.cia.gov/cia/publications/factbook/geos/bh.html>.

²³ 97% of the migrants deported by Mexico in 1999 were from Guatemala, Honduras and El Salvador. Manuel Angel Castillo, *Migración internacional en la frontera sur de Mexico*, Boletín editado por el Consejo Nacional de Población, núm. 12, (2000), available at www.conapo.gob.mx/publicaciones/boletines.htm.; 44.9% of apprehended migrants in Mexico were Guatemalans. Alba, *supra* note 4, at 4.

largely immigrate to the United States, supporting the theory that Mexicans migrate for economic reasons.²⁴ Documentation of migration between Belize and Mexico is negligible, which is understandable since the poverty levels in both countries are quite similar. Although economics is a major factor in migration, there is another important factor that has impacted migration from Guatemala to Mexico.

Guatemala endured a civil war that lasted thirty-six years and ended in the late 1990s.²⁵ Political unrest in Guatemala continues. The political instability coupled with a high unemployment rate has caused steady migration from Guatemala to Mexico. Since Belize and Mexico both have stable political situations, politics has had a negligible impact on migration between the countries. The same is true for Mexico and the United States.

The typical migration pattern is from Guatemala into Mexico and from Mexico to the United States. The economic and political situations have directly affected the movement of migrants from the south to the north. Migration from Guatemala to Mexico parallels migration from Mexico to the United States. Although the wave of Mexican migrants to the United States is well publicized, the same phenomenon is occurring with the movement of Guatemalans to Mexico. Since there is no substantial migration pattern between Belize and Mexico, this paper will focus on the migration issues of Mexico as a nation and in relation to the U.S. and Guatemala. Mexico's migration policy begins with its federal government.

²⁴ 1.2 million people were apprehended on the U.S./Mexico border in 2001. Alba, *supra* note 4, at 4.

²⁵ Guatemala's civil war lasted thirty-six years. Although a peace accord was signed in 1996, civil unrest continues to date. *Guatemalans Celebrate Peace*, FIN. TIMES (London) December 30, 1996. *See also* Castillo *supra* note 23, at 2.

IV. Mexico's National Migration Policy

The structure of Mexico's immigration policy begins with its federal constitution. Under article 73 of the Mexican Constitution, the power to regulate immigration policies is delegated to Congress.²⁶ The Secretary of the Interior oversees migration through the National Migration Institute, which is led by the Assistant Secretary of Population, Migration and Religious Matters.²⁷ The Department of the Interior issues an "Immigration Procedures Manual" for the National Migration Institute.²⁸ Migration law is codified in the General Population Law set forth by Congress and executed by the President.²⁹ Classification of migrants occurs in the General Population law.³⁰

Migrants are put into one of three categories and then issued one of two permits. The three categories into which foreigners are divided for immigration purposes are: 1) non-immigrants, 2) immigrants, and 3) residents.³¹ Non-immigrant status is granted to an alien who enters Mexico on a temporary basis, with no objective to reside in Mexico, such as a tourist, visitor, minister of religious affairs, alien seeking political asylum, student, refugee, distinguished visitor, local visitor, provisional visitor, or newspaper

²⁶ To enact laws in regard to nationality, the legal status of foreigners, citizenship, naturalization, colonization, emigration and immigration, and the general health of the country. MEX. CONST., § III, Ch. I, Art. 73.

²⁷ The principles of political migration which have been adopted by Mexico are: 1) to respect the human rights of all migrants, 2) to share responsibility for migrants with their countries of origin, 3) legality, security & order, 4) to combat the trafficking of people, 5) to not criminalize the migrant, and 6) to view migration as a tool for national development. Intervención de Armando Salinas Torre, Subsecretario de Población – Migración y Asuntos Religiosos de Gobernación (Nov. 22, 2004) at www.gobernacion.gob.mx.

²⁸ Immigration Law of Mexico IV-2 to IV-76, (transl. by Marc W. Mellin & David D. Spencer, Latin America Translations LLC, Victoria, Canada 2003).

²⁹ The president promulgates and executes the laws enacted by the Congress of the Union, providing for their exact enforcement in the administrative sphere. MEX. CONST., § IV, Ch. III, Art. 89.

Chapter V of the General Population Law covers migration; Ch. VI establishes the National Institute of Migration, Ch. VII deals with immigration; Ch. VIII Documentation & Policing. Reglamento de la Ley General de Población, Secretaría de Gobernación, at www.migracioninternacional.com/docum/indice.html?mundo=/docum/rlgp.html.

³⁰ Immigration Law of Mexico *supra* note 28, at II-1 to III-54.

³¹ Martindale-Hubbell International Law Digest MEX-15 (Martindale-Hubbell 2004).

correspondent.³² Immigrant status is granted to an alien who stays permanently in Mexico while becoming a resident.³³ This status is granted to a person for up to five years for the following classifications: individual alien living on foreign income, investor, professional, confidential personnel, scientist, technician, family member, artist, athlete, or father, mother or spouse of a Mexican national.³⁴ Absence from Mexico for a two-year period may result in loss of status.³⁵ Physical absence from Mexico for more than eighteen (18) months during a five-year period will bar the immigrant from requesting resident status.³⁶

Resident status is granted to aliens who have resided in Mexico for five years and whose purpose is to settle in the country on a permanent basis; an application is subject to review by the Secretariat. Therefore an alien must inform the Secretariat whenever he modifies his professional activity, his marital status or his domicile.³⁷ Permanent absence from Mexico for more than thirty-six (36) consecutive months or accumulated absences in excess of five years over a ten-year period will cause forfeiture of the visa.³⁸

As set forth in Article 41 of the General Population Act, migrants are divided into the following two categories: immigrants and non-immigrants.³⁹ Article 42 states that non-immigrant permits are issued to persons who intend to visit Mexico for a specific purpose and then depart.⁴⁰ Article 48 allows immigrant permits to be issued to migrants

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ Martindale-Hubbell *supra* note 31, at MEX-15.

³⁹ Immigration Law of Mexico *supra* note 28, at p. II-7.

⁴⁰ *Id.*

who wish to live in Mexico temporarily or on a long-term basis.⁴¹ Article 145 of the General Population Act enables the Federal Administrative Procedures Act to set forth procedures relating to entry, stay and exit of foreigners. This sets forth the basic framework of Mexico's immigration policy.

Although the policy framework has many commonalities to the one used in the United States, Mexico enforces this policy through a system that is not used in the United States, the *cedula de identidad ciudadana*, or Citizen Identity Card.⁴² According to Article 48 of the General Population Law, after reaching eighteen years of age, every Mexican citizen has six months to register with the National Citizen Registry and obtain a Citizen Identity Card.⁴³ An entity of the federal, state or municipal government may require that a citizen produce the Citizen Identity Card.⁴⁴ In the United States, a person is not required to carry identification on her/his person; the contrary is the law in Mexico.

If an official wants to verify whether a person is a citizen of Mexico, (s)he only needs to request that the person produce the Citizen Identity Card. Therefore, policing immigration may occur at any time. Mexico's system is more pervasive than the United States, since in the United States enforcement of immigration occurs only when entering the country and when applying for employment.

Legal migrants to Mexico do not receive a Citizen Identity Card. Instead, a legal migrant receives a permit upon entry into the country.⁴⁵ If a foreigner has legally entered Mexico, (s)he must register with the National Registry of Foreigners if admitted under

⁴¹ *Id.*

⁴² Chapter IV, article 48, National Population Act, at www.migracioninternacional.com/docum/indice.html?mundo=/docum/r1gp.html.

⁴³ *Id.*

⁴⁴ The law further states that although a citizen may be required to show the Citizen Identity Card, no sanction may be given if it is not produced. *Supra* note 42, at Chapter IV, article 51.

⁴⁵ Martindale-Hubbell *supra* note 31, at MEX-15.

migrant status and, in some cases, *non-immigrant* status.⁴⁶ A foreigner may be denied entry or return to Mexico if she does not have her immigration document.⁴⁷ If a foreigner is found inside Mexico without proper documentation, Mexico follows the Law of International Extradition.⁴⁸ The Supreme Court of Mexico has held that a migrant has the right to a hearing in front of a federal district judge prior to extradition.⁴⁹

Unlike the United States, Mexico's law not only addresses migrants entering the country, but also addresses the novel concept of regulating exiting from Mexico. This may be in large part due to the United States government's constant pressure upon Mexico to control the flow of Mexican migrants into the United States. Tom Ridge, Director of Homeland Security in the United States, has publicly stated that Mexico must accept shared responsibility for controlling the common border.⁵⁰ Mexico has responded by enacting laws enforcing legal migration to other countries. For example, Article 118, Section II of the General Population Act decrees that immigration officials shall check the list of persons on a vessel, ensuring that legal requirements for leaving Mexico have been satisfied.⁵¹ The Supreme Court has further solidified this law in several *jurisprudencia*. For instance, the Court found in *jurisprudencia* from 1981 that even if the person transporting persons on a vessel to a foreign country does not receive money, he or she is committing an illegal act if the persons being transported do not have the

⁴⁶ Non-immigrant status foreigners who must register are: scientist visitors, religious ministers or associates, political asylees, refugees, and students. TMI-E-38 Immigration Procedures Manual, cross-referenced with Article 63 of the General Population Act, Immigration Law of Mexico *supra* note 28, at IV-55.

⁴⁷ Immigration Law of Mexico *supra* note 28, at p. III-10.

⁴⁸ Extradición Internacional. Ley de no Contraviene la Garantía de Audiencia, A.R. 8396/84 Pietro Antonio Arisís. 14 de mayo de 1985. J.S.C., D.O.

⁴⁹ *Id.*

⁵⁰ Robert S. Leiken, Enchilada Lite: A Post-9/11 Mexican Migration Agreement; at <http://www.cis.org/articles/2002/leiken.html>

⁵¹ Immigration Law of Mexico *supra* note 28, at p. III-14.

proper documentation.⁵² Mexico's federal immigration laws have been affected by its relationship with the United States and the migratory pattern of Mexicans traveling north.

The United States/Mexico border is renowned for migrants traveling to the United States without documentation. The most heavily crossed area of that border is between Tijuana, Baja California Norte and San Diego, California.⁵³ Mexico's response has been to form a coalition between various layers of government. An agreement between the Secretary of the Interior of the federal government of Mexico, the governor of the State of Baja California Norte, where Tijuana lies, and the Mayor of the City of Tijuana formed a special task force of the Tijuana police.⁵⁴ *Grupo Beta* is a police force, which includes federal, state, and municipal officers.⁵⁵ The mission of the group is to protect the human rights and physical integrity of all migrants, regardless of their national origin.⁵⁶ After *Grupo Beta* was spread along the border with the United States, the Mexican government then established three sections of *Grupo Beta* along the southern border of Mexico with Guatemala.⁵⁷

⁵² Braceros, Trafico Ilegal de Lucro No Requerido Para la Integración del Delito, A.D. 6624, 1981, Vols. 163-168, p. 15, Ricardo Rodriguez Macias, J.S.C., D.O.

⁵³ Glynn Custred, *North American Borders: Why They Matter*, Center for Immigration Studies (April 2003) at <http://www.cis.org/articles/2003/back803.html>.

⁵⁴ Jorge Bustamante, Ph.D., Beta Group of Tijuana, Mexico, p. 1.

⁵⁵ The official title of the group is *Grupo Operativo de Protección a Migrantes: Operative Group to Protect Migrants*. Since its inception in 1990, Grupo Beta has forces in other cities along the border such as Tecate, Mexicali, Nogales, Matamoros which spread along the border with California, Arizona, and Texas. Bustamante *supra* note 54, at p. 1.

⁵⁶ Bustamante *supra* note 54, at p. 1. Mexico's official count was 491 deaths of migrants along the U.S./Mexico border in the year 2000. Claudia Smith, *Border 'Safety' and Border Fatalities*, San Diego Union Tribune, B-9 (July 6, 2001).

⁵⁷ The task forces on the southern border are in: Comitán; Tapachula, Chiapas; and Villahermosa, Tabasco. Bustamante *supra* note 52, at p. 1. Mexico's 2,000-mile-long border with the United States is a heavily guarded focal point of the global argument about immigration. But Mexico's southern boundary gets little attention, and has now become a major problem in regards to Mexico's treatment of Central Americans. Scott Johnson, *A Risky Trip*, Newsweek, Atlantic Ed. 37 (March 1, 2004).

The formation of *Grupo Beta* was in direct response to violence against migrants along the borders and police extortion.⁵⁸ The section of *Grupo Beta* along the northern border does not get involved in preventing migrants from traveling to the United States, since this is considered the exclusive sovereign right of the United States.⁵⁹ *Grupo Beta* and United States police organizations do work in concert regarding organized crime and the international trafficking of migrants.⁶⁰ *Grupo Beta* exemplifies the synthesis of power from several governmental departments to resolve a migration issue. Border tensions between the United States and Mexico continue, partially due to the inability of the two countries to agree on an appropriate solution to the issue.

V. Multinational Agreements

A. United States/Mexico

Since wage differentials are at a 1:10 ration between Mexico and the United States, large numbers of Mexican Nationals continue to move to the United States for economic reasons.⁶¹ Under the leadership of President Vicente Fox, Mexico has continuously attempted to resolve migration issues with the United States. Although the North American Free Trade Agreement (NAFTA) was enacted between Mexico, the United States, and Canada, it did not address the most relevant and pressing topic between Mexico and the United States: immigration.⁶² Instead of allowing a common market that would have included the movement of citizens, NAFTA only allowed free

⁵⁸ Bustamante *supra* note 54, at p. 1.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ The U.S. Census Bureau estimates that nine million Mexican immigrants reside in the United States. Alba, *supra* note 4, at 2, 4.

⁶² Kevin R. Johnson, An Essay on Immigration, Citizenship, and U.S./Mexico Relations: The Tale of Two Treaties, 5 *Ws. J. of L. & Trade Am.* 121, 124 (Spring 1998).

trade between the countries.⁶³ Post-NAFTA, a significant undocumented Mexican labor force continues to reside in the United States.⁶⁴

Subsequent to the passage of NAFTA, Mexico and the United States signed the United States–Mexico Border Partnership Action Plan in 2002.⁶⁵ The objectives of this plan are to upgrade border infrastructure and facilitate the legitimate flow of people and goods between the countries.⁶⁶ The plan’s theme is national security: secure infrastructure, secure flow of people, and the secure flow of goods.⁶⁷ This topical document, while more relevant to the issue of immigration than NAFTA, fails to adequately address the large number of undocumented Mexican Nationals in the United States. Migration issues between Mexico and the United States are a point of contention between the two countries. Until there is economic parity between the countries, migration will continue from Mexico to the United States. Documented legal migration results in a more orderly society; future agreements between the countries should move towards that end.

⁶³ Johnson *supra* note 57, at 124.

⁶⁴ *Id.* at 126.

⁶⁵ Fact Sheet: 22-Point U.S.-Mexico Border Partnership Action Plan, at <http://usinfo.state.gov/regional/ar/border2.htm>.

⁶⁶ The plan covers twenty topics: long-term planning, relief of traffic at ports-of-entry, infrastructure protection, harmonization of port-of-entry operations, demonstration projects for port-of-entry, cross-border cooperation, financing projects at the border, pre-clearance of travelers, exchange of information regarding airplane passengers, NAFTA travel, deterrence of alien smuggling, visa policies, joint training on fraudulent documents and alien smuggling rings, developing compatible databases, appropriate screening of third-country nationals, cooperation between the public and private sector regarding importation/exportation of goods, development of electronic exchange of customs information, develop shipment-tracking mechanisms, develop monitoring technology such as to read license plates, secure rail-crossings at the border region, expand the Bilateral Customs Fraud Task Force, and jointly combat illegal contraband such as illicit drugs. *Id.*

⁶⁷ *Id.*

B. Guatemala/Mexico

Southern Mexico could be characterized in the same light as the southern states of the United States that border Mexico.⁶⁸ The same type of tension that exists between Mexico and the United States exists between Mexico and Guatemala due to migrants attempting to enter Mexico. Just as the southern states of the United States have migrants from Mexico living in them in large numbers, the Mexican states bordering Guatemala have the largest number of Guatemalan migrants found in Mexico.⁶⁹ Historically, the political unrest from Guatemala's civil war and a poor economy created a migration pattern from Guatemala north to Mexico.⁷⁰

Guatemalans moving to Mexico seek one of three main objectives: to seek refuge from their country's political unrest, to cross through Mexico on their way to another destination, or to obtain employment in Mexico.⁷¹ In 1991, Mexico created the Mexican Commission to Aid Refugees (*COMAR*), generally to address Central American refugees.⁷² Mexico began to officially integrate Guatemalan political refugees into the country beginning in 1998 through the *Programa de Integración Definitiva*.⁷³ This program began the formal recognition of refugee status for those migrants escaping war and/or political persecution.⁷⁴

⁶⁸ Castillo *supra* note 23, at 6.

⁶⁹ The southern states of Guatemala which border Mexico are: Chiapas, Tabasco, Campeche and Quintana Roo. Castillo *supra* note 23, at 1, 3.

⁷⁰ Guatemala's civil war lasted thirty-six years. Although a peace accord was signed in 1996, civil unrest continues to date. *Guatemalans Celebrate Peace*, FIN. TIMES (London) December 30, 1996. *See also* Manuel Angel Castillo *supra* note 23, at 2.

⁷¹ Guatemalan political refugees arrived in the southern Mexican states of Chiapas, Campeche and Quintana Roo. Castillo *supra* note 23, at 1-2, 5.

⁷² Edith F. Kauffer Michel, *La Comisión Mexicana de Ayuda a Refugiados; Refugiados Guatemaltecos en México: del refugio a la repatriación, del retorno a la integración*, Migración internacional en la frontera sur de México, 8 (Consejo Nacional de Población, ed. Año 4, núm. 12, 2000) at www.conapo.gob.mx/publicaciones/boletines.htm.

⁷³ Castillo *supra* note 23, at 2.

⁷⁴ Edith F. Kauffer Michel *supra* note 72, at 8.

The majority of the second group of Guatemalans crossing through Mexico has the United States as their destination.⁷⁵ Mexico receives pressure from the United States to close its southern border to migrants without documents to stop the flow of migrants into the United States, a situation that is addressed in the United States-Mexico Border Partnership Action Plan.⁷⁶ The third group, Guatemalans seeking employment, is mainly agricultural workers whose destination is Chiapas, Mexico.⁷⁷ According to the Mexican National Institute of Migration, 123,680 migrants were deported in 1999.⁷⁸ As an attempt to resolve the undocumented migrants crossing into Mexico, a temporary migrant worker program has been established.⁷⁹ The Ministry of Work & Social Provision of Guatemala issues Guatemalan worker identification cards.⁸⁰ Data is collected regarding employers in Mexico who need workers and on Guatemalan migrants to Mexico that includes their destination and work site once they cross into Mexico.⁸¹

Mexico has developed two solutions for the Guatemalan migration issues: (1) they have created a legal status for migrants who are political refugees and (2) they have worked binationally with Guatemala to create a guest worker program. Mexico has used its own laws to create solutions for migration issues and it has used binational treaties and agreements to resolve specific issues between itself and its neighbors. At times, these have not been sufficient avenues. When two countries negotiate, it is rare that they are on a common ground and Mexico is no exception. In the case of Guatemala and Mexico, Mexico has a stronger bargaining position since it has the more advantageous economic

⁷⁵ Alba, *supra* note 4, at 1.

⁷⁶ Fact Sheet *supra* note 65.

⁷⁷ Castillo *supra* note 23, at 1.

⁷⁸ *Id.* at 2.

⁷⁹ *Id.* at 5.

⁸⁰ Guatemalan Temporary Migrant Workers to Mexico Report, International Organization for Migration, Guatemala 2 (2003) at <http://www.oim.org.gt>.

⁸¹ *Id.* at 1-4.

position and because the direction of migration is from Guatemala to Mexico. With the United States and Mexico, the United States is in the stronger economic position and so the bargaining positions of the two countries are unequal. In order to negotiate the most contentious issues, Mexico has sought a neutral ground to resolve conflicts, the International Court of Justice.

VI. Resolution of Disputes By The International Court of Justice

The International Court of Justice uses international law to settle legal disputes submitted to it by States; the court also gives advisory opinions on legal questions referred to it by authorized international agencies.⁸² As a member of the United Nations, Mexico has accepted, with reservations, the jurisdiction of the International Court of Justice (ICJ).⁸³ The United States is a member of the United Nations and has also accepted the jurisdiction of the ICJ.⁸⁴ The United States and Mexico were unable to resolve a dispute regarding Mexican nationals sentenced to death under the United States' legal system; so Mexico brought the *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)* to the International Court of Justice, who decided the case in 2004.⁸⁵

Fifty-four (54) Mexican nationals who were within United States' territory were arrested, detained, tried, convicted and sentenced to death row within the United States' legal system.⁸⁶ Mexico set forth that the United States violated its international legal

⁸² See <http://www.icj-cij.org/icjwww/igeneralinformation/icjgnnot.html>.

⁸³ *Id.*

⁸⁴ Article VI, cl. 2 of our Constitution provides that the "Laws of the United States," expressly including "all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land." . . . The Court is equally unfaithful to that command when it permits state courts to disregard the Nation's treaty obligations. Mullins *supra* note 18, at 1036-37.

⁸⁵ See *Case Concerning Avena and Other Mexican Nationals (Mexico v. U.S)*, 2004 I.C.J. No. 128, at 10 (March 31) available at <http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm>.

⁸⁶ *Id.* at 85.

obligations to Mexico under Article 36 of the Vienna Convention, and that under the Optional Protocol the ICJ has jurisdiction over disputes arising from the application of the convention.⁸⁷ The Optional Protocol is relevant to the compulsory settlement of disputes:

*Disputes arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by a written application made by any party to the dispute being a Party to the present Protocol.*⁸⁸

Although the United States objected to the jurisdiction of the International Court of Justice for four different reasons, the ICJ failed to uphold any of the objections of the United States and adjudicated the case.⁸⁹ The case was presided over by twelve judges from various nations, although there was no judge of Mexican nationality on the bench, therefore, the ICJ allowed Mexico to choose a judge *ad hoc* to sit in on the proceedings.⁹⁰

Mexico set forth that under Article 36, the United States failed to immediately inform fifty-two Mexican nationals arrested in the United States, of their right to consular notification and access as set forth in the Vienna Convention.⁹¹ Mexico also contended that the United States had a duty to notify the Mexican Consul so that it could have the opportunity to aid and advise the Mexican nationals.⁹² Article 36, paragraph 1 sets forth

⁸⁷ *Id.* at 10, 15.

⁸⁸ Art. I of the Optional Protocol of the Vienna Convention, pp. 7, 19 at www.icj-cij.org.

⁸⁹ The United States has objected to the jurisdiction of the ICJ for the following reasons: that the ICJ may not rule on the operation of the U.S. criminal justice system; that Mexico is requesting that the ICJ acts as a court of appeal to the U.S. courts; that the remedies requested by Mexico go beyond the jurisdiction of the ICJ; and that the ICJ lacks jurisdiction to determine whether consular notification is a human right. *Avena*, 2004 I.C.J. No. 128, at 1, 2, 18, 21-24.

⁹⁰ See the case for a complete list of the presiding judges, president, vice-president, registrar and ad hoc judge. *Avena*, 2004 I.C.J. No. 128, at 4, 9.

⁹¹ *Id.* at 29.

⁹² *Id.* at 29.

- (a) *consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending state;*
- (b) *if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;*
- (c) *consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.*⁹³

Mexico contended that fifty of the Mexican nationals were never informed by the United States' authorities of their rights under Article 36 of the Vienna Convention and two of the Mexican nationals were not provided that information *without delay* as required.⁹⁴ The United States objected to the admissibility of Mexico's claims for five reasons, but the ICJ did not uphold any of those claims and proceeded with adjudication.⁹⁵

⁹³ *Id.* at 29-30.

⁹⁴ Three of the individuals had their sentences commuted in the State of Illinois; at that time the Mexican government withdrew its request for provisional measures in those three instances. *Avena*, 2004 I.C.J. No. 128, at 18.

⁹⁵ The United States objected to the claims for the following reasons: 1) the ICJ was functioning as a court of criminal appeal for the U.S., 2) Mexican nationals should have to meet the customary legal requirement of exhaustion of municipal remedies, 3) certain of the Mexican nationals had dual citizenship with the U.S., 4) Mexico should not be able to bring a breach of the Vienna Convention to the ICJ if they had not first brought it to the attention of the U.S. without considerable delay, and 5) Mexico should not be able to bring a claim that the U.S. did not follow a standard which Mexico itself does not follow. For a complete explanation of the court's finding against these objections. *Id.*

There were two relevant underlying issues that the court adjudicated: (1) the definition and application of *without delay* as used in Article 36 and (2) whether some of the arrested Mexican nationals were also United States citizens.⁹⁶ In twenty-nine of the cases, consular authorities did not learn of the detention of the Mexican nationals until after death sentences had been handed down.⁹⁷ The term *without delay* was used regarding consular notification, although the term is not defined in the Vienna Convention. Mexico argued that *without delay* was equivalent to immediately, but the court found that the term meant that detaining authorities must give an individual information regarding consular notification once it is realized that a person is, or is probably, a foreign national.⁹⁸ Although the time period could vary based on the circumstances, the court found only one individual was notified without delay, Mr. Juarez, who was notified within forty hours.⁹⁹

The United States argued that the United States consists of a multicultural society with many languages spoken and persons having a diverse appearance cause difficulty in determining whether a person is or is not a United States citizen.¹⁰⁰ The court responded by comparing consular notification to *Miranda rights* in the United States.¹⁰¹ When a person is taken into custody, while *Miranda rights* are given, officers can also inquire whether the arrested is a United States citizen and, if not, inform him of his right to communicate with his country's consul.¹⁰²

⁹⁶ *Avena*, 2004 I.C.J. No. 128, at 14, 30.

⁹⁷ *Id.* at 18.

⁹⁸ *Id.* at 33.

⁹⁹ *Id.* at 32.

¹⁰⁰ *Avena*, 2004 I.C.J. No. 128, at 33.

¹⁰¹ *Id.* at 34.

¹⁰² *Id.* at 34.

The United States also argued that many of the Mexican nationals arrested were also citizens of the United States, since Mexico allows citizens to maintain citizenship in both countries.¹⁰³ The United States argued that if the arrested were also United States citizens, then the United States had no obligation to those persons under Article 36.¹⁰⁴ The court agreed with the United States and found that Mexico had the burden of proof to show that the Mexican nationals were actually citizens of Mexico and therefore, the provisions of Article 36 applied to them.¹⁰⁵ Mexico produced birth certificates and declarations of nationality for all persons named in the case.¹⁰⁶ The court found that the United States had the burden to demonstrate to the court through documentation that the persons that the United States claimed were also citizens of the United States were, in fact, United States citizens.¹⁰⁷

The court found that the United States did not meet its burden in obtaining the correct documentation to prove United States citizenship.¹⁰⁸

The court held that the United States failed to notify Mexican nationals of their right to communication with the Mexican consul and that the United States precluded Mexico from exercising its rights to communicate and have access to the Mexican nationals.¹⁰⁹ The court also held that the United States needed to find an appropriate remedy according to criteria set forth in a prior ICJ case against the United States, *La Grand*, which held that the violation and possible prejudice caused by the violation

¹⁰³ *Id.* at 30-31.

¹⁰⁴ *Id.* at 31.

¹⁰⁵ *Id.* at 31.

¹⁰⁶ *Id.* at 31.

¹⁰⁷ *Id.* at 31.

¹⁰⁸ *Id.* at 32.

¹⁰⁹ *Avena*, 2004 I.C.J. No. 128, at 41, 48.

needed to be fully examined and taken into account by the United States review and reconsideration process.¹¹⁰

Mexico and the United States have opposing laws on the death penalty; the United States imposes it, but Mexico does not. This grave difference in law creates a tension between the governments. Since the Mexican migrants were on United States land when they were convicted, the United States sentenced the death penalty in accordance with United States law to Mexican citizens. Mexico's disagreement with the convictions and with the United States' violation of international law was not going to alter the United States government's decision to impose death. Mexico went to a neutral arbitrator in order to resolve the dispute and in order for the court to enforce the international law.

VII. Conclusion

Analyzing Mexico's policies reinforces the globalization of the migration issue. Although Mexico has a federal policy in place, the government has looked beyond traditional answers to resolve migration issues. Due to the specific pattern of migration from Mexico to the United States, Mexico has responded with laws and court decisions that regulate the emigration of migrants from Mexico. Mexico has reached beyond its national law to resolve migration issues. The United States and Mexico have negotiated the United States–Mexico Border Partnership Action Plan in order to address United States/Mexico border issues. Presidente Fox has expressed on numerous occasions his desire to legalize migrant flows between the United States and Mexico.¹¹¹ This may

¹¹⁰ *Id.* at 53, 58.

¹¹¹ Deborah Kong, *Mexico: Fox Calls For U.S. To Take "Illegal" Tag Off Immigrants*, Associated Press (July 18, 2001).

include a future treaty specifically focusing on the movement of people between the countries, as NAFTA did not adequately or directly address the issue.

The Guatemala/Mexico border receives minimal attention, but many of the same issues of the United States/Mexico border persist thereon. Not only does Guatemala have a weaker economy than Mexico, it also has the additional pressure of an unstable government. Mexico has responded to human rights issues along both borders by implementing *Grupo Beta*, which is a prime example of multi-levels of government cooperating in order to reach resolutions. As the United States has been criticized for human rights violations along the United States/Mexico border, Mexico has been criticized for those same violations along its border with Guatemala. Mexico and Guatemala have worked together on implementing a guest worker program in Mexico. This guest worker program directly addressed the undocumented migrants who were entering Mexico from the southern border.

Undocumented migration is a great concern. An aggravating factor in the *Avena* case was the lack of documentation by migrants. When migrants are in a country without documents, authorities are unable to accurately determine citizenship. As seen in *Avena*, this lack of identity leads to graver migration problems, which then result in bi-national tensions. Since migration occurs when there is not parity between nations, legal, documented migration must be the foremost objective for the government. Of course, the underlying issue of a weak economy also needs to be addressed in order for eventual parity to occur which would then lower the overall number of migrants.

The use of the International Court of Justice to solve the United States/Mexico dispute regarding imposing the death penalty on Mexican migrants demonstrates using an

international tribunal to resolve a binational dispute. Mexico is utilizing international agreements and international law to peacefully resolve disputes with other countries. As the world becomes increasingly international, this type of resolution will become common and will set an international standard for countries.