MEXICAN TRANSMIGRATION: A CASE FOR THE APPLICATION OF INTERNATIONAL LAW

"Between strength and weakness, the desert."

— Lerdo de Tejada

Over a century ago, Mexican President Lerdo de Tejada recognized the need for his weak nation to remain separated from the powerful giant to the north. Today the desert is inhabited by both Americans and Mexicans and is no longer a buffer between the two nations. Mexicans, as a result of this proximity to the United States, are finding expatriation the most expedient solution to the poverty situation in Mexico. Illegal entry or "transmigration" into the United States has, since the 1940s, increased steadily to its current alarming proportions.

The United States government has utilized several policy tools in its attempt to stop transmigration, but its overall immigration policy remains unclear. In October 1978, Congress established a sixteen-member Select Commission on Immigration and Refugee Policy, also known as the Askew Commission.

1. J. Bazant, A Concise History of Mexico 93 (1977). Compare to this the statement of Pope John XXIII: "The contrast between nations that are economically advanced and enjoy a high standard of living, and those in earlier stages of development which suffer from extreme poverty is therefore called one of the most difficult problems facing the modern world." Pope John XXIII, Encyclical on Christianity and Social Progress 119 (1961).
2. See V. Briggs, Mexico Migration and the U.S. Labor Market 22 (1975); see also text accompanying notes 78-88 infra.
3. The purpose of this Comment is to examine transmigration as an international phenomenon. Terms such as "illegal aliens," "undocumented workers," and "wetbacks" are therefore avoided where possible. These terms denote an illegality that is associated with United States law and not international law. Mexicans illegally entering the United States will be referred to as "transmigrants." For the purposes of this Comment, the words "transmigrant" and "transmigration" are derived from the Spanish word transmigrar which means to go from one country to another.
5. See text accompanying notes 95-127 infra.

92
Commission was “instructed to study and evaluate ‘existing laws, policies and procedures governing the admission of immigrants and refugees to the United States and to make such administrative and legislative recommendations to the President and the Congress as are appropriate,’ not later than September 30, 1980.”9 In effect, the legislation creating the Commission is a decree of inaction that will await the findings of the Commission.10 In the interim, the Immigration and Naturalization Service (INS) is the only government agency formulating policy on transmigration, and it has relaxed enforcement of immigration laws under former INS Commissioner, Leonel J. Castillo.11

The United States government’s “hands-off” policy on transmigration is the result of political pressure from many sides.12 Several Chicano13 groups promote the legalization of transmigration, anxious to reinforce the Chicano political power base.14 Other Chicanos oppose transmigration, feeling transmigrants limit employment opportunities for Mexican aliens legally in the United States.15 In addition, they believe that transmigration lowers the standard of living and social status of all persons of Mexican or Spanish descent living in the United States, whether they are citizens or legal aliens.16 American citizens who compete with transmigrants for low-wage employment also oppose transmigration,17 but American employers welcome transmigration as a source of

---

11. INS Halts Most ‘Raids’ on Factories for Illegal Aliens, supra note 6. But see D.C. Arrests Could Signal Crackdown On Employers Of Illegal Aliens, San Diego Union, Nov. 18, 1978, § A, at 11, col. 1. INS policies took an about-face after the resignation of Castillo’s predecessor Leonard F. Chapman, a retired Marine general. Castillo, a Carter appointee, was not popular among those who would like to see the transmigrants driven back. In particular, Border Patrol officers of the INS found Castillo’s policies made their job more difficult. Castillo Has Hamstrung Them, INS Agents Say, L.A. Times, Nov. 11, 1978, pt. 1, at 1, col. 1; “It’s Your Turn in the Sun,” TIME, Oct. 16, 1978, at 61. Castillo resigned on September 30, 1979, and was replaced by Acting Commissioner David Crosman, formerly General Counsel for the INS. It appears Crosman will increase enforcement efforts. See Memorandum from Donald M. Cameron, Chief Patrol Agent, INS, Chula Vista, California, to all personnel (Oct. 5, 1979) (copy on file with the California Western International Law Journal).
13. As used in this Comment, “Chicano” refers to American citizens of Mexican descent politically active in the United States.
15. See note 52 infra, and accompanying text.
17. Id.
cheap labor. 18

There is a shortage of statistical studies examining the magnitude of Mexican transmigration and its impact on the United States, and neither the United States nor Mexico 19 are encouraging effective studies. Nevertheless, government officials, including former United States Attorney General Griffin Bell, Secretary of Labor F. Ray Marshall, and several Congressmen, including Representatives Peter Rodino and James Scheuer, are aware of the need for a more aggressive policy on transmigration. 20 As more Americans become aware of the problem and how it affects them, the United States government will be forced to reconcile political differences and formulate a direct policy on transmigration. 21

This Comment suggests a new foreign policy approach whereby the United States and Mexico can negotiate a solution to the transmigration problem. The first section examines the magnitude and character of transmigration from Mexico into the United States; the negative effects of transmigration experienced on the American side; the forces causing transmigration; and, the failure of United States immigration policy to curb transmigration. The second section discusses the guidelines needed to formulate a new foreign policy. These guidelines comprise the rights and duties of Mexico and the United States regarding transmigration, resulting from treaties, agreements, conventions, and fundamental principles of international law. Finally, this Comment recommends that Mexico and the United States take specific action following those guidelines to resolve the transmigration problem.

21. Pessimism Expressed Measures Will Pass, supra note 20. Already, vigilante groups have threatened to take the law into their own hands in personal frustration over the ineffectiveness of legal enforcement. See Ku Klux Klan Plans Border Patrol To Help Fight Illegal Alien Problem, N.Y. Times, Oct. 18, 1977, § 1, at 80, col. 5; see also Conine, supra note 6; "It's Your Turn in the Sun", supra note 11.
I. MEXICAN TRANSMIGRATION

Mexico City and the United States have become the principal destinations in a radical redistribution of population from rural areas in Mexico. The fact that the population of Mexico's capital city has quadrupled since 1965 is an indication of this phenomenal rate of redistribution. Zero Population Growth, Inc., maintains that the rate of population growth in the United States is being doubled by the influx of Mexican transmigrants. There is also an indirect effect of transmigration on population growth in the United States, because female transmigrants have, on the average, more children than do American women. According to projections, transmigration — direct and indirect affects combined — will soon treble the rate of population growth in the United States.

“Guestimates” of the number of transmigrants living in the United States range from four to twelve million. The most reliable figure is an estimate of eight million made by former INS Commissioner, Leonard F. Chapman.

Recent events indicate that the rate of transmigration continues to rise. In the summer of 1977, President Carter announced his “amnesty plan” for transmigrants living in the United States.

23. 1968 INFORMATION PLEASE ALMANAC 733; 1979 THE WORLD ALMANAC 559.
25. Illustrative is the fact that Mexico is experiencing a 50% greater increase in population than is the United States. Davis, The Migrations of Human Populations, SCIENTIFIC AM., Sept. 1974, at 103; see also Reston, The Silent Invasion, N.Y. Times, May 4, 1977, § 1, at 23, col. 1.
26. DOMESTIC COUNCIL COMMITTEE ON ILLEGAL ALIENS, PRELIMINARY REPORT 204 (1976) [hereinafter cited as DOMESTIC COUNCIL].
29. The estimates are made from the only reliable data available — the number of apprehensions made each year by the Border Patrol, an enforcement division of the INS. For fiscal year 1976, the INS reported the location of 875,915 transmigrants, 89% of whom were Mexican. Apprehended transmigrants totaled 781,474 for the year. 1976 INS REPORT, supra note 4, at 13-14. Note that the estimated eight million transmigrants represent about one-eighth of Mexico’s entire population and about one-fourth of the adult population of Mexico. 1979 THE WORLD ALMANAC 559; Conine, supra note 6.
30. See notes 33-34 infra.
31. Carter Said to Seek Amnesty for Aliens in Country 7 years, N.Y. Times, July 21,
Although the plan was never implemented, its announcement induced a sudden influx of transmigrants. Even more recently, a reordering of priorities under former INS Commissioner Castillo produced an estimated seventy percent reduction in the number of arrests and deportations of transmigrants. Such reduced enforcement will likely produce a further increase in the rate of transmigration.

Population growth is a major cause of economic pressure in Mexico, likewise, population growth due to transmigration is a burden on the American economy. Signals indicating the magnitude of this burden include unemployment, increased "dollar drain," and an added usage of public services.

A. Effects of Transmigration In the United States

1. Unemployment. Primarily, transmigrants are seeking employment in the United States, and nearly all of them eventually find jobs. Because most transmigrants are unskilled, their competitors in the search for employment are also unskilled. This category includes most women, teenagers, uneducated persons, disabled persons, and other Mexicans who legally seek work in the United States. The extent to which transmigrants may be displac-


32. Conine, supra note 6.

33. Increase in Illegal Aliens Linked to Amnesty Plan, N.Y. Times, July 7, 1977, § 1, at 16, col. 6; 200,000 at Tijuana Wait to be Smuggled into U.S. by Deadline, N.Y. Times, Aug. 8, 1977, § 1, at 1, col. 3.

34. INS Halts Most 'Raids' on Factories for Illegal Aliens, supra note 6. But see D.C. Arrears Could Signal Crackdown On Employers of Illegal Aliens, supra note 11.

35. See DOMESTIC COUNCIL, supra note 26, at 48; Illegal Aliens — Where to Draw the Line, supra note 20, at 29, col. 2.


37. But see "It's Your Turn in the Sun," supra note 11 (A 1975 Department of Labor study concluded that transmigrants provide a net benefit to the United States economy); Maxwell, supra note 8, at 30-31 (Economist Clark W. Reynolds believes transmigration is an economic boons to the United States).

38. In a message to Congress, President Carter stated: "In the last several years, millions of undocumented aliens have illegally immigrated to the United States. They have breached our nation's immigration laws, displaced many American citizens from jobs, and placed an increased financial burden on many state and local governments." 13 WEEKLY COMP. OF PRES. DOC. 1170 (Aug. 8, 1977). See text accompanying notes 39-73 infra.

39. See BRIGGS, supra note 2, at 13.

40. DOMESTIC COUNCIL, supra note 26, at 156.

41. Id. at 160. Jack Ricciardi, Assistant District Director of Investigations for the INS in New York City, said: "How many black teen-agers are pounding the streets looking for jobs? Forty per cent? Many of them can't get jobs because of illegal aliens." Illegal Mexican
ing Americans in the job market is significant when one considers that the estimated number of transmigrants in the United States exceeds the total number of unemployed Americans. 42

Defenders of transmigration contend that no competition exists, because transmigrants perform work unsavory to Americans. 43 The contention is deceptive, however, if transmigration tends to depress wages and working conditions below the level most Americans will accept. 44 Generally, an increased supply of labor produces such conditions. 45 As an added factor, transmigrants are willing to work for lower than standard wages, and employers often exploit that willingness. 46

Defenders of transmigration insist, nevertheless, that Americans alone could not satisfy the farm labor needs of the United States. 47 An historical example suggests the contrary. The use of Mexican farm labor in the United States was encouraged under the Bracero program from 1941 until 1965. 48 Farm labor employers did not believe the American labor market would fulfill their employment needs for harvest when the program was discontinued, yet harvest labor demands were satisfied using legal aliens and Americans. 49

Currently, a Mexican national can work legally in the United States by obtaining a “green card.” He must meet all the requirements of the Immigration and Nationality Act 50 and obtain labor certification from the Secretary of Labor showing that:

(A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of applica-


42. A New Marshall Plan?, N.Y. Times, March 13, 1977, § 4, at 23, col. 2. See also Conine, supra note 6. The article points out that if just half of the 3.8 million jobs believed to be held by transmigrants could be shifted to American citizens, unemployment in the United States would be reduced to less than five percent, and the federal budget could be cut in half.


44. BRIGGS, supra note 2, at 26.

45. 1976 INS REPORT, supra note 4, at 15.

46. BRIGGS, supra note 2; Conine, supra note 6; Eaton, supra note 41.

47. Illegal Aliens — Where to Draw the Line, supra note 20, at 29.

48. For an account of the Bracero or Mexican Farm Labor Program, see SAMORA, supra note 22, at 18-19.

49. Illegal Aliens — Where to Draw the Line, supra note 20, at 29.

tion for a visa and admission to the United States and at a place to which the alien is destined to perform such skilled or unskilled labor, and

(B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed.\(^{51}\)

Even these so-called green card workers are finding it difficult to compete with transmigrants.\(^{52}\)

Even if it could be proved that transmigrants exclusively provide needed farm labor, farm laborers are not the only segment of the population with which transmigrants are competing. A recent study\(^{53}\) reveals that only twenty-seven percent of apprehended male transmigrants are working as farm laborers. The other seventy-three percent are working in service, blue collar, and even white collar jobs according to the study.\(^{54}\) This explains why more transmigrants are being found in major urban and suburban areas each year.\(^{55}\) According to Leonard Chapman, former INS Commissioner:

I often hear that the illegal aliens are taking only jobs that Americans won't take, but that is absolutely not true. I am talking about jobs in construction, in services in light and heavy industry throughout the country.

We apprehend technicians working for $18,000 to $20,000 a year, construction foremen making $9.50 an hour.\(^{56}\)

No one contends that only transmigrants compete for these kinds of employment.

Employers often argue they would be priced out of their markets if forced to pay higher wages to legal employees.\(^{57}\) In the long run, at least, this argument fails because industries facing high labor costs tend to become capital intensive in order to lower their costs to competitive levels within the industry.\(^{58}\) The argument also assumes that the supply of legal labor in the affected industries is


\(^{53}\) DOMESTIC COUNCIL, supra note 26, at 169.

\(^{54}\) Id. See, e.g., 13 Aliens Captured; Worked in Gun Shop, San Diego Union, Nov. 9, 1975, § B, at 1, col. 5 (transmigrants were receiving from $2.00 to $2.50 an hour); Alien Check Nets 8 on Hotel Staff, San Diego Union, Feb. 2, 1976, § B, at 3, col. 5.

\(^{55}\) Conine, supra note 6; see note 94 infra, and accompanying text.


\(^{57}\) DOMESTIC COUNCIL, supra note 26, at 160-61.

\(^{58}\) A. KOUTSOYIANNIS, MODERN MICROECONOMICS 86-92 (1975).
inelastic and that demand for the items produced in those industries is elastic. In other words, it is assumed industries could only induce adequate increases in the supply of "legal" workers by increases in wages and that they would experience fatal revenue losses if forced thereby to raise their prices. This assumption is unfounded.

Transmigrants are working in the United States and are competing successfully with Americans for their employment. Transmigration is, therefore, contributing to unemployment in the United States. Unemployment is not only significant to those unemployed, it is a major signal of a nation's economic stability or instability. Both Mexico and the United States recognize the need to protect their own employment rates by restricting the number of aliens that may be employed within their boundaries.

2. Dollar drain. Another economic concern, related to the employment of transmigrants, is how transmigrants use the wages they earn in the United States. Most of the money earned by transmigrants is sent home to support families and relatives and to accumulate in savings. This outflow of dollars to Mexico contributes to "dollar drain" in the United States by an estimated three to ten billion dollars annually. A dollar drain of this magnitude threatens the United States economic stability by exacerbating the balance-of-payments deficit and hampering government attempts to control the United States money supply. Transmigration is, therefore, a direct threat to the stability of the United States economy.

59. DOMESTIC COUNCIL, supra note 26, at 161.
60. Id.
63. BRIGGS, supra note 2, at 20. For a cameo setting, see SAN DIEGO COUNTY HUMAN RESOURCES AGENCY, A STUDY OF THE SOCIOECONOMIC IMPACT OF ILLEGAL ALIENS ON THE COUNTY OF SAN DIEGO 62-63 (Jan. 1977). Although San Diego County comprises only 3.3% of the United States-Mexican border, it accounts for 43% of the total apprehensions made along the entire border.
64. Dollar Drain Laid to Illegal Aliens Estimated in the Billions Annually, N.Y. Times, May 27, 1977, § 1, at 9, col. 4.
67. See generally PIERCE & SHAW, supra note 61, at 424-37.
68. By stopping transmigration and the dollar drain caused by it, a substantial portion
3. Use of social services. Transmigrants, while living in the United States, use the public and welfare services of their community. These public services include police and fire protection, law enforcement, education, water and sewage treatment, highway construction, and park and recreational facilities. The INS reports that the tax contribution of transmigrants does not compensate for the cost of these services.

Transmigrant use of welfare services includes general assistance, supplementary security income, medicaid, food stamps, social security, unemployment insurance, and aid to families with dependent children. The INS has estimated the annual receipt of welfare benefits by transmigrants to be $13 billion. Furthermore, this figure does not include welfare and unemployment benefits received by Americans who are unemployed as a result of transmigration.

Transmigration increases economic pressure in the United States. Transmigrants who displace United States workers cause unemployment; transmigrants who send their wages home to Mexico contribute to dollar drain in the United States; transmigrants, as a group, do not pay adequately for the public services they receive; and many transmigrants receive welfare payments illegally from the United States government. Before discussing United States at-

of the United States balance-of-payments deficit — more than three billion dollars — could be abated. See Hearings on H.R. 982, supra note 24, at 33 (statement of Leonard F. Chapman).

69. See notes 70-73 infra.

70. In a three-month test conducted by the Internal Revenue Service at INS detention centers, 1,090 of the 1,699 transmigrants interviewed had paid only about 67% of the taxes they owed. Domestic Council, supra note 26, at 151; see Hearings on H.R. 982, supra note 24, at 33-34; U.S. To Bolster Border Force In Illegal Alien Crackdown — All-out Operation Has Top Priority, San Diego Union, Sept. 19, 1974, § B, at 1, col. 6; see also The Silent Invasion, supra note 25. But see It's Hispanics' Turn At U.S. City Gates, San Diego Union, May 6, 1979, § C, at 7, col. 1; Analyst Says Mexicans' Taxes Here Offset Health Cost, San Diego Union, June 3, 1979, § B, at 8, col. 1. The article refers to sales taxes paid by Mexican shoppers who enter the United States legally.

71. A Los Angeles County grand jury found that 3,500 transmigrants were receiving assistance in the form of welfare benefits totaling $3.7 million dollars, and in the form of medical care totaling $10.8 million dollars. A Falling Peso Spurs Illegal Immigration, N.Y. Times, Jan. 9, 1977, § 3, at 43, col. 1; see also Domestic Council, supra note 26, at 192. When officials in Los Angeles were able to terminate payments to another 2,600 transmigrants who had been receiving welfare payments, an estimated $2.7 million dollars was saved. Id.; 1976 INS Report, supra note 4, at 16.

72. Domestic Council, supra note 26, at 193; Illegal Aliens, supra note 20, at 39.

tempts to halt transmigration, it is necessary to consider the forces motivating Mexicans to expatriate.

B. Causes of Transmigration

A dual set of forces compels Mexicans to forsake their homeland for the hostile, dissimilar environment of the United States. The forces — known as "push" and "pull" forces — are present in any sizable migration. People tend to be pushed from depressed regions and pulled to destinations where conditions are more favorable.

In Mexico, lower-class Mexicans are living in extreme poverty. Although recently Mexico has been experiencing a favorable economic growth rate, her population continues to grow at a faster rate, causing economic depression. Simply stated, demand continues to outgrow production. Furthermore, economic growth is experienced by only a small percentage of upper-income Mexicans because the distribution of wealth and income in Mexico disproportionately favors this group. The vast lower-income group is experiencing high unemployment — thirty to forty percent — and declining living standards. Community services are inadequate, health care is poor, and the illiteracy rate is over twenty-three percent. Despite domestic pleas to remedy the situation, the Mexican government has refused to accept any direct foreign assistance. There is no doubt, however, that the Mexican government recognizes transmigration to be an indirect form of aid

74. See notes 75-94 infra, and accompanying text.
75. DOMESTIC COUNCIL, supra note 26, at 47.
76. Davis, supra note 25, at 108.
77. See DOMESTIC COUNCIL, supra note 26, at 47.
78. BRIGGS, supra note 2, at 21.
79. Id. at 20. Since the late 1960s, Mexico's gross national product has increased at an annual rate of six percent, while her per capita income has increased at an annual rate of only three percent. Id.
81. BRIGGS, supra note 2, at 20.
82. Id.
85. BRIGGS, supra note 2, at 21.
86. Id.
87. Id.
that must continue for the time being.88

The United States, a pulling force to many Mexicans, is viewed as a "promised land,"89 offering the reverse of conditions in Mexico. The vision may seem exaggerated to Americans, but to Mexicans who have known nothing but poverty as a way of life, the contrast is dramatic. In 1976, the per capita income in Mexico was $1,130;90 in the United States the per capita income was $6,995.91 For Mexicans in general, the difference is inspiring. For Mexicans seeking employment despite the level of salary, the United States job market offers better opportunity than Mexico's. Although the United States is experiencing high unemployment, Mexican transmigrants find work easily; they accept lower-than-standard pay and working conditions, and American employers are eager to exploit such a "black market" of labor.92 As a pull force, the promise of employment is drawing Mexicans northward to a number of interdependent twin-cities along the border.93 From there, transmigrants are moving in great numbers to major cities in the United States.94

The cause of transmigration is not a mystery. Depressed socio-economic conditions in Mexico are pushing Mexicans out, and favorable conditions in the United States are pulling them northward. Employment push and pull forces appear to be the most powerful of all. The United States government has considered solutions to employment pull forces within the United States, but a proper treatment of those forces has not been formulated and agreed upon.

88. Illegal Aliens — Where to Draw the Line, supra note 20.
89. Briggs, supra note 2, at 19; see Samora, supra note 22, at 10.
90. 1979 The World Almanac 559.
91. Id. at 591.
92. Strictly speaking, there is a black market of employment but not of employees, because it is not illegal for employers to hire transmigrants in the United States, except in California and Louisiana. See note 117 infra.

Illegal Mexican aliens are able to "disappear" into the diverse mix of Latin and Central American groups living in New York. No one will even venture a guess on how many Mexicans have arrived in New York and in other Eastern cities in the last couple of years. Indeed, federal authorities have balked lately at giving estimates on any aspect of the problem of illegal undocumented aliens.

Illegal Mexican Aliens Now Flowing to Northeast U.S., supra note 41.
C. Attempts by the United States to Halt Transmigration

United States concern for the harmful effects of transmigration has been demonstrated by a variety of proposals, including new legislation and efforts to enforce existing laws. Recent proposals have ranged from more intense border control95 to legalized transmigration.96 In actual practice, the United States government, through the INS, has used deportation and border enforcement as its primary policy instruments.97

1. Deportation. The Immigration and Nationality Act of 195298 and subsequent amendments give federal officers the authority to deport illegal aliens.99 Deportation is also a right derived from international law principles; it is well accepted that a nation has the right to deport aliens for its own protection.100 In the past, the United States government has used deportation as a policy tool. In 1953-1954, the INS boldly launched a program known as “operation wetback,”101 which resulted in nearly one million apprehensions. In the summer of 1976, a $2 million deportation experiment was run by the INS.102 Apprehended transmigrants were placed on airplanes in major cities and flown to Mexico City. The INS believed that flying the transmigrants deep into the interior of Mexico would make return to the border more difficult and, therefore, effect a decline in repeat offenders.103

95. Illegal Aliens, supra note 20.
97. See notes 98-107 infra.
99. The Mexican Constitution gives similar authority to the Federal Executive: “The Federal Executive shall have the exclusive power to compel any foreigner whose remaining he may deem inexpedient to abandon the national territory immediately and without the necessity of previous legal action.” CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS, art. 33 (Mexico 1917).
100. In the words of the Court in Fong Yue Ting v. U.S., 149 U.S. 698, 711 (1893): “The right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace . . . is an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare.”
101. DOMESTIC COUNCIL, supra note 26, at 70; SAMORA, supra note 22, at 8.
103. Id.
Since 1976, deportation has played a diminishing role in the portfolio of INS immigration policy tools. This is attributable in part to the priorities set by former INS Commissioner Castillo, who INS employees believe was overly sympathetic to the Mexican transmigrant's situation. Castillo may have been responding to protests made by Mexicans of deportation practices. For whatever reasons, INS forces have been redistributed from the interior of the United States to the international border — that is, Castillo de-emphasized deportation and concentrated on the exclusion of transmigrants.

2. Exclusion — Border forces and blockades. Protective activity of the INS is carried out primarily by the Border Patrol Division, whose function is to capture transmigrants as they attempt to enter the United States. Border Patrolmen are aided by strategically located fences and helicopters.

The success of this combination of obstacles is best told in one Border Patrolman's account:

Our men stand on the California side of the border and watch the groups forming across the line in Mexico . . . . When the first groups start across, our men move in, then other groups surge across and get away. From sheer weight of numbers and fast movement they make it across.

Despite the presence of border opposition, transmigrants continue to cross into the United States in large numbers. Legislators and other government officials have come to realize that transmigration cannot be treated symptomatically — legislation must address the "causes" of transmigration.

104. Illegal Aliens — Where to Draw the Line, supra note 20, at 29.

105. See note 11 supra; Illegal Aliens Stir Competing Power Blocs, supra note 12.

106. See, e.g., 50 Illegal Aliens To Leave Today, supra note 102. According to the article, Mexican newspapers condemned the airlift program calling it "inhumane and degrading" and demanded it be denounced before the United Nations.

107. BRIGGS, supra note 2, at 19; INS Halts Most 'Raids' on Factories for Illegal Aliens, supra note 6; Illegal Aliens — Where to Draw the Line, supra note 20, at 29.


112. Hearings on H.R. 982, supra note 24, at 34.

113. See note 20 supra.
3. **Attention to pull forces.** The primary pull force in the United States is the existence of employment opportunities.\(^{114}\) One possible way to reduce the employment pull force is to eliminate these opportunities.\(^{115}\) Although United States laws make it illegal for a transmigrant to seek employment,\(^{116}\) American employers may hire transmigrants with impunity,\(^{117}\) except in California and Louisiana.\(^{118}\) Recent proposed federal legislation, however, would place criminal and civil sanctions on the hiring of transmigrants in the United States.\(^{119}\)

---

\(^{114}\) *Illegal Aliens — Where to Draw the Line,* supra note 20.

\(^{115}\) The effectiveness of the sort of disincentives for employers suggested by Congressman Rodino has been observed in three localized attempts. One called “program cooperation” was sponsored by the Denver District Office of the INS. The program involved the voluntary support of local employers to combat the employment of transmigrants. The INS reported limited success in its 1976 Annual Report. The other two attempts are being made by the State of California and the State of Louisiana. To protect workers within the state, criminal sanctions have been imposed on employers who knowingly employ transmigrants. CAL. LAB. CODE § 2805 (West 1971) reads in full as follows:

(a) No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.

(b) A person found guilty of violation of subdivision (a) is punishable by a fine of not less than two hundred ($200) nor more than five hundred dollars ($500) for each offense.

(c) The foregoing provisions shall not be a bar to civil action against the employer based upon a violation of subdivision (a).

The constitutionality of the statute was upheld by the United States Supreme Court in *DeCanas v. Bica*, 424 U.S. 351 (1976). In the words of the Court: “In attempting to protect California’s fiscal interests and lawfully resident labor force from the deleterious effects on its economy resulting from the employment of illegal aliens, § 2805(a) focuses directly upon those essentially local problems and is tailored to combat effectively the perceived evils.” *Id.* at 357. Transmigrants continue to pour into California, however, and many are merely heading for other states to seek employment. Furthermore, enforcement is limited to state authority. It is difficult to determine from this evidence what the effect would be of nationwide sanctions. The Louisiana law, which was only recently enacted, is printed in part at note 118 *infra.*


\(^{117}\) Included in the Immigration and Nationality Act of 1952 as a concession to Texan agricultural interests, the so-called “Texas proviso” reads: “Provided, however, That for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.” 8 U.S.C. § 1324 (a)(1976); BRIGGS, supra note 2, at 17.

\(^{118}\) CAL. LAB. CODE § 2805 (West 1971) is printed in full at note 115 *supra.* The Louisiana law reads in part as follows:

No person . . . shall knowingly hire . . . an alien who is not entitled to lawful residence in the United States; provided however, that the provisions of this Part shall not apply to aliens employed in the production of raw agricultural crops; or horticulture, livestock, dairy or poultry products; nor to aliens engaged in the field of animal husbandry . . ..

1979 La. Sess. Law Serv. 1085 (West) (to be codified as LA. REV. STAT. ANN. § 992 (West)).

\(^{119}\) See note 31 *supra,* and note 120 *infra.*
The Rodino bills each proposed a three-step sanction against employers who "knowingly" hire transmigrants. The first offense would result in a warning by the Attorney General; the second offense would be punishable by not more than $500 per transmigrant; and further offenses would be punished by a fine not to exceed $1000, imprisonment of up to one year, or both. The bill was passed by the House of Representatives twice and ignored both times by the Senate; a third attempt failed when the bill died in the House. Former Attorney General Griffin Bell and Secretary of Labor F. Ray Marshall were also vehement in their pleas for the enactment of legislation such as that proposed by Representative Rodino.

4. Recent proposals. In June 1977, President Carter proposed legislation that would tighten border controls, impose civil fines on employers who knowingly hire illegal aliens, improve economic aid to Mexico, and legalize the presence of illegal aliens living in the United States prior to January 1, 1977. Because of its complexity, the Carter bill died in the Senate Judiciary Committee. It was followed in May 1978 by a bill proposing the creation of a Select Commission on Immigration and Refugee Policy to study United States immigration policy, with particular emphasis on the transmigration issue.

D. Conclusion

The United States government has treated transmigration as a contest between itself and the individual transmigrant. Consequently, all attempts by the government to contain transmigration


121. Id.; Domestic Council, supra note 26, at 112.

122. See note 20 supra.

123. See note 31 supra.

124. Transmigrants living in the United States continuously since January 1, 1970, were to be given permanent legal status, while the others would be given legal status for five years after which time they would have been eligible to receive permanent legal status. Even this feature of the plan met with Chicano-based opposition. See 2 Chicano Leaders Denounce Carter Immigration Plan, San Diego Evening Tribune, June 27, 1978, § A, at 7, col. 1.

125. Conine, supra note 6.


127. Id. at 3-4.
have been implemented through the domestic legal system. Presently, the only illegal acts associated with transmigration are entry into the United States and the procurence of employment.128 Barricading the border with INS officers, fences, and helicopters only addresses the symptoms of the problem.129 Transmigrants are not to blame for the problem; they are merely victims of conditions in Mexico and prey to conditions in the United States. Push and pull forces cause transmigration, and United States domestic laws are powerless to affect push conditions on the Mexican side of the border.130 If the United States is to protect itself from the effect of these push conditions, Mexico, as well as her transmigrants, must be the subject of United States immigration policy. Immigration policy must be extended beyond technical boundaries and become an integral part of United States foreign policy.

II. MEXICAN TRANSMIGRATION AND INTERNATIONAL LAW

Broadly defined, foreign policy is a nation’s method of relating with foreign nations.131 Because international law provides principles governing the interactions of nations, it also provides guidelines for the formation of every nation’s foreign policy.132 This Comment will discuss and define those international guidelines relating to Mexican transmigration, and then recommend a new United States foreign policy following those guidelines.

A. Introduction

The duty of a nation to prevent mass transmigration from within its borders has not been specifically acknowledged or denied in international law. The situation between the United States and Mexico is unique. Presently, there is no other example of such extreme economic disparity between neighboring countries as exists between the United States and Mexico.133 Nevertheless, there is historical recognition of transmigration as a domestic issue. For example, in the late 1800s, Max Weber expressed concern over the injurious economic and social effects occurring in Germany, resulting from Polish transmigration to escape poverty in Poland and at-

130. C. Eagleton, The Responsibility of States in International Law 78 (1928).
131. See C. Fenwick, Foreign Policy and International Law 1 (1968).
132. Id. at 3.
133. Maxwell, supra note 8, at 1, col. 2.
tain employment security in Germany.\footnote{134} No international law developed as a result of that situation, however.

The problems of mass transmigrations have also received attention in international arenas. In 1969, Pope Paul VI wrote in an apostolic letter that transmigrations should be "the result, not of compulsion, but of free choice by the human person"\footnote{135} and that "governing authorities of states should be concerned that sources of work are created in their own regions."\footnote{136} Statements of the Pope, such as these quoted, are understood to "enunciate moral principles which are universal in application."\footnote{137} More recently, the world has seen a reaction by members of the United Nations to the plight of Vietnamese refugees (boat people).\footnote{138} Vietnam has received international pressure to curb the flow of the boat people from her territory.\footnote{139} This pressure resulted from disapproval of the risks boat people have been forced to take to escape Vietnam and of the burden placed on neighboring Southeast Asian countries by this transmigration.\footnote{140} As a result, on July 21, 1979, Vietnam pledged before a United Nations sponsored conference on Indochinese refugees that she would "make every effort to stop illegal departures"\footnote{141} of refugees.

What follows is an examination of recognized international law applicable to cases analogous to transmigrations — that is, cases where similar types of problems are created. There is considerable support for the proposition advanced here that a nation, in this case Mexico, owes a duty to prevent the transmigration of its own citizens.

\section*{B. The Responsibility of Mexico}

1. \textit{International law recognized by Mexico and the United States}. Whatever its source, international law does bind nations, because, as Brierly explains, "[M]an is constrained . . . to believe

\footnotesize

\begin{itemize}
\item \textsuperscript{134} R. BENDIX, MAX WEBER — \textsc{An Intellectual Portrait} 17-23 (1962).
\item \textsuperscript{135} POPE PAUL VI, \textsc{New Norms for the Care of Migrants} 9 (1969).
\item \textsuperscript{136} Id.
\item \textsuperscript{137} REV. J. CRONIN, \textsc{Catholic Social Principles} 56 (1950). The position of the Pope as a leader of the Holy See is unique in international law, since his institution enjoys "Supreme Spiritual Sovereignty." Kunz, \textit{The Status of the Holy See in International Law}, 46 \textsc{Am. J. Int'l Law} 311 (1952). The view today is "that the Holy See does, in fact, enjoy international personality." R. GRAHAM, \textsc{Vatican Diplomacy, A Study of Church and State on the International Plane} 201 (1959).
\item \textsuperscript{139} Id.
\item \textsuperscript{140} See id.
\item \textsuperscript{141} Id. (statement of Kurt Waldheim, United Nations Secretary General).
\end{itemize}
that order and not chaos is the governing principle of the world in which he has to live."142 Yet, thinking is divided on the source of specific international law rules. One school of thought teaches that nations are bound by "fundamental" rights and duties derived from natural law.143 Another teaches the "doctrine of positivism," which states that international law is the whole of rules to which nations have consented to be bound, either expressly in a treaty or impliedly by customary rule.144 Both sources are valid for the purpose of discussing guidelines for the United States and Mexico, since both nations have agreed, by express treaty provisions and by customary practice, to be bound by fundamental rights and duties in international law.145

Mexico and the United States have, in the course of their differences, entered into claims conventions — in particular, the Conventions of 1868146 and 1923.147 Although conventions are not considered an expression of positive rules of international law, they are evidence of the customary practice between the parties.148 The United States and Mexico agreed to be bound by "principles of international law, justice and equity"149 in the 1923 Convention and "according to public law, justice and equity" in the 1868 Convention.150

Treaty law between the United States and Mexico provides more definitive evidence of positive rules of international law binding the two nations. One important agreement to which the United States and Mexico are signatories is the Charter of the Organization of American States (OAS Charter).151 In Article 5, each member reaffirms the basic principle that "[i]nternational law is the stan-

143. Id. at 50.
144. Id. at 52.
145. See notes 146-57 infra, and accompanying text.
149. See note 147 supra.
dard of conduct of States in their reciprocal relations.” Subsequent provisions of the OAS Charter define international law as fundamental rights to sovereignty, independence, equality, and self-preservation.

These fundamental rights are the source of two particular duties that arise in Mexico because of transmigration: (1) the duty to respect the territorial integrity and sovereignty of the United States and (2) the duty to prevent injury to the United States. It is shown below that these duties require that Mexico prevent the current transmigration into the United States. Mexico’s conduct and possible defenses are then considered. Charter provisions of the United Nations and the Organization of American States are also discussed as the source of Mexico’s duty to cooperate economically with the United States in the satisfaction of her general duty to prevent transmigration. Then, assuming that the propounded set of international rights and duties applies, and that the duties of Mexico are neither fulfilled nor excused, this Comment proposes possible remedies and solutions.

2. The duty to respect United States sovereignty. Transmigration violates a United States statute (8 U.S.C. § 1182) that has unique significance in international law. The power of a nation to forbid transmigration into its territory is “inherent in sovereignty and essential to self-preservation . . . .” Unlike other domestic laws of order, immigration laws designed to exclude certain or all aliens are considered a fundamental sovereign attribute. It follows, therefore, that any nation which would condone the violation

---

152. O.A.S. Charter art. 5.
154. O.A.S. Charter art. 5(b).
155. O.A.S. Charter art. 5(b).
156. O.A.S. Charter art. 6.
158. Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892). The power to expel aliens is subject to limitations imposed by fundamental notions of morality and humanity, but lesser limitations exist for the power to exclude aliens. Fifth Report of the International Law Commission on International Responsibility, 1960 2 Y.B. Int’l L. Comm’n 58-60, U.N. Doc. A/CONF. 4/125 (1960). In an instruction to the American Embassy in Madrid, then Secretary of State Dulles said, “It has been pointed out . . . that the decision to admit or to refuse admission to Spain is one for the Spanish Government alone to make, and that the United States has no basis on which to demand Mr. . . . ‘s admission to that country.” J. Dulles, Instruction No. A-294 (June 5, 1958), reprinted in 8 Whiteman, Digest of International Law 573 (1965).
of another nation's immigration laws condones an interference with that nation's very right to territorial sovereignty and inviolability.

The right to exclude aliens has been exercised by the United States through enforcement of the Immigration and Nationality Act of 1952 and subsequent amendments. Mexico also exercises its right to exclude aliens and strictly enforces its immigration and alien employment laws. Neither country denies the other its right under international law to enforce its own immigration laws, but does either country recognize its duty to prevent violations by its nationals of the other nation's immigration laws?

It is an accepted principle that "the rights of states under general international law are always the reflection of the duties imposed by general international law upon other states." The OAS Charter contains the following articles under the heading "Fundamental Rights and Duties of States":

Article 7

Every American State has the duty to respect the rights enjoyed by every other State in accordance with international law.

Article 8

The fundamental rights of States may not be impaired in any manner whatsoever.

More specifically stated, the duty would be "to abstain and prevent agents and subjects from committing acts constituting a violation of another state's independence or territorial supremacy . . ." or, in this case, the duty of Mexico to prevent its nationals from entering the United States in violation of United States immigration laws.

The uniqueness of this violation under international law is that, unlike other violations of international law, a violation of territorial sovereignty does not necessarily involve an injury to the offended nation. Note, for example, the violation of Argentina's sovereignty by Israel, who, without the permission of Argentina's government, authorized agents to enter her territory and abduct...

161. See notes 62 & 99 supra.
163. O.A.S. CHARTER arts. 7 & 8.
164. J. STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 75-77 (2d ed. 1950) (emphasis added). See also I L. OPPENHEIM, INTERNATIONAL LAW 251 (4th ed. A. McNair 1928).
Adolf Eichmann.\textsuperscript{166} At the outbreak of World War I, when Mexico needed to send troops from Nogales, Sonora, to Tijuana, Baja California, via United States territory, United States consent was obtained, and the Department of State made it clear that permission was being granted.\textsuperscript{167} Although the journey involved no threat of injury, without the permission of the United States there would have been a clear violation of United States territorial sovereignty.

There is no burden on the excluding nation to prove an injury or otherwise justify its exclusion of aliens.\textsuperscript{168} However, if transmigration is causing injurious effects to the United States economy, then, in addition to there being a violation of United States sovereignty, the welfare and economic security of the United States are being threatened. This gives rise to a second duty in the Mexican government — the duty to prevent injury to the United States.

3. \textit{The duty to prevent economic injury.} It is a well recognized principle of international law that a nation can be held legally responsible for acts committed by its nationals within its territory, which are injurious to another nation.\textsuperscript{169} Every nation owes a "primary duty"\textsuperscript{170} to exercise "due diligence"\textsuperscript{171} to prevent the occur-

\begin{flushleft}
\textsuperscript{166} \textit{Id.} at 750 n.25. The Security Council adopted the following resolution, quoted here in part, on June 23, 1960:

\textit{The Security Council,
Having examined the complaint that the transfer of Adolf Eichmann to the territory of Israel constitutes a violation of the sovereignty of the Argentine Republic,
Considering that the violation of the sovereignty of a Member State is incompatible with the Charter of the United Nations, . . .

1. \textit{Declares} that acts such as that under consideration, which affect the sovereignty of a Member State and therefore cause international friction, may, if repeated, endanger international peace and security;
2. \textit{Requests} the Government of Israel to make appropriate reparation in accordance with the Charter of the United Nations and the rules of international law."

U.N. Doc. S/4349 (1960), reprinted in 43 DEP'T STATE BULL. 116-17 (1960). Oppenheim states: "The duty is to refrain from the performance of any act which would violate the internal autonomy or the external independence of another state, such as the making of an arrest by one state within another, or interference in the conduct of the latter's foreign policy." OPPENHEIM, supra note 164, at 262.

\textsuperscript{167} 5 DEP'T STATE BULL. 484 (1941).

\textsuperscript{168} The Court in Nishimura Ekiu v. United States, 142 U.S. 651 (1892), said, "Every sovereign nation has power, inherent in sovereignty and essential to self-preservation, to forbid entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe." \textit{Id.} at 659.

\textsuperscript{169} OPPENHEIM, supra note 164, at 307-08; EAGLETON, supra note 130, at 79-80; 2 J. MOORE, A DIGEST OF INTERNATIONAL LAW 446 (1906); C. FENWICK, INTERNATIONAL LAW 301 (3d ed. 1948); U.S. v. Arjona, 120 U.S. 479, 484 (1886).

\textsuperscript{170} H. BRIGGS, THE LAW OF NATIONS 615 (2d ed. 1952).

\textsuperscript{171} See notes 191-93 infra, and accompanying text.
\end{flushleft}
rence of such injurious acts. Failure to perform this primary duty of prevention gives rise to a "secondary duty."172 Under the secondary duty, the nation, having failed to perform its primary duty, must punish offenders and make reparations where required.173

The first issue is whether the economic injury caused by transmigration is one which Mexico owes a fundamental duty, under international law, to prevent. In his work The Law of Nations, the publicist Vattel wrote that anything harmful gives rise to the primary duty of prevention:

The Nation, or the sovereign, must not allow its citizens to injure the subjects of another state, much less to offend that state itself; and this not only because no sovereign should permit those under his rule to violate the precepts of the natural law, which forbids such acts, but also because Nations should mutually respect one another and avoid any offense, injury, or wrong; in a word anything which might be harmful to others.174

The duty to prevent injury to another nation's economy may rest on more specific grounds than this. Nations have continually demonstrated their belief that economic welfare is an international concern by entering into treaties for economic cooperation.175 Two aims of the United Nations are "to employ international machinery for the promotion of the economic and social advancement of all persons . . ."176 and "[t]o achieve international cooperation in solving international problems of an economic . . . character . . ."177 The OAS Charter reaffirms the principle that "[e]conomic cooperation is essential to the common welfare and prosperity of the peoples of the continent."178

All nations recognize the importance of their own economic welfare, but the issue here is the extent to which they acknowledge

---

173. Oppenheim, supra note 164, at 308.
174. Mais d'un autre côté, la Nation, ou le Souverain, ne doit point souffrir que les Citoyens fassent injure aux sujets d'un autre Etat, moins encore qu'ils offensent cet Etat lui-même. Et cela, non seulement parce qu'aucun Souverain ne doit permettre que ceux qui font tous les ordres violent les préceptes de la Loi Naturelle, qui interdit toute injure; mais encore parce que les Nations doivent se respecter mutuellement, s'abstenir de tout offense, de toute lezion, de toute injure, en un mot, de tout ce qui peut faire tort aux autres.
177. U.N. CHARTER art. 1, § 3.
178. O.A.S. CHARTER art. 5(i).
a duty to protect the economic welfare of another nation. In cases where a nation has claimed damages for the injurious conduct of private foreign nationals, the primary duty of prevention has been recognized, particularly for injury caused by air pollution,\textsuperscript{179} mob violence,\textsuperscript{180} and counterfeiting.\textsuperscript{181} Counterfeiting is the conduct most analogous to transmigration.

Preventing economic injury is not always a recognized duty: in commerce, for example, a nation assumes the risk of economic loss. It is well recognized, however, that a nation may protect its economy by making counterfeiting illegal, and that nations shall endeavor to prevent the counterfeiting of another nation's currency within its territory.\textsuperscript{182} Similarly, it is a principle of international law that a nation may protect itself by making and enforcing laws that exclude aliens, and it is suggested above that other nations owe a duty to prevent activity within their territory that threatens to violate those protective laws. Moreover, the analogy of transmigration to counterfeiting is particularly appropriate, because the laws that prohibit these activities are, in both cases, designed to protect a nation from economic injury.\textsuperscript{183}

Traditionally, nations have associated the security of their monetary systems with their fundamental right to exist.\textsuperscript{184} Counterfeiting causes economic harm, because it is a subversive injection of money into a nation's monetary system,\textsuperscript{185} which undermines the value of the victim nation's currency and thwarts attempts by that

\begin{itemize}
\item \textsuperscript{179} The decision in The Trail Smelter Case (United States v. Canada), III R. Int'l Arb. Awards 1905 (1941) expresses the modern accepted view on air pollution:
\begin{quote}
Under the principles of international law, as well as the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties of the persons therein.
\end{quote}

\item \textsuperscript{180} Janes Claim (United States v. Mexico), United States-Mexico, General Claims Commission (1926), \textit{reprinted in} Briggs, \textit{supra} note 170, at 605-11 (Mexican authorities failed to take effective steps to apprehend the man who shot Janes); Youmans Claim (United States v. Mexico), United States-Mexico, General Claims Commission (1926), \textit{reprinted in} Briggs, \textit{supra} note 170, at 705-11 (Mexico showed a lack of due diligence in the punishment of nationals implicated in mob violence in the United States).

\item \textsuperscript{181} M. Garcia-Mora, \textit{International Responsibility For Hostile Acts of Private Persons Against States} 151 (1962); U.S. v. Arjona, 120 U.S. 479 (1886).

\item \textsuperscript{182} U.S. v. Arjona, 120 U.S. 479, 484 (1886).

\item \textsuperscript{183} See note 12 supra.

\item \textsuperscript{184} Garcia-Mora, \textit{supra} note 181, at 131-32.

\item \textsuperscript{185} The effect is to undermine the value of the money counterfeited and to create inflation. Napoleon I was considered a master counterfeiter or faux-monnayeur. In his wars against Austria, England, and Russia, he made use of this tactic to debilitate those nations' economies. See A. NuSSBAUM, \textit{Money in the Law — National and International} 494 (1950).
\end{itemize}
nation to control its money supply. In a similar fashion, transmigration, by contributing to "dollar drain," causes uncontrollable changes in the money supply of the United States. 186

The concept that a nation's money should be protected from counterfeiting has expanded with the growth of international commerce. 187 Today, the security of a nation's monetary system is as important internationally as it is domestically. It is recognized, for example, that a nation has a fundamental right to protect its balance-of-payments. 188 As a result of developed economic practice, the right of a nation to protect itself economically is now expressed in broad terms; Article 23 of the OAS Charter reads in pertinent part: "Each State has the right to develop its cultural, political and economic life freely and naturally." 189 A nation's duty under the OAS Charter is likewise as broad and clear: "The member States should make every effort to avoid policies, actions, or measures that have serious adverse effects on the economic or social development of another Member State." 190

Given the status of economic protection in international law, the duty of Mexico becomes clear. To the extent transmigration contributes to American economic instability and impairs the right of the United States to protect its economy, Mexico owes a duty to use due diligence to prevent transmigration.

4. Possible defenses. The first question to ask is whether Mexico has satisfied her duty to exercise due diligence to prevent Mexican transmigration. The answer will revolve around the definition of due diligence, which is unsettled in international law. Some tribunals have supported a definition requiring that governments exercise available means. 191 Other tribunals have supported the definition advanced by the United States that governments must do what is required to prevent injury. 192 Under either definition, a nation's government is not expected to prevent acts committed in secrecy or by surprise. 193 Mexico, however, is aware of its transmigration and has unofficially revealed it will make no effort

186. See note 61 supra.
188. Nussbaum, supra note 185, at 475-76.
189. O.A.S. Charter art. 30 (emphasis added).
190. O.A.S. Charter art. 34 (emphasis added).
191. Borchard, supra note 172, at 188.
192. Case of Salvador Prats, reprinted in Eagleton, supra note 130, at 88-89.
193. Fenwick, supra note 169, at 301.
to prevent its nationals from participating. Mexico has not, therefore, satisfied its duty under either definition of due diligence.

The duty to exercise due diligence to prevent transmigration is subject to one defense which Mexico would likely assert — self-preservation. When a state is in real and imminent danger, it may excusably infringe on the rights of other nations, subject to the limitation that the danger be avertable by no other means. Experts agree that Mexico would be in great danger economically, politically, and socially if transmigration were not allowed to continue. The pertinent question, then, is whether these dangers can be averted by means other than the continuation of transmigration.

This Comment suggests above that Mexican transmigration will not solve Mexico’s problems; transmigration is symptomatic evidence of Mexico’s underlying economic debility. Moreover, transmigration is the cause of problems for the United States. The problems and their sources — push and pull forces — have been identified as economic in nature. If there exists a means to eliminate or otherwise relocate these forces — that is, an alternative to transmigration for Mexico to handle her severe internal problems — the defense of self-preservation becomes untenable. Because the nature of the transmigration problem strongly suggests an international economic approach to the solution, one must examine whether economic cooperation by Mexico is an alternative means of self-protection, which she ought to pursue to protect the United States from injury.

For Mexico to agree to economic cooperation, two criteria must be met: (1) Mexico may not be subjected to either the immediate danger transmigration now averts or any new dangers that could threaten Mexico’s existence, and (2) seeking economic cooperation with the United States must satisfy Mexico’s primary duty

194. There has, nevertheless, been a recent agreement between Governor Robert de la Madrid of Baja California Norte and Michael Walsh, United States Attorney for the Southern District of California. In the agreement, Mexico’s full cooperation was pledged to identify and prosecute major transmigrant smugglers. The objective is to reduce border violence and the exploitation of transmigrants. Mexico has not, however, otherwise committed itself to preventing transmigration. Walsh, A Light At Both Ends Of The Border Tunnel, San Diego Union, July 1, 1979, § C, at 3, col. 1; see also Roundup Of The People Smugglers, Newsweek, July 30, 1979, at 38.


197. Maxwell, supra note 8.

198. See text accompanying notes 74-94 supra.
to use due diligence to prevent transmigration.\textsuperscript{199}

The first criterion could be met if the United States allowed transmigration to continue to the degree necessary to avert immediate danger to Mexico and if Mexican concessions in a cooperative economic program would not endanger Mexico in new ways. The recommendation offered below is meant to secure both for Mexico.

The second criterion is more difficult to meet because of the standing United States definition of due diligence. If the United States will require success in a cooperative effort before it will acknowledge the satisfaction of Mexico's duty, then it is unlikely Mexico will pursue the effort.

Success, in this case, cannot be guaranteed. The United States must therefore use one of two tactics — either change its strict interpretation of due diligence or agree by treaty to acknowledge a satisfaction of Mexico's duty providing Mexico uses her best efforts in the cooperative arrangement. The use of specific language in the treaty could make Mexico's duty to perform more easily enforceable.\textsuperscript{200}

A second defense Mexico could raise regarding her inaction toward the transmigration problem is the United States contribution to the problem.\textsuperscript{201} United States statutes prohibit transmigrants from seeking employment in the United States,\textsuperscript{202} but it is clear these prohibitive laws are not a deterrent to transmigrants. As long as United States law allows American employers to hire transmigrants with impunity, there is a strong argument that the United States contributes to, and is perhaps wholly responsible for, the pull forces that exist on the United States side of the international border. To overcome this defense, the United States could, of course, pass and enforce laws prohibiting the employment of transmigrants by United States employers, as recommended by Representative Peter Rodino, former Attorney General Griffin Bell, President Carter, and Secretary of Labor F. Ray Marshall.\textsuperscript{203}

\textsuperscript{199} If economic cooperation would not satisfy the primary duty, then Mexico could not be expected to pursue it thereby changing her present position.

\textsuperscript{200} The United States might want to make clear in the treaty that this \textit{ad hoc} change in position by the United States on the definition of due diligence does not suggest a general change in the official stand.


\textsuperscript{203} See notes 120-23 supra, and accompanying text.
There exists, however, a paradox in Mexico raising this defense of United States contribution to the transmigration problem. Mexico recognizes the necessity of transmigration to prevent an internal crisis, yet Mexico, by raising this defense, would accuse the United States of allowing transmigration to continue.\footnote{Maxwell, \textit{supra} note 8.} If the United States Congress were to pass a law today making the hiring of transmigrants illegal, and if the law were successful in drying up pull forces in the United States, the diminution of transmigration might be so harmful to Mexico that the United States could be accused of an aggressive and unfriendly act against Mexico.\footnote{\textit{Id.}} Transmigration is not suggested here or anywhere to be such an immediate threat to the United States that self-protection could justify harming Mexico. It is not the recommendation of this Comment that such laws be immediately passed. The United States should make Mexico aware, however, that refusal to pass such laws is not to be interpreted as hypocrisy or used to assert estoppel against the United States. Neither is it recommended that the United States take a lenient stand on the transmigration issue. Transmigration should be allowed to continue, but only as one part of a cooperative economic effort with Mexico — an effort the United States should forcefully insist Mexico join.

Economic cooperation, as an alternative means to transmigration, overcomes Mexico’s defense of self-preservation; it is also the most evident long-term solution to the prevention of transmigration. To prod Mexico into pursuing this course, the United States must confront Mexico with her duty to prevent transmigration — perhaps by insisting on the punishment of transmigrants who attempt to enter the United States or by demanding the payment of reparations from Mexico. The United States could, for example, demand that Mexico reimburse the United States for the expense of maintaining a border patrol and border fences. A friendlier approach might be, however, to confront Mexico with her \textit{duty} to cooperate economically with the United States.

5. \textit{The duty to cooperate economically.} In 1948, the United States and Mexico, with other American states, formed the Organization of American States.\footnote{\textit{See O.A.S. CHARTER, supra note 151.}} Two essential purposes of the organization are “to seek the solution of political, judicial and \textit{economic} problems that may arise among them”\footnote{O.A.S. \textit{CHARTER} art. 4(d) (emphasis added).} and “to promote, by co-
operative action, their economic, social and cultural development.208 Article 35 of the OAS Charter states the duty of the member nations more specifically: “The member States agree to join together in seeking a solution to urgent or critical problems that may arise whenever the economic development or stability of any Member State is seriously affected by conditions that cannot be remedied through the efforts of that State.”209

The question, then, is whether Mexico has cooperated economically with the United States to halt transmigration. As a rule, Mexico isolates herself economically by severely restricting foreign investment and refusing to accept direct foreign aid.210 There are, however, two examples of cooperation between the United States and Mexico that are worth noting in the search for a solution to the transmigration problem. One program, the Mexican Farm Labor211 or Bracero program, allowed great numbers of Mexican nationals, when needed by growers in the United States, to work as farmworkers. The Bracero program was discontinued in 1965, however, causing staggering unemployment in Northern Mexico.212 The reaction to the high unemployment was an investment program known as the Border Industrialization Program213 (BIP) — the second example of economic cooperation between the United States and Mexico. Currently under the BIP, United States firms may invest in a twelve and one-half mile deep zone in Mexico along the United States-Mexico border, with only two requirements: that the entire production be exported, and that Mexican labor be used exclusively.214

The BIP has been a success: in Northern Mexico, unemployment dropped from seventy percent in 1969 to ten percent in 1970.215 In the United States, American businessmen can finally compete with East Asian manufacturers who also use “cheap” la-

208. O.A.S. Charter art. 4(e) (emphasis added).
209. O.A.S. Charter art. 35 (emphasis added).
214. Id.
215. Id.
The BIP has, however, contributed to Mexican transmigration. Employment opportunities draw Mexicans northward where they are attracted by even better employment opportunities in the United States.

The concept of the BIP could, nevertheless, play a significant role in preventing transmigration. Its implementation shows: (1) Mexico is not entirely against wholly-foreign investment within her borders, and (2) the migration of Mexicans can be affected by an isolated investment region located within Mexico. BIP-type investment regions could foreseeably be established in the interior of Mexico to divert the flow of transmigration. This possibility should be scrutinized as part of a comprehensive cooperative economic program between the United States and Mexico.

C. Summary of Foreign Policy Recommendations

On the basis of the preceding analysis of the transmigration problem and applicable international law, the following summarizes those measures the United States and Mexico should take to prevent Mexican transmigration:

1. The United States should finance impact studies of Mexican transmigration. The problem needs to be observed quantitatively to determine whether efforts to relieve it are effective.

2. The United States should confront Mexico with her pri-

---

216. Id.
217. Border Town Growth Tied to Alien Influx, supra note 94.
218. Transmigration has recently been made an even more complex issue with the discovery of abundant oil and natural gas resources within Mexico — resources desperately needed by the United States. See Carter Pressed to Give In to Mexicans on Gas Prices, L.A. Times, Feb. 11, 1979, pt. 1, at 1, col. 4. United States and Mexican government officials deny that negotiations on oil will make transmigration a negotiable item, that is, that Mexico will seek a more lenient United States transmigration policy in exchange for Mexican oil and natural gas. Such a trade, however indirectly proposed, is nevertheless likely. Maxwell, supra note 8. Negotiations for oil between the United States and Mexico have already been threatened by Chicanos who would have the Mexican government refuse to sell natural gas to American companies who exploit transmigrants. New Tactics Being Used in Behalf of Aliens, L.A. Times, Feb. 8, 1978, pt. 1, at 3, col. 1. A clear United States foreign policy on transmigration is therefore necessary to future oil negotiations. Mexico's vast oil resources could be the foundation for the economic development Mexico needs. Such development could be coordinated with efforts to prevent transmigration and must at least be planned so as not to aggravate transmigration. Assuming Mexico acknowledged her duty to cooperate economically with the United States and Mexico were held to her duty of due diligence in such an effort, she could make use of her development in the oil and gas industry to provide a partial solution to the transmigration problem. For example, by providing employment opportunities in the oil and gas industry, she could divert the flow of her transmigrating nationals — perhaps by allowing freer foreign investment in this industry in BIP-type investment regions.
mary duty under international law to prevent transmigrants from entering the United States. The United States should not allow its own present inaction to be interpreted as leniency on the issue.

3. An Economic Development Commission\textsuperscript{219} should be established by treaty between the United States and Mexico. The Commission's purpose and goal would be to halt transmigration into the United States by changing those economic conditions causing it. Those changes should be:

a. To relocate current employment pull forces by establishing BIP-type investment regions in Mexico's interior. The goal would be to divert the migration of Mexicans from their present destinations — Mexico City and the United States — to the newly formed investment regions by providing employment there. As Secretary of Labor Marshall said, "Developing labor-intensive rural industries (in Mexico) is the key to dealing with [transmigration] . . . ."\textsuperscript{220} Investment laws in these regions must be liberal to attract American and other foreign investors.

b. To continue attempts to regulate the flow of transmigrants into the United States, but never to a degree that would be harmful to Mexico. This regulation should be supported with manpower and finances by both nations. If both countries contribute equally, Mexico will thereby discharge her fundamental duty to prevent transmigration to the extent the United States would exercise its fundamental right to prevent it.

Ideally, the Economic Development Commission would coordinate the effect of new legislation in both countries so transmigrants would not suffer from reduced employment opportunities at any given time in the process. Employment opportunities would be increased in Mexico as rapidly as they would be reduced in the United States.\textsuperscript{221}

\textsuperscript{219} See, e.g., Intergovernmental Committee for European Migration, Nov. 30, 1954, 6 U.S.T. 603, T.I.A.S. No. 3197.

\textsuperscript{220} Eaton, \textit{supra} note 41. Also note that this proposal is in line with the papal policy of "bringing the work to the workers, wherever possible, rather than drafting workers to the scene of the work." \textit{Pope Paul VI, supra note 135} (quoting \textit{Pope John XXIII, Pacem in Terris} 33-34 (1965)). The World Bank and the Inter-American Development Bank have a similar objective to create industrial activity, employment, and income in isolated investment regions in rural Mexico. \textit{Development Lending and Illegal Immigration: Hearing Before the Subcomm. on Int'l Dev. Institutions and Finance and Urb. Aff., 95th Cong., 1st Sess. 13-15, 33-37 (1977)}.

\textsuperscript{221} Compare this recommendation with that of the House Select Committee on Population, which proposed that foreign assistance be offered to create industries and jobs in Mex-
III. CONCLUSION

Mexicans are transmigrating to the United States in greater numbers each year, yet the governments of Mexico and the United States have taken no action.222 The United States government is presently doing little to prevent transmigration, because it is tethered by political interest groups;223 the Mexican government does nothing to prevent transmigration, because it is in Mexico's economic best interest to allow it.224

Transmigration is easing economic pressures in Mexico, but is compounding economic pressures in the United States. Population growth, unemployment, "dollar drain," and the use of government-provided services and benefits are all being increased by transmigration.225 Past efforts by the United States government have not succeeded in halting transmigration or in alleviating its effects, because the efforts have been unilateral, whereas the causes of transmigration — push and pull forces — are bilateral.226

Since the real causes of transmigration exist both in the United States and in Mexico, there must be a cooperative attempt at prevention by the two countries. Cooperation will not only assure improved economic conditions in both countries but ameliorate the plight of the victim caught in-between — the individual transmigrant.

Before the United States can expect Mexico to cooperate, however, it must prompt Mexico to recognize her duties under international law. These duties are: the duty Mexico owes to prevent transmigration; the responsibility Mexico assumes in case she fails to perform the duty of prevention; and the duty Mexico owes to engage in economic cooperation with the United States to alleviate economic push forces. In short, the United States must formulate a new foreign policy approach with Mexico on the issue of transmigration, and international law provides the guidelines to that approach.

Samuel W. Bettwy