

# New Formulas, Old Sins: Human Rights Abuses Against Migrant Workers, Asylum Seekers, and Refugees in the Americas

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Human rights norms and practices have been institutionalized at the international level and, concomitantly, have grown in stature, attaining an unparalleled level of legitimacy. As a result of the growing legitimacy attained by human rights, instances in which states commit human rights abuses in *broad daylight* (i.e. acknowledging that the actions were committed and disclosing the identity and affiliation of perpetrators) are becoming rarer today. Hence, states increasingly have turned to sophisticated, deceitful strategies aimed at concealing their unlawful actions. A growing tendency is seen in the inclination of regimes to manipulate discourse by using dubious legal terminology or by resorting to *euphemisms* that distort the real nature of their actions and thus mask abusive practices. More disturbingly, in pursuing their interests, several states subcontract or outsource human rights abuses to other parties, including other states and/or private actors. As part of the effort to broaden our understanding concerning strategies used by states to conceal human rights violations, this piece examines the ways in which states attempt to disguise or camouflage abuses perpetrated against migrants. This article argues that as part of their overall efforts to thwart the arrival of migrants, refugees, and asylum seekers, some states in the Americas, particularly receiving and transit countries, infringe upon the fundamental rights of such peoples. In order to conceal these illegal practices, states rely on a two-pronged strategy: on the one hand, they distort the real nature of their violations by using a benign, human rights friendly discourse to characterize their policies; on the other, they rely on other states or private actors to perpetrate human rights violations as a means to implement measures designed to contain the flow of foreign nationals attempting to reach their territories.

In the last five decades the Americas have witnessed important developments in the field of human rights. Since the adoption of the Universal Declaration of Human Rights and the American Declaration of the Rights and Duties of Man in 1948, the subsequent covenants including the 1966 International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights, and the 1978 American Convention on Human Rights, international instruments enhanced their strength and scope to protect and ensure human rights have. Simultaneously, universal and regional human

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rights bodies and mechanisms have been created to enforce compliance with the obligations set forth in the aforementioned instruments.

Since the 1970s this trend has been reinforced as states have ratified several other international instruments. In doing so, states have effectively surrendered part of their sovereignty and become accountable to the international community for their actions. One author describes this historical trend as the *internationalization of human rights* (Forsythe 1991: 11, 17-20).<sup>1</sup> Human rights norms and practices thus have been institutionalized in the international realm and, concomitantly, grown in stature, attaining an unparalleled level of legitimacy, both among states and public opinion worldwide.

In practical terms, in spite of recurrent violations, “international consensus has implanted human rights as a nearly universal vocabulary of debate, aspiration, and civic challenges to state legitimacy” (Brisk 2002: 4). As a result of the growing legitimacy attained by human rights, the instances in which states commit human rights abuses in *broad daylight* (i.e. acknowledging that the actions were committed and disclosing the identity and affiliation of perpetrators) are becoming rarer today. Governments can ill afford to commit blatant abuses against their citizens or persons residing under their jurisdiction because they risk being stigmatized and ostracized by the community of nations. Hence, states increasingly have turned to sophisticated, deceitful strategies aimed at concealing their unlawful actions. However, this strategy cannot be attributed only to repressive semi-authoritarian and totalitarian regimes; even institutionalized democracies, generally characterized by solid human rights records, engage from time to time in this type of behavior (Risse, Ropp and Sikkink 1999: 24).

States, at least those concerned with their international prestige and which aspire to remain respectable members of the international community, use diverse mechanisms to conceal human rights abuses. Traditionally, highly repressive regimes attempt to conceal their actions in secrecy and to restrict access and freedom of movement and expression to prevent information regarding human rights abuses from surfacing. Thus, as a rule, they generally contest charges regarding improper behavior, categorically denying any wrongdoing. When international pressure upon them mounts, however, they adapt their discourse to deflect criticism for instrumental reasons without really modifying their behavior (Risse, Ropp and Sikkink 1999: 11-24; Keck and Sikkink 1998: 23-4).

A growing tendency regards the inclination of regimes to manipulate discourse by using dubious legal terminology or resorting to *euphemisms* that distort the real nature of their actions and thus mask abusive practices. More disturbingly, in pursuing their interests, several states subcontract or outsource human rights abuses to other parties, including other states and/or private actors (Gordon 2002: 321-337). As part of the effort to broaden our understanding of the strategies used by states to conceal human rights violations, this piece examines the way in which states attempt to disguise or camouflage abuses perpetrated against migrants in the Americas.<sup>2</sup> While our analysis is restricted to the Americas, the aforementioned pattern is prevalent in Asia, Africa, Europe, and Oceania, although showing different variations.

We argue that as part of their overall efforts to thwart the arrival of migrants, refugees and asylum seekers, some states in the Americas, particularly receiving and transit countries, infringe upon the fundamental rights of such peoples. In order to conceal these illegal practices, states rely on a two-pronged strategy: on the one hand, they distort the real nature of their violations by using a benign, human rights friendly discourse to characterize their policies; on the other, they rely on

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<sup>1</sup> This argument has also been brought forward by several constructivists who underline the role that inter-subjective ideas play in shaping actors' interests and expectations in international politics. See among others Wendt 1999; Adler 1997; Finnemore and Sikkink 1999; Barnett and Finnemore 1999, and especially Risse, Ropp, and Sikkink 1999

<sup>2</sup> By the rubric “migrants” we refer in this article to non-citizens including migrant workers, asylum seekers, and refugees. Unless specified hereafter, we use the terms “migrants” and “non-citizens” interchangeably.

other states or private actors to perpetrate human rights violations as a means to implement measures designed to contain the flow of foreign nationals who attempt to reach their territories.

The article is divided into four sections. In the first part, we briefly discuss the growing phenomenon of migration and the logic of migration policies. We then turn to examine the relationship between human rights and migration, emphasizing the special vulnerability of migrant populations. In the third section, we explore a number of instances in which states in the Americas resort to the manipulation of language in order to conceal human rights violations. Finally, we turn to the phenomenon of outsourcing human rights violations against migrants and asylum seekers, examining several concrete situations in the Americas in which states deliberately rely on external sources, private actors, or other states to implement migratory controls aimed at curbing the arrival of foreigners to their territories.

## I MIGRATION IN A GLOBALIZED WORLD

### Migration as a Growing Phenomenon in World Politics

The increasing number of people attempting to escape from violence, destitution, and lack of economic opportunities in search for a dignified life has pushed migration into the forefront of the international political agenda. While migration represents a historic event, in the last two decades it has grown dramatically, becoming a truly global phenomenon characterized by conspicuous economic, social, and political ramifications (Koslowski 2001: 4-7; Castles and Miller 1993: 9). International actors including states, intergovernmental bodies, and non-governmental organizations are therefore paying increasing attention to this issue.

The International Labor Organization (ILO) indicates that between 1965 and 1990 the number of migrants rose by nearly 50 %, from 75 to 120 million people. Of that total number, 70 to 80 million people migrated to search for work, while the rest were either refugees or internally displaced as a result of violent conflict. In the case of migrant workers, an elevated yet undetermined percentage is composed of undocumented persons (ILO 1994).<sup>3</sup> On the other hand, between 1970 and 1990 the total number of countries of destination for migrant workers (i.e., receiving countries) increased from 39 to 67, whereas countries of origin of migrants augmented from 29 to 55. The number of countries that both receive and are a point of origin of migrants also grew from 4 to 15 (Böhening and Oishi 1995: 794-8). In 2000, an estimated 175 million people – approximately 3 % of the world's population and a number roughly equal to the population of Brazil— resided in a country other than that of their birth or nationality for more than 12 months (UN Population Division 2002).

What accounts for this sharp increase in the number of persons who leave their countries of origin? Experts agree that migration has augmented as a consequence of a combination of social, political, economic, and demographic factors. In this respect, the steep expansion of the world's population, which surpassed 6 billion in 2000, has naturally contributed to eliciting greater migration pressures. Between 1970 and 1990, migration grew annually on average by 1.9 %. This number was just 0.1 % above the world population's annual growth rate of 1.8 %, however. Accordingly, some scholars suggest that the increase in the total number of migrants does not necessarily mean that we are witnessing a significant boost in the propensity of people to migrate; rather, this rise reflects population growth (Stalker 2000: 5-7).

The ascendant trend of a growing number of people seeking to migrate has also been buttressed by political developments. A major factor was the lifting of restrictions on population move-

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<sup>3</sup> It should be noted that assessing the real number of undocumented migrants is very difficult because there is no reliable source of data. Additionally, undocumented migrants are reluctant to participate in surveys or other data collection efforts because they fear being identified by authorities, and later detained and deported.

ment in communist countries in Europe and Asia brought by the demise of the Soviet Union. Following a steep deterioration in the standard of living in the former U.S.S.R. and its satellite countries, thousands of individuals decided to immigrate, especially to Europe. At the same time, in the last decade political instability and violence in Africa, the Balkans, the Caucasus, Central Asia, and Latin America, derived from ethnic, national, economic, and religious grievances, pushed hundreds of thousands of persons to emigrate in search of a brighter future (Weiner 1995: 1-9; Loescher 1993: 3-4).

Just as political conditions have motivated migration, economic reasons have also reinforced people's decision to migrate. Perhaps the most important factor behind the increase in migration has been the growing discrepancy in the standards of living and the provision of social and labor services (e.g., access to education, health services, pensions) between developed and developing countries. While disparities among rich and poor countries constitute historical feature, over the last 20 years these gaps have widened substantially. Wages are a case in point. While salaries have been on the rise in most developed countries, in the majority of developing countries they have diminished or stagnated in the last 20 years. In 1980, for example, the ratio of the hourly wage in the manufacturing sector in China compared to that of the United States was 1:36 (US\$0.25 to US\$9.87); by 1995 the ratio had risen to 1:72 (US\$0.25 to US\$17.20) (Stalker 2000).

Revolutionary advances in technology and the concomitant globalization of world commerce, communication, and transportation have also had a major impact in facilitating migration. Technological improvements have reduced the cost and multiplied the efficiency of transportation, especially air travel. Additionally, the penetration of the international media has allowed a growing number of people in the developing world to become attracted to the pleasantries and life opportunities in developed countries. Cultural symbols often associated with higher social status, which are disseminated through the media and the cinema and music industries, also lure people in developing countries to migrate. Technological advances, moreover, help migrants to bear the costs of their decisions to emigrate. Easier access and lower costs in communications help migrants to stay in touch with their families and environment, thus decreasing feelings of isolation (Cairncross 2002: 3-6).

Sociological transformations have also contributed substantially to increasing the magnitude of migration flows. One of the most conspicuous elements concerns the propensity of women to migrate. While historically women represented a small percentage of the total number of migrants, in 1999 they made up 47.5 percent of the total. Reflecting changes in social behavior, today more families and, more interestingly, an ever growing number of young women migrate on their own. (International Organization for Migration 2000).

Simultaneously, the expansion and consolidation of migrant communities in several receiving countries have also become crucial factors that help explain the growing numbers of the migrant population. Migrant communities tend to operate like magnets attracting newcomers: they develop important *ad hoc* networks that disseminate crucial information on immigration regulations and on the labor and housing markets that facilitate the further arrival of friends and relatives from their communities of origin (Massey, Durand and Malloy 2002: 18-21; Cairncross 2002: 3-6).

In short, as a result of a combination of social, political, economic, and demographic factors the number of people seeking to migrate has not only increased steeply, but also pushed the issue to the forefront of international politics.

### **The Logic of Migration Policies**

As described above, migration is constituted by a series of complex processes which also have ample social, economic, and political repercussions. In essence, migration is shaped by the interaction between two different sets of actors. On the one hand, states that attempt to regulate the exit and entry of persons from and into their territories according to their national interests; on the

other hand, individuals who aim to leave one country and settle in another (Zolberg 1981: 6-25).<sup>4</sup> As a result of the asymmetrical power relations characterizing the interaction between these two kinds of actors, migrant workers, asylum seekers, and refugees tend to suffer grave human rights violations (Taran 2000).

When it comes to devising immigration policy, states need to reconcile domestic concerns and foreign policy considerations, including respect for international human rights norms. States, particularly receiving ones, usually seek to regulate the inflow of foreigners according to economic and political considerations. As far as economic factors are concerned, the arrival of immigrants (workers), especially if the number of newcomers is sizable, generally affects the labor market in several ways: for example, by lowering wages and thus increasing the elasticity of the labor supply. In this respect, several countries promote the immigration of skilled workers as a way to enhance productivity and fill shortages in strategic industries (e.g., information technology). Others, meanwhile, may be more interested in opening their doors to unskilled workers who are willing to perform jobs that the local population is not. Similarly, states with low or negative demographic growth and a large retirement-age population normally seek to promote immigration as a way of expanding their labor force. Some nations require active workers to enlarge the ranks of those contributing to the welfare system and to finance education, health, pension, and other social programs. During cycles of economic growth when labor becomes scarce, countries normally seek to promote immigration. In periods of recession the opposite occurs: states tend to limit the arrival of foreigners because they face a surplus of labor (Weiner 1995: 140-4; Zolberg 1999: 1276-9).

The forces that shape migration policies transcend the economic domain, however. Political considerations, while normally intertwined with economic ones, also play a crucial part in determining immigration policies. States shape these policies by reacting to public opinion vis-à-vis the presence of foreigners. When public opinion is manifestly in favor of accepting foreigners (i.e., for humanitarian, economic or security considerations), governments generally loosen entry requirements. States may also open their doors to foreign workers when pressed by certain influential sectors, particularly business groups. These groups often lobby to favor permissive immigration policies, either because they are facing labor shortages or because they want to contract foreigners who work for lower wages (Weiner 1995: 140-4; Teitelbaum 1984: 429-50; Castles and Miller 1993: 18-35).

When public opinion turns against the entry of foreigners, states usually respond conversely by implementing restrictive, anti-immigration measures. This situation arises when the presence of migrant workers, asylum seekers, and/or refugees prompts resistance and uneasiness on the part of the local population. Antipathy or resentment towards foreigners may be triggered by multiple factors. In certain sectors of the receiving society, fear of losing jobs or seeing wages plummet as a result of the presence of foreigners fuels public resentment. Resistance is also often prompted by fear that foreigners may overload government-run social services. Local sectors also commonly fret that the presence of foreigners may change long-standing cultural patterns in an unpredictable and undesirable fashion. In several countries, particularly those characterized by homogenous populations, the arrival of foreigners whose appearance, customs and religion are markedly different generally elicits a negative reaction and unease on the part of some sectors of the native population (Weiner 1995: 140-4). The recent upsurge of terrorism worldwide has exacerbated in many countries native mistrust and resentment of foreigners, especially people of Middle Eastern descent. In this sense, the harmonious absorption of foreigners remains a daunting challenge for most countries.

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<sup>4</sup> Zolberg (1981) points out that states, in general, insist that emigration is a legitimate aspiration and thus reject placing restrictions on persons exiting countries of origin. By restricting the right to enter their territories (a concomitant right derived from the overall perception that emigration is legitimate) states engage in a contradictory behavior.

Meanwhile, transit countries for migrants determine their immigration policies by using similar considerations as receiving states because they normally share similar apprehensions concerning the presence of foreigners in their territories. While many migrants enter transit countries without the intention of staying, their massive arrival, even if temporary, may generate concern among local citizens. One of the most difficult problems faced by countries of transit is the pressure brought to bear on them by receiving countries –especially when the latter are powerful in economic terms— oftentimes to enforce severe migration controls.

It is apparent that immigration policies constitute a matter of international interest if only because they reflect the manner in which foreign nationals are perceived and treated by receiving or transit states. Because national sentiments are prevalent, states are usually sensitive to the treatment of their nationals abroad. Abuses against these people often strike a nationalist cord, something that aggravated governments often use to obtain local support. Taking into account this factor, a receiving or transit state must attempt to reconcile its own objectives and interests with those of sending states in an effort to avoid friction and maintain mutually beneficial relations. Immigration policies and practices thus need to reflect ostensibly rational, objective, and logical reasoning, and must not harm the national interests of sending states. Furthermore, immigration policies and practices must take into account international human rights law.

## II. MIGRATION AND HUMAN RIGHTS VIOLATIONS

Understanding the logic behind immigration policies helps to elucidate why human rights violations against migrants are so common and widespread. While abuses against these individuals stem from several complex factors, three causes stand out. First, violations derive from restrictive governmental policies that seek to limit the flow of migrants into countries. As a reaction to public resistance against the presence of foreigners, states often implement policies that contravene basic human rights standards. Second, violations are the result of prevalent racially discriminatory<sup>5</sup> and xenophobic<sup>6</sup> attitudes on the part of some sectors of the local population, including state agents. Third, violations stem from opportunistic employers who exploit migrants in order to extract economic benefits. It is worth emphasizing that the different causes of abuse are related to the underlying premise that migrants are a marginal group living at the fringes of society. In ancient Rome, groups such as these were dubbed *Homo Sacer*. Although *Homo Sacer*s are humans, they are nonetheless, as Giorgio Agamben suggests, excluded from the human community and, therefore, are in many ways conceived as people without rights (Agamben 1998).

A variety of actors take part in this infringement, including, state agents, common criminals, traffickers and smugglers in human beings, employers, and even the general population. Violations include infringements on due process guarantees during criminal and immigration proceedings; unfair and substandard working conditions; discriminatory, limited or complete lack of access to basic social services (e.g. housing, health, and pensions), and political rights (e.g. the right to vote in the country of origin and the possibility to obtain citizenship in the receiving country); harassment and discrimination on the part of the authorities and the population; deficient or degrading detention conditions, and the impossibility of using the legal system to seek protection for their rights.

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<sup>5</sup> Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination states that racial discrimination means: "any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in people's ideology based on the idea that human beings should be separated into distinct racial groups and that these groups can be ranked on a hierarchy of intelligence, ability, morality and so on."

<sup>6</sup> While there is no universally accepted definition of xenophobia, we define it as an irrational and obsessive hatred of people who are foreign or perceived as foreign. See International Encyclopedia of the Social Sciences 2004.

The state is both responsible for establishing discriminatory and restrictive policies against non-citizens and for not effectively protecting their rights (Taran 2000: 8-20).

It is important to underscore that migrants constitute an especially vulnerable population prone to suffer human rights abuses (UN Economic and Social Council 1998). Migrants are often unfamiliar with the law, customs, and even the language of the place to which they immigrate. These problems disproportionately affect migrant women and children. Additionally, non-citizens frequently encounter open ethnocentric hostility from certain sectors of the local population. Ethnocentrism is usually intertwined with racist beliefs, thereby reinforcing the sense of supremacy of some cultures or peoples, and has become rooted in nearly all countries of the world, although to varying degrees (Hjerm 1998: 335-340; Levine and Campbell 1971: 7-21).

The vulnerability of foreigners is particularly acute in the case of undocumented migrants. As a consequence of their irregular migratory status, they are exposed to even more serious abuses than documented migrants, especially in the work place. Employees who are aware of their precarious situation repeatedly take advantage of them. Common abuses against migrants include the payment of salaries below the national minimum wage; denial of basic working benefits and rights such as the right of association; dangerous working conditions (e.g., lack of minimal conditions of hygiene and security), and harassment of workers who dare to challenge existing conditions. Undocumented migrants are unlikely to denounce abuses for fear of calling attention to their irregular status and thus being deported, as opposed to obtaining remedies for abuses and protection of their rights. It is important to bear in mind that these people often face deportation or expulsion proceedings that do not meet the minimal standards of due process. Additionally, migrants are victims of criminal rings engaging in human smuggling and trafficking (Inter-American Commission on Human Rights 2002).

Given migrants' vulnerabilities, states have the responsibility to actively guarantee and protect their rights. In this sense, international obligations, drafted as standard-setting norms in binding and non-binding instruments, limit the sovereign power of states. As explained in the introduction, the international community may resort to formal and informal mechanisms to remind states of the obligations they acquired by ratifying international human rights instruments. It should be noted that it is the duty of states to ensure and protect the rights of migrants. In this sense, international human rights treaties specify that states are obliged to guarantee rights and ensure the well-being of all people under their jurisdiction, irrespective of their nationality and whether or not their admission and permanence in the country is authorized. Being an irregular migrant thus has no bearing on the inalienable nature of human rights.

### III. CONCEALING ABUSE: THE MANIPULATION OF DISCOURSE

Public policies are an exercise in sovereignty, limited by the state's constitutional and legal framework. A policy's efficacy is determined not only by its objective, concrete accomplishments and political outcomes, but also by the perception it creates and the way it is received by the public. It is important to underscore that legal discourse helps shape general perceptions which, in turn, influence the way in which collective truth is built (Kent and Sloop 2002). In order to influence public perception and convey a message of success, states regularly rely on the manipulation of legal discourse, if only because governments must also balance conceptions of justice and social obligation in their policy-making process. This tool is employed in every issue area including immigration policy. Indeed, the misuse and manipulation of discourse plays an essential role in the pursuit of immigration policies that violate non-citizens' human rights.

Following Antonio Gramsci's notion of hegemony,<sup>7</sup> discourse can be conceived as part of a structure of domination, which facilitates social control through the production of a specific worldview.<sup>8</sup> Language, as David Kennedy explains, "is neither simply a system of names for tangibles nor a system of value. Rather it is a shared and largely unconscious structure which both controls and permits communication by the choice and recognition of the variable contents presented according to fixed patterns" (Kennedy 1980: 103). The use of discourse in the definition and implementation of immigration policies can be analyzed from a dual perspective: positive and negative. On the one hand, discourse is employed to produce new identities, interests, and ways of relating to the world. On the other hand, discourse can be employed as a mechanism of repression, used as part of a denial and tactical concession strategy to deflect domestic and international pressure concerning human rights violations.

Given the magnitude of migration and the multiplicity of actors involved, states can hardly deny that human rights abuses are occurring. Thus, in order to conceal their illegal actions they often distort the nature of their actions by manipulating discourse. This strategy entails framing dubious or illegal practices that violate rights as benign actions. The manipulation of discourse thus serves the purpose of concealing abuses and presenting a distorted version of the policies carried out by states. This strategy allows states to avoid criticism and/or being held accountable for human rights violations in the course of implementing their immigration policies. Examining a number of central concepts currently employed by states helps to expose the proliferation of this trend.

## Aliens

The underlying differentiation between aliens and citizens is the basis for establishing laws that limit or deny access to the former.<sup>9</sup> "Alien" comes from the Latin *alienus*, and means strange or hostile. It is used to refer to foreign-born persons and also to extraterrestrial beings.<sup>10</sup> In the Americas, the term "alien" is only used in immigration legislation in English-speaking countries. Most immigration legislations in Spanish-speaking countries refer to "*extranjeros*" (foreigners), rather than "aliens". While the term "alien" has negative connotations, it is a legal term of art that in a nuanced fashion lessens people's human character and their rights. The term "alien" also reinforces the idea of difference between citizens and non-citizens, bolstering national jingoism, racism, and distrust of foreigners. Accordingly, "aliens" and their descendents are neither regarded nor treated in the same way as natives. Governments have historically manipulated these sentiments according to their interests, portraying foreigners as dangerous elements, particularly during periods of armed confrontations.

In the past, human rights covenants and treaties also employed the term "alien." However, as concerns regarding the negative connotations associated with the term began to be voiced, a new vocabulary such as "non-citizen" emerged. For example, the drafters of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, considered it appropriate to establish in the definition that the term "alien" shall apply "*with due regard to qualifi-*

<sup>7</sup> By hegemony Gramsci meant the predominance of one social class over others (e.g. *bourgeois hegemony*). Hegemony, according to Gramsci, transcends political and economic control; it also reflects the capacity of the dominant class to project its own *Weltanschauung* over subordinated classes forcing them to accept its view as "common sense" and "natural." See Litovitz 2000: 515-538 and Cox and Sinclair 1996: 124-143.

<sup>8</sup> Scholars from critical legal studies and its derivations such as critical race theory, Latino critical theory, and feminist jurisprudence have examined this matter.

<sup>9</sup> See Section 236 (A) "Detention of Terrorist Aliens" The USA PATRIOT Act of 2001, Public Law 56, 107th Congress, 1st session, October 26, 2001; see also Kent and Sloop 2002 and García 1995.

<sup>10</sup> In this regard, concerned with misinterpretations of this term and deeming it appropriate to insist on the rights of non-citizens, in 1982 a Decision of the Supreme Court of the U.S. deemed it appropriated to indicate "whatever his status under immigration laws, an alien is a 'person' in any ordinary sense of that term." *Pyle v. Doe*, 457 United States Supreme Court (1982), 202.

*cations made in subsequent articles*, to any individual who is not a national of the State in which she or he is present” (emphasis added). Those same drafters chose to use the definition of “alien” in the title of the Declaration, rather than the word “alien” in an effort to encourage the use of other terms.<sup>11</sup>

The term “alien” also permeates the identity of immigrants as it influences their perception of themselves as well as the opportunities and rights to which they think they are entitled (García 1995: 511). “Aliens” perceive themselves as individuals with restricted rights. This partly explains their reluctance, irrespective of their status, to seek judicial protection when their rights are infringed upon or when they are subject to discrimination on the basis of their national, ethnic, or migratory status (Wishnie 2003). The “alien” stigma carries on to the second, third, and even later generations, as migrants continue enduring discrimination.<sup>12</sup>

### Illegals

All too often the adjective “illegal” is transformed into a noun referring to unlawful immigrants who are dubbed “illegals.” The term “illegals” constitutes an abbreviation for “illegal aliens.” These are individuals who enter or remain in a country in violation of its immigration law. By using the term “illegals,” the migratory status of a non-citizen is underscored. Calling a person “illegal” –not as a legislation term of art but rather as speech recourse -- conveys the message that this person’s very existence is in violation of the law, which also suggests an association with criminal activity (i.e. if they are “illegals” they must commit “illegal acts”).<sup>13</sup>

In some countries in the Americas the situation of immigrants in this respect is particularly worrisome since unauthorized entrance is penalized as a felony or a misdemeanor.<sup>14</sup> In these countries migrants entering irregularly are *in flagrante delicto* (committing a flagrant crime) at all times. That is to say, their mere presence without proper authorization constitutes a crime and thus they can be arrested without a warrant (i.e. flagrancy constitutes an exception to the arrest warrant requirement). In other countries, unlawful entry is characterized as an administrative violation and is sanctioned with deportation or expulsion and sometimes a fine.

Difficulties in enforcing immigration laws, even in countries that apply a criminal approach to this phenomenon, explain why some states resort to other public policy areas to limit the rights of non-citizens. For example, in some countries undocumented immigrants cannot submit *amparos* or writs in order to seek judicial protection of their rights.<sup>15</sup> In others, labor law limits the rights of undocumented workers, denying them basic protections to which the rest of the workforce is entitled (Walsh 2003: 313-6)

<sup>11</sup> See Declaration on the Human Rights of Individuals Who Are not Nationals of the Country in which They Live, adopted by United Nations, General Assembly Resolution 40/144, December 13, 1985, article 1.

<sup>12</sup> An interesting essay illustrates through the metaphor “Death by English,” borrowed from the book *Latinos* by Earl Shorris, the “Latino invisibility” and “symbolic deportation” suffered by Latinos as a result of the discrimination they must endure in the U.S. See Perea 1995.

<sup>13</sup> In U.S. immigration law the term “illegal alien” is a term of art. However it is never defined in the law. “Illegal alien” is defined in labor law: Code of Federal Regulations, Title 29—Labor, Subtitle B—Regulations Relating to Labor, Chapter V—Wage and Hour Division, Department Of Labor, Subchapter A—Regulations, Part 500—Migrant and Seasonal Agricultural Worker Protection, Subpart A—General Provisions, § 500.20 Definitions. “Illegal alien” means any person who is not lawfully admitted for permanent residence in the United States or who has not been authorized by the Attorney General to accept employment in the United States. See Neumann 1996.

<sup>14</sup> See Article 89 of the *Ley General de Migración y Extranjería* (Migration Statute) of Costa Rica which establishes that entering the country through a place not habilitated for that purpose is a crime, punishable with six months to a year in prison. See also, article 123 of the *Ley General de Población* (Population Statute) of Mexico, which punishes the unlawful entrance to the country with up to two years in prison and a fine.

<sup>15</sup> For example, article 67 of the *Ley General de Población* (Population Statute) of Mexico, establishes the duty of all public officials to request immigration documents from any individual who appears before them. This general duty also applies to police officials and judges, resulting in the impossibility for undocumented migrants to request and obtain protection of their rights.

This distorted representation of undocumented migrants permeates public opinion, law enforcement officials, legislators, and judges (Harris 2003: 73). Resorting to this language contributes to creating a negative image of immigrants among the general public because it equates migrants with infringement of the law. This identity, in turn, reinforces views that favor the limitation or denial of basic rights to non-citizens. Irregular migrants therefore constitute individuals who are truly outside the sphere of protection warranted by the law to the rest of the population.<sup>16</sup> Furthermore, the concept of illegality also impacts the construction of a personal and group identity (Ngai 2003). As with alien, an “illegal” identity results in a limited capacity for agency and empowerment (Tully 2000). In order to challenge this conception, several pro-immigrant and human rights organizations have introduced the slogan *no human being is illegal*.

### Internally Displaced Persons in Transit

The international legal framework clearly differentiates between refugees and internally displaced persons. According to the 1967 Protocol relating to the Status of Refugees, refugees are “any person who is outside the country of his nationality... because he has or had a well-founded fear of persecution by reason of his race, religion, nationality and membership of a particular social group or political opinion and is unable or, because of such fear, unwilling to avail himself to the protection of the government of the country of his nationality (Goodwin-Gil 1983: 5-6).”<sup>17</sup> Internally Displaced Persons (IDPs), for their part, are persons or groups of people “who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border” (Cohen and Deng 1998: 18).<sup>18</sup>

In spite of the existence of these clear distinctions within the international legal framework, the Venezuelan and Colombian governments have relied on a dubious discourse to confront the flight of Colombian citizens who cross into Venezuela to escape armed conflict and political violence. Even though both countries are signatories of the 1951 Refugee Convention and the 1967 Protocol, they have resorted to the creation of an artificial category, “internally displaced persons in transit,” to sidestep their international obligations. As of late, the Venezuelan authorities have simply denied refugee status to Colombians fleeing their country, and regularly deport them against their will.<sup>19</sup> Venezuela enforces this policy because it is reluctant to admit a massive influx of refugees, for the arrival of these people may imply obligations in terms of protection and assistance under the 1951 Refugee Convention. Colombia, meanwhile, accepts this arrangement because it wants to avoid the embarrassment of being perceived as generating massive numbers of refugees. Authorities in both countries claim that IDPs in transit wish to remain in their home country and that they cross into Venezuelan territory merely en route to a safer location within Colombia. In other words, these persons should not be treated as refugees as they do not desire to stay in Venezuela. Furthermore, the two states propose that, based on bilateral agreements, the host state may only be responsible for providing temporary aid and protection to these people.

The aforementioned approach is justified by these governments on the grounds that they require flexibility to adapt to new situations in the international realm. The creation of a concept

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<sup>16</sup> On this matter see Advisory Opinion OC-18 of the Inter-American Court of Human Rights.

<sup>17</sup> In the Americas, through the so-called *Cartagena Declaration*, the aforementioned definition for refugees has been expanded to include persons who have fled their country in fear for their lives, safety or freedom, who have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order. See Conclusion 3 of the Cartagena Declaration on Refugees, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held in Cartagena on November 19-22, 1984.

<sup>18</sup> While there is no binding document sanctioning the rights of IDPs, the aforementioned definition is considered authoritative in international human rights law and refugee law.

like “IDPs in transit,” however, constitutes an abuse of legal terminology and a blatant violation of binding instruments devised to protect refugees. Defying condemnation on the part of international and regional human rights bodies, both governments insist that they are creating a new legal concept, when in reality all they are doing is distorting the spirit of generally accepted legal terms with the purpose of concealing the violation of the rights of Colombian refugees (Cançado Trindade 2002: 29-35; Murillo 2000).

### Admitted versus Excludable

In the United States, immigration law differentiates between “admitted” and “excludable aliens.” “Admitted aliens” are authorized to enter the country, while “excludable aliens” are non-citizens who, even though living or in detention within the United States, are treated as if they had never entered the country. The basis for this treatment is the fiction that “excludable aliens” are seeking to be “admitted” into the United States and, therefore, their presence and entrance is under discussion (Cole 2003: 567).

This legal fiction has important effects. The Supreme Court of the U.S. recently ruled on a case concerning “unremovable aliens,”<sup>20</sup> adjudicating even more legal consequences for the distinction between “admitted” and “excludable” non-citizens. In *Zadvydas v. Davis*, the Court protected the liberty of “admitted excludable aliens” (Gardner 2003). It also established that “unremovable aliens” could be detained until a determination was made that there was “no significant likelihood of removal in the reasonably foreseeable future.” The Court held that a presumptive six-month period of detention should be sufficient to deport a non-citizen. After that period, an “unremovable alien” should be released. The six-month maximum period of detention does not apply to “excludable aliens,” who may remain deprived of their freedom indefinitely (Peitzke 2003).

Three months before the *Zadvydas v. Davis* decision, on April 4, 2001, the Inter-American Commission on Human Rights (IACHR) rejected the distinction between “admitted” and “excludable aliens” and protected the right to liberty of non-citizens detained in the U.S. who could not be deported to their country of origin.<sup>21</sup> The IACHR determined that the guarantees which protect human rights cannot be suspended or limited on the basis of the migratory status of a person.<sup>22</sup> The recommendations set forth in this decision were ignored by the United States, which continues to employ the category “excludable aliens.”

### Shelters

The detention of non-citizens who are undergoing deportation proceedings is a common practice in the Americas. Among the discourse tactics used to manipulate the issue of detention, Guatemala’s legislation and practice stands out. In Guatemala detention centers are dubbed “*albergues*” (shelters in English).<sup>23</sup> The use of this euphemism is indicative of an ambiguous authority when it comes to detaining non-citizens who violate immigration laws. The Constitution (article 6) establishes that deprivations of liberty should be preceded by an arrest warrant issued by a judicial authority. In Guatemala, this is never the case, for judicial authorities never issue such warrants in immigration proceedings (IACHR 2002a).

<sup>19</sup> The United Nations High Commissioner for Refugees (UNHCR) stated that “Venezuelan authorities reportedly returned more than 2,000 Colombians since mid-1999 without granting them access to asylum procedures.” See UN ECOSOC 2001 Para. 52.

<sup>20</sup> “Unremovable aliens” are individuals who have been ordered to be deported or removed, but whose deportation has not been made effective because either they are stateless or their country of origin does not accept deportees from the U.S.

<sup>21</sup> IACHR, Report Nº 51/01, Case 9903, Rafael Ferrer-Mazorra *Et Al.* v. United States, April 4, 2001, para. 232-236.

<sup>22</sup> *Ibid.*

<sup>23</sup> Guatemala, Ley de Migración (Immigration Statute), Decreto Número 95-98, November 26, 1998, article 111.

In light of this irregularity, immigration authorities claim that they are not detaining foreigners but rather “taking care of the stay of non-citizens in shelters.” Authorities argue that they are empowered by the Guatemalan Immigration Statute to run shelters. Furthermore, they maintain that if they are not allowed to hold immigrants in shelters they cannot enforce immigration law.<sup>24</sup> When making these allegations, immigration authorities carefully avoid the use of the term “detention” or “deprivation of liberty.” However, “*albergues*” are guarded by policemen and the migrants “sheltered” there are not free to leave and enter. In spite of international condemnation, the “shelters” continue to exist under the supervision of immigration authorities (IACHR 2002a).

### Dignified, Safe and Orderly Repatriation

Mexico pioneered the expression *Dignified, Safe and Orderly Repatriation* (“Repatriación Digna, Segura y Ordenada”) as a euphemism to refer to deportations. The expression was first introduced as part of bilateral agreements between Mexico and the United States regarding places and schedules for the reception of Mexican nationals deported or rejected by the U.S. immigration authorities.<sup>25</sup> The adjective “dignified” was recently added to the aforementioned expression, as Mexico continued a similar practice for the deportation of Central Americans from its territory.

The so-called dignified, safe, and orderly repatriation is in reality a massive deportation program for Central Americans who are apprehended in Mexico and transported by land to their home countries. The expression is used by the Mexican government to promote the benefits of a program that violates due process guarantees on a systematic basis (see section III B 1). Moreover, as part of the Mexican government’s discourse, the noun “repatriation” is commonly used by authorities to refer to the action of “repatriating” (*repatriar* in Spanish), even though it is not contemplated as a term of art in Mexican immigration law. Naming a deportation or removal “repatriation” conveys the message that the person subject to this measure is being favored, when in reality for all practical purposes she is being forced to leave the country against her will. At the same time, the adjective “orderly, dignified and safe” purport the appearance of legality and protection to massive deportations that fail to guarantee minimum due process safeguards.

In sum, states often rely on legal discourse to tailor general perceptions concerning immigrants. As illustrated in the previous examples in the Americas, governments oftentimes distort the meaning of legal terms to justify their ill-treatment of this vulnerable population.

## IV. CONCEALING ABUSE: OUTSOURCING HUMAN RIGHTS VIOLATIONS IN THE AMERICAS AS PART OF US CONTAINMENT STRATEGIES TO CURB IMMIGRATION

In their efforts to restrict the number of migrants entering their territories, some states in the Americas have outsourced part of their immigration control to other parties, especially neighboring states. In a few occasions some states have also relied on private agents to contain irregular migration. The United States, the main receiving country in the region, plays a crucial role in this dynamic.

While intraregional migration has increased as of late, giving way to new migratory routes (e.g. Canada), the exodus to the United States continues to be the main nucleus of regional migra-

<sup>24</sup> Sala Duodécima de la Corte de Apelaciones Constituida en Tribunal Constitucional de Exhibición Personal, Recurso de Exhibición Personal C-24-2002 Of. 3ero, Guatemala, (Decision from the 12<sup>th</sup> Appellate Court, acting as Constitutional Tribunal deciding on a Habeas Corpus Petition) February 13, 2002.

<sup>25</sup> Procedures for the Safe and Orderly Repatriation of Mexican Nationals, signed by the U.S. and Mexico, San Diego, California, December 17, 1997.

tion. According to a 2000 report by the International Organization for Migration (IOM), the United States admits every year approximately one million immigrants; additionally, it receives another 300,000 people, including professionals with temporary contracts, agriculture seasonal workers and students who enter on a temporary basis (IOM 2000). At the same time, every year approximately 500,000 people enter irregularly into the United States. Independent studies estimate that the total number of undocumented people residing in the United States reached 9 million in 2001. People attempting to work temporarily and/or settle in the United States come from literally every corner of the world. Mexico represents the leading country of origin of undocumented migrants, as it constitutes almost 50 % of the total undocumented population (Migration Policy Institute 2002).

In seeking to restrict the arrival of bogus refugees and undocumented migrants, the United States (and other industrialized countries) adopted a policy of containment characterized by measures devised to deter the influx of unwelcome migrants since the late 1980s. These included, among others, the imposition of visa requirements on citizens from refugee-producing countries, stricter interpretations of the asylum principle, a commitment to repatriation, penalties on transportation companies carry foreign passengers without the appropriate documentation, expedite deportation proceedings, and interdiction of vessels in the high seas (Teitelbaum and Weiner 1995: 21-6; Chimni 1998: 350-59).

Continuing this policy, the Clinton administration promoted a major overhaul of border control enforcement in 1993. In order to improve effectiveness, several measures were introduced, *inter alia*, intensifying border surveillance through the deployment of a larger border patrol force<sup>26</sup> and the installation of new high-tech detection equipment; developing internationally coordinated immigration regulation mechanisms; exerting diplomatic pressure upon border states so that they would adopt criminal statutes that sanction human trafficking; establishing inflexible procedures for granting asylum and reducing the intake quotas for refugees; imposing fines on companies transporting people without proper documentation, and thwarting the falsification of travel documents. Simultaneously, in order to fund the aforementioned measures, the budget of the Immigration and Naturalization Service (INS)<sup>27</sup> rose from \$1.5 billion in 1993 to \$4 billion in 1999 (Massey, Durand and Malloy 2002: 114-18). Additionally, with the assistance of Army Reservists, the United States built new defenses in various points along its southern border. While attempting to put into practice the strategy dubbed *Prevention Through Deterrence*, the United States orchestrated several special operations and contingent plans to reduce border crossings by undocumented persons (e.g. Operation Gate Keeper in San Diego, California; Safe Guard in Nogales, Arizona, and Operation Hold the Line in El Paso, Texas).

Measures to control migration flows were supplemented with restrictive measures in the legal realm. In the last two decades, the US Congress approved several legislative acts aimed at deterring immigrants from crossing the border and thwarting their efforts to settle in the country.<sup>28</sup> These laws imposed sanctions against employers who hired undocumented workers, restructured criminal and immigration procedures, increased penalties for violations of immigration laws, restricted access to social benefits for immigrants, limited the number of immigrants allowed to enter the country, and granted ample powers in immigration affairs to the executive (e.g. the authority to declare an *immigration emergency* in the event that a high, yet unspecified, number of undocumented

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<sup>26</sup> Since 1993, the Border Patrol has grown from a small force comparable to the police department of a small American town to a huge force composed of 11 thousand people with a US\$ 711 million budget in 2003. See United States Bureau of Citizenship and Immigration Services 2003 <<http://www.immigration.gov/graphics/publicaffairs/presinfo2.htm#BorderPatrol>>

<sup>27</sup> As of 2003, the Immigration and Naturalization Service (INS) was replaced by the Bureau of Citizenship and Immigration Services (BCIS), which depends on the newly created Department of Homeland Security (DHS).

<sup>28</sup> The most important legislative initiatives include the *Immigration Reform and Control Act* (1986), the *Immigration Act* (1990), the *Illegal Immigration Reform and Immigrant Responsibility Act* (1996), and the *Personal Responsibility and Work Opportunity Reconciliation Act* (1996). At the State level, restrictive legislation such as California Proposition 187 was passed.

migrants would enter or attempt to enter the US) (Spener 2001: 143). These measures were toughened after the September 2001 terrorist attacks with the passage of the US Patriot Act. Invoking national security concerns, the Congress approved a draconian law, which extends considerable powers of surveillance and law enforcement (e.g. ample powers for detention) regarding non-citizens (Chishti 2002).

The strategy devised by the American government to frustrate the arrival of unauthorized migrants has been supplemented with several measures in the international arena. As indicated before, by resorting to incentives in the economic and political realm and diplomatic pressure, the United States seeks to persuade its neighbors to put into practice concrete measures aimed at controlling the passage of migrants *en route* to the United States. In this respect, some authors contend that the United States is attempting to create a buffer zone or “continental security perimeter,” stretching from Canada’s arctic region to Mexico’s southern border, aimed at preventing migrants from reaching its shores and borders (Klein 2003:10-1).<sup>29</sup>

In the case of Canada, the United States has negotiated with the administration of Prime Minister Jean Chretien diverse measures to increase security along their common 6,400 kilometer border. Canada, another major receiving country in the region and also concerned with the constant influx of migrants, agreed to the implementation of additional immigration controls. Both countries thus signed an accord to regulate asylum procedures (denominated *safe third country of asylum*) in December 2002, which determines that asylum seekers have to claim asylum in the first country of entry. Several human rights organizations including Amnesty International (AI), the United States Committee of Refugees (USCR), and the Canadian Council for Refugees denounced the accord, arguing that it is purposely restrictive and that the US asylum system does not provide the same safeguards as other industrialized countries (Fox 2002). At the same time, US authorities have compelled Canada to harmonize its immigration and refugee policies and visa standards with those of the United States.

American officials have also worked with their Mexican and Guatemalan counterparts on the implementation of containment measures. Because it shares a 5,000 kilometer-long common border with the United States, Mexico has turned into arguably one of the most important countries of transit in the world. To provide an idea of the magnitude of this phenomenon in Mexico, in 2002 the Mexican authorities detained 133,485 undocumented migrants (Sin Fronteras 2003). Most of them were Central Americans (e.g. Guatemalan, Honduran, Salvadoran, and Nicaraguans) en route to the United States and Canada. However, apprehended individuals also came from several dozen different countries, ranging from Africa and Asia to Eastern Europe, the Middle East and South America. Most undocumented migrants that enter Mexico do not plan to settle there. Guatemala, for its part, is also crucial for it shares a 962 kilometer porous border with Mexico. Like Mexico, as of late Guatemala has also received a considerable number of migrants in transit to the United States (Inter-American Commission on Human Rights 2003; Nezer 1999).

In light of these countries’ strategic positions, American officials have pressured Mexican and Guatemalan authorities to introduce several measures aimed at stopping migrants before they reach the Mexican-American border. Measures include expediting deportation procedures of Central Americans and extra-regional migrants apprehended in their territories, increasing border controls along the border line and, as in the Canadian case, promoting legislative changes in their migration and criminal legal framework, especially regarding human smuggling and trafficking.<sup>30</sup>

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<sup>29</sup> With the aim of preventing the arrival of migrants, members of the European Union (EU) have pursued similar policies creating what some authors dub “Fortress Europe.”

<sup>30</sup> A case in point is the recent inception in Guatemala of laws that punish the crime of “*concealing illegals*.” This crime consists of “allowing the concealment of foreigners who have entered or have remained in Guatemalan territory without meeting the legal requirements, in any item of real or personal property, with the aim of concealing them on their way to another country or of facilitating their continued presence.” This offense is punishable with prison terms ranging from three to six years. See IACHR 2002a and Grayson 2002.

Some of the new policies implemented to boost immigration control in border areas constitute grave violations of human rights. Two cases in point include deportation procedures and detention conditions of undocumented migrants awaiting deportation. It is important to underscore that the Mexican-Guatemalan border was historically an open border and that recent growing controls constitute a new development. A close examination of this matter suggests that the United States is subcontracting to the Guatemalan and Mexican governments a part of its immigration policy (i.e. containing the flow of migrants en route to the United States). Because the implementations of these measures entail human rights violations, we argue that the United States bears part of the responsibility for these abuses.

### Deportation Procedures

In 2001, following encouragement from the US government, the Mexican authorities launched *Plan Sur* (Southern Plan), a multi-pronged initiative designed to combat human smuggling and trafficking, curb corruption, and facilitate the orderly transit of migration across the Guatemalan-Mexican border. As part of this scheme, Mexico and Guatemala signed the aforementioned *Dignified, Safe and Orderly Repatriation Program*, a plan envisaged to expedite the deportation of Central Americans from Mexico. Under this program, undocumented Central Americans apprehended within Mexico are deported or expelled (as Mexico's immigration law calls these deportations) through a standardized procedure. As a rule, apprehended migrants are sent to a detention facility of the Mexican National Immigration Institute (*Instituto Nacional de Inmigración*, INM) located in Tapachula, a border town in the southern Mexican State of Chiapas. INM officials ask migrants a few questions in order to verify their nationality and prepare listings of persons who will be deported to each country. After spending anywhere from 1 to 36 hours at the Tapachula detention facility, migrants are then transported by bus to their countries of origin. During the trip migrants are escorted to the Mexico-Guatemala border by Mexican INM officers. Guatemalan citizens are released in El Carmen, a border town in Guatemala, while Salvadorans, Hondurans, and Nicaraguan citizens continue their journey to the border of their respective countries escorted by Guatemalan Police Officers (Inter-American Commission on Human Rights 2002).

As a result of this initiative, Mexican authorities deported more than 99,000 people in 2002 and 140,000 in 2001. Authorities and other sources point out that since the *Orderly, Dignified and Secure Repatriation Program* was introduced, on average, between 400 and 500 people are deported every day from Mexico (Office of the Guatemalan Attorney for Human Rights 2002:24). This complex operation is endorsed by the United States government, which contributes monetarily by financing part of the deportation costs as well as by providing logistical support (Grayson 2002).

Several human rights organizations have expressed their apprehension concerning some of the features of the aforementioned program, particularly regarding the deportation proceedings of Central Americans. In a recent report on the situation of migrant workers in Mexico, the Special Rapporteur on Migrant Workers and their Families of the IACHR underlines that Mexican authorities do not determine deportation decisions individually and that, therefore, the process amounts to *collective deportations* (Inter-American Commission on Human Rights 2003). According to the IACHR, the *Orderly, Dignified and Safe Repatriation Program* violates due process guarantees and freedom of movement. It is important to bear in mind that international human rights instruments contain a clear prohibition concerning this matter.<sup>31</sup> While the term "collective expulsion" is not really well-defined and no clear threshold exists that unmistakably differentiates individual from collective expulsions, the deportation of Central American nationals from Mexico is collective for there is no real effort on the part of the authorities to implement a procedure that is based on individual

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<sup>31</sup> Article 22(9) of the American Convention, article 12(5) of the African Charter, and Migrant Workers Convention article 22(1).

examination and decisions for each case. It is relevant to underscore that states cannot sidestep the ban on collective expulsions in a single action by simply driving out small groups of people at a time. To illustrate the shortcoming of this process: since the program was launched, Mexican authorities deported by mistake several Mexican nationals to Guatemala (Mexican National Institute for Migration 2002).

As part of the *Orderly, Dignified and Safe Repatriation Program*, migrants are commonly detained while they await deportation. According to the IACHR, the detention conditions to which migrants are exposed while awaiting deportation are, to say the least, substandard. The detention facility in Tapachula where migrants are held has serious problems. These include overcrowding, lack of proper ventilation, severe hygiene problems (e.g. cells do not have running water and washrooms are unsanitary), and the absence of appropriate medical services. Additionally, migrants repeatedly claim to be mistreated by Mexican authorities while in custody (Inter-American Commission on Human Rights 2003). The aforementioned detention conditions clearly violate the right to personal liberty.

While recognizing the pressure imposed by the United States government, in agreeing to carry out an ambitious immigration control program for which it is not logistically prepared, Mexico is contravening basic human rights norms and violating the rights of foreigners under its jurisdiction. For example, by not guaranteeing an individual assessment on which to base the decision to deport a person, by all practical considerations, Mexico is carrying out collective expulsions. Additionally, Mexico exposes persons in administrative detention under its jurisdiction to inadequate conditions that endanger their health and well-being. In short, the aforementioned repatriation program is characterized, in practice, by serious problems which clearly do not reflect the positive features (i.e. order, dignity and security) that the authorities purport the initiative has.

### **Crime and the regulation of cross border flows**

Migrants also risk being attacked or robbed by criminals who operate with impunity along frontier areas, especially at strategic crossing points. This pattern is related to a growing trend: the criminalization of border areas. While border areas have historically tended to be unsafe places, the growth of criminal activities related to narcotics, arms smuggling and human trafficking has increased the hazardousness of these areas (Inter-American Commission on Human Rights 2000). This development is particularly visible in several countries in the Americas that are characterized by a weak rule of law, lack of state presence, and widespread corruption and impunity (Pinheiro 1999:1-15; O'Donnell 1993: 50-2).

Increasingly, border areas in some poor countries in the Americas, particularly those located in strategic migration routes, have become particularly dangerous places. In several border towns that receive massive influxes of migrants, crime rates have skyrocketed.<sup>32</sup> These places usually absorb sizeable floating populations – both individuals arriving to cross the border and/or individuals who have been deported and either do not have the means to go back to their places of origin or who decide to stay in order attempt to cross the border once more. These towns also operate as magnets for other individuals who seek job opportunities created by the presence of large numbers of migrants and criminal organizations that prey upon migrants. Criminal elements include traffickers and some smugglers, petty thieves, and opportunistic “businesspeople” who seek to deceive migrants by offering different types of “services.” The hazards of these areas are heightened by the presence of corrupt officials who abuse, rob, and extort migrants. Usually, thugs operate with absolute impunity for they are colluded with and receive protection from corrupt state agents. Several

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<sup>32</sup> One of the most conspicuous cases is that of Ciudad Juárez, Mexico, where women have been victims of a distressing pattern of structural violence for more than 10 years and where impunity is rampant. See IACHR 2002b and Amnesty International 2003.

of these border areas are also infested with gangs of thugs/thieves waiting to assault and rob migrants. Aware of the vulnerability of migrants, these gangs steal, attack, extort, deceive, and, on occasion, rape or slay those who resist being abused. Attacks frequently occur in the remote areas that migrants use to cross the border, eschewing the presence of authorities.

Far from combating these groups, in several countries authorities ignore or even tolerate their presence. This attitude can be attributed to various factors. First, law enforcement officials often lack the human and technical capabilities to combat these criminals. Second, some corrupt state officials collude with delinquents. This situation inhibits the capacity of law enforcement officials to control the operations of criminals. And third, authorities are aware that the existence of these criminal gangs is instrumental to controlling the flow of migrants, for their presence deters people from crossing the border.

Some areas of the Mexican-Guatemalan border zone such as Tecún Umán-Ciudad Hidalgo clearly illustrate this pattern. There, the presence of large numbers of Central-American and extra-regional migrants with scant knowledge of the zone, carrying money in their pockets, and afraid of drawing the attention of law enforcement officials, become easy targets for thugs (Venet 1999: 53-6). Reports indicate that migrants on a regular basis report being victimized by corrupt officers and common criminals around the border zone or in Mexican territory. Testimonies commonly point to abuses including hold-ups, mistreatment, robberies, rapes, and even assassinations. These sources claim to have reliable information concerning allegations of collusion between Guatemalan and/or Mexican officials and gangs of smugglers and thieves. Authorities at both sides of the border openly know that criminal gangs operate and allow them to do so with impunity.<sup>33</sup>

While recognizing the difficulties authorities encounter in combating criminal groups, in particular if one takes into account the meager means (i.e. lack of equipment and poorly trained personnel) that law enforcement agencies have at their disposal in Mexico and especially in Guatemala, the authorities have not shown political will to tackle this phenomenon. This may reflect that authorities are not overly concerned about the matter. It may also suggest that the existence of these gangs is instrumental to their stated goal of containing the passage of migrants through their border.

These states' inaction in combating criminal groups operating across their border areas reflects at best negligence. At worst, though, it may be a sign that Guatemalan and Mexican authorities have deliberately abdicated their responsibility of controlling the border, for allowing criminals to operate with impunity serves their goal of inhibiting the influx of migrants. By forfeiting the responsibility for enforcing the law within their territories and refusing to patrol portions of their border, these states are effectively abrogating their political and legal responsibility for serious human rights violations. This sort of behavior gravely affects the rights of thousands of migrants every year.

## V. CONCLUSIONS

Given the magnitude of abuse perpetrated against migrants and the special vulnerability that characterizes persons moving from one country to another, either voluntarily or under duress, it is crucial to devote time to examine this seriously understudied area of research. We have shown how states rely on a two-pronged strategy to conceal their illegal practices: on the one hand, they manipulate discourse to de-humanize migrants and to disguise abusive practices; on the other hand,

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<sup>33</sup> The Migrant House in Tecún Umán, a humanitarian shelter that assists and protects migrants run by the Scalabrini Order, regularly receives reports of victimized migrants. In 2001, it sheltered 7,544 migrants. Of them 2,899 reported having been swindled, attacked and/or robbed by ordinary criminals or having suffered abuses, extortion, mistreatment, or arbitrary arrest by Guatemalan and Mexican officials. See IACHR 2002a

they implement measures to contain the flow of foreign nationals attempting to reach their territories, relying on other states or private actors that often times engage in serious human rights violations. Our analysis reveals how a discourse based on the notion of domination creates concepts, institutions, and mechanisms that foster exclusion, discrimination and human rights violations. We have also illustrated how the United States has taken a series of measures aimed at strengthening border control, which include enlisting the services of other states. Resorting to economic and political incentives as well as diplomatic pressure, the United States has subcontracted violations to Mexico and Guatemala. We elaborate on how the Mexican and Guatemalan governments, in turn, outsource violations to bandits whose crimes complement efforts to curb the flow of migrants through the mutual border. While recognizing the daunting challenges developing states face when combating crime, we argue that the Mexican and Guatemalan authorities have not shown political will to tackle the aforementioned law enforcement problem. These states' inaction reflects at best negligence and, at worst, a desire to use the presence of criminals as a way to inhibit the influx of migrants. By forfeiting their responsibility for enforcing the law within their territories and refusing to patrol portions of their border, we think, these States are effectively abrogating the political and legal responsibility for serious human rights violations.

The patterns described in this article are very worrisome not only because they affect a massive number of vulnerable people, but also because they demonstrate that states are resorting to increasingly sophisticated techniques to disguise their abuses. The plight of migrant people poses difficult challenges for those concerned with promoting respect for human rights. In order to combat the violations perpetrated against migrant people, concerned individuals and organizations will necessarily need to devote much more time to broaden their understanding of the new and ingenious ways to which states are resorting to conceal illegal actions. This entails, among other things, devoting more resources to monitoring and denunciation. But also calls for an in-depth discussion on the root causes giving rise to these violations as well as developing new strategies to confront the ever-growing abuse of this vulnerable population. One issue that must be addressed and ultimately undermined is the relegation of whole populations to the status of *homo sacer* – people who are excluded from the human community and as such do not even have the right to have rights.

## BIBLIOGRAPHY

- Adler, Emmanuel. 1997. "Sizing the Middle Ground: Constructivism in World Politics." *European Journal of International Relations* 3 (3): 319-363.
- Agamben, Giorgio. 1998. *Homo Sacer: Sovereign Power and Bare Life*. Stanford: Stanford University Press.
- Amnesty International 2003. "Mexico: Intolerable Killings: 10 years of abductions and murder of women in Ciudad Juárez and Chihuahua." <http://web.amnesty.org/library/print/ENGAMR410262003>
- Barnett, Michael and Martha Finnemore 1999. "The Politics, Power, and Pathologies of International Organizations," *International Organization* 53(4): 699-732
- Böhening W.R. and Nana Oishi. 1995. "Is International Economic Migration Spreading?" *International Migration Review* 29 (3): 794-8.
- Brysk, Allison. 2002. *Globalization and Human Rights*. Berkeley: University of California Press.
- Cançado Trindade, Antônio. 2002. "El Desarraigo como Problema de Derechos Humanos frente a la Conciencia Jurídica Universal." Conference paper delivered at the Forum Deusto, Universidad de Deusto, Bilbao (March).
- Cairncross, Frances. 2002. "The Longest Journey," *The Economist*, 2 November.
- Castles, Stephen, and Mark J. Miller. 1993. *The Age of Migration*. New York: The Guilford Press.
- Chimni, B.S. 1998. "The Geopolitics of Refugee Studies: A View from the South," *Journal of Refugee Studies* 11 (4): 350-374
- Chishti, Muzaffa. 2002. *Immigration and Security Post Sept. 11*. Migration Policy Institute. <http://www.migrationinformation.org/Feature/display.cfm?ID=46>
- Cohen, Roberta, and Francis Deng. 1998. *Masses in Flight*. Washington D.C.: Brookings Press.
- Cole, Edward B. 2003. "What Difference does it Make Whether you are Deportable or Excludable? The Supreme Court

- Refuses to Say." *North Carolina Journal of International Law and Commercial Regulation* 28 (Spring): 567-602.
- Cox, Robert W., and Timothy J. Sinclair. 1996. *Approaches to World Order*. Cambridge: Cambridge University Press.
- Finnemore, Martha, and Kathryn Sikkink. 2001. *Annual Review of Political Science* 4 (1): 391-416.
- Forsythe, David. 1991. *The Internationalization of Human Rights*. Lexington Mass: Lexington Books.
- Fox, Mike. 2002. "Canada-US Refugee Deal Raises Concerns," *BBC News Service*, December 31. <http://news.bbc.co.uk/2/hi/americas/2616889.stm>.
- García, Ruben J. 1995. "Across the Borders: Immigrant Status and Identity in Law and LatCrit Theory," *Florida Law Review* 55: 511-537
- Gardner, Joshua W. 2003. "Halfway There: Zadvydas V. Davis Reins in Indefinite Detentions, but Leaves Much Unanswered," *Cornell International Law Journal* 36 (Spring): 177-206.
- Grayson, George. 2002. "Mexico's Forgotten Southern Border: Does Mexico Practice at Home what it Preaches Abroad?" Center for Immigration Studies. <http://www.cis.org/articles/2002/back702.html>
- Goodwin-Gil, Guy S. 1983. *The Refugee in International Law*. Oxford: Oxford University Press.
- Gordon, Neve. 2002. "Outsourcing Violations: The Israeli Case," *Human Rights Review* 3 (2): 321-337.
- Harris, David. 2003. "Racial Profiling Redux," *Saint Louis University Public Law Review* 22: 73-93
- Hjerm, Mikael . 1998. "National Identities, National Pride and Xenophobia: A Comparison of Four Western Countries," *Acta Sociologica* 41 (4): 335-348
- International Encyclopedia of the Social Sciences. 2004. Online Dictionary of Social Sciences. <http://datadump.icaap.org/cgi-bin/glossary/SocialDict>
- International Organization for Migration. 2000. *World Migration Report*. <http://www.iom.int/iom/Publications/entry.htm>.
- International Labor Organization 1994. *World Labor Report*. Geneva: International Labor Organization.
- Inter American Commission on Human Rights. 2003. Special Rapporteurship on Migrant Workers and their Families. 2003. Report on the on-site Visit to Mexico, July 25-August 1. <http://www.iachr.org/annualrep/2003eng/chap.5c.htm>
- \_\_\_\_\_. 2002. Special Rapporteurship on Migrant Workers and their Families. Report on the on-site visit to Guatemala, March 19 – 24. <http://www.cidh.org/annualrep/2002eng/chap.6d.htm>
- \_\_\_\_\_. 2002. The Situation of the Rights of Women in Ciudad Juárez, Mexico: The Right to Be Free From Violence and Discrimination. <http://www.cidh.org/annualrep/2002eng/chap.vi.juarez.htm>
- \_\_\_\_\_. 2000. Second Progress Report of the Special Rapporteurship on Migrant Workers and Their Families. <http://www.iachr.org/annualrep/2000eng/chap.6.htm>.
- Keck, Margaret, and Kathryn Sikkink, 1998. *Activists Beyond Borders*. Ithaca: Cornell University Press.
- Kennedy, David. 1980. "Theses About International Law Discourse," *German Yearbook of International Law* 353: 103-137.
- Kent, Ono, and John M. Sloop. 2002. *Shifting Borders: Rhetoric, Immigration and California's Proposition 187*. Philadelphia: Temple University Press.
- Klein, Naomi. 2003. "The Rise of the Fortress Continent," *The Nation* 276 (4): 10-12 <http://www.thenation.com/doc.mhtml%3Fi=20030203&s=klein>
- Koslowski, Ray. 2001. *Migrants and Citizens*. Ithaca: Cornell University Press.
- Levine, Robert, and Donald Campbell. 1971. *Ethnocentrism. Theories of Conflict, Ethnic Attitudes and Group Behavior*. New York: John Wiley and Sons, Inc.
- Litovitz, Douglas. 2000. "Gramsci, Hegemony and the Law," *Brigham Young University Law Review* 2: 515-538.
- Loescher, Gil. 1993. *Beyond Charity: International Cooperation and the International Refugee Crisis*. Oxford: Oxford University Press.
- Massey, Douglas, Jorge Durand and Nolan Malone. 2002. *Beyond Smoke and Mirrors*. New York: Russell Sage Foundation.
- Mexican Institute for Migration. 2002. "La Comisionada del INM, Magdalena Carral recibió en sus oficinas a 2 mexicanos que fueron confundidos con extranjeros 30 de agosto de 2002." <http://www.inami.gob.mx/paginas/galeria/651005.htm>
- Migration Policy Institute. 2002. *Country Profiles. A New Century: Immigration and the US*. <http://www.migrationinformation.org/Profiles/display.cfm?ID=6>.
- Murillo, Juan Carlos. 2000. "Desafíos para la Protección Internacional: El Caso Colombia," Memoria, III Encuentro de Movilidad Humana: Migrante y Refugiado, San José, Costa Rica (September). <http://www.acnur.org/biblioteca/pdf/0087.pdf>

- Neuman, Gerlad L. 1996. *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law*. Princeton NJ: Princeton University Press.
- Nezer, Melanie. 1999. The Puebla Process. U.S. Migration Controls Move South of the Border. United States Committee for Refugees. [http://www.refugees.org/world/articles/wrs99\\_migrationcontr ols.htm](http://www.refugees.org/world/articles/wrs99_migrationcontr ols.htm)
- Ngai, Mae M. 2003. "The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921-1965," *Law and History Review* 21 (1): 69-108.
- O'Donnell, Guillermo. 1993. "The Browning of Latin America," *New Perspectives Quarterly* 10 (4): 50-5.
- Office of the Guatemalan Attorney for Human Rights. 2002. *Report of the Defense Office for Uprooted and Migrant Populations*.
- Peitzke, Megan. 2003. "The Fate of 'Unremovable' Aliens before and after September 11, 2001: The Supreme Court's Presumptive Six-Month Limit to Post-Removal-Period Detention," *Pepperdine Law Review* 30 (May): 769-814.
- Perea, Juan F. 1995. "Los Olvidados: On the Making of the Invisible People," *New York University Law Review* 70 (October): 965-91.
- Pinheiro, Paulo Sergio. 1999. "Introduction." In the *(Un) Rule of Law and the Underprivileged in Latin America*, eds. Juan E. Méndez, Guillermo O'Donnell and Paulo Sérgio Pinheiro, 1-15. Notre Dame, IN: University of Notre Dame Press.
- Risse, Thomas, Stephen C. Ropp and Kathryn Sikkink. 1999. *The Power of Human Rights: International Norms and Domestic Change*. Cambridge: Cambridge University Press.
- Sin Fronteras. 2003. La Migración Contexto Actual. <http://www.sinfronteras.org.mx/mi.htm>
- Spener, David. 2001. "Smuggling Migrants through South Texas: Challenges Posed by Operation Rio Grande." In *Global Human Smuggling: Comparative Perspectives*, eds. David Kyle and Rey Koslowski, 129-165. Baltimore: Johns Hopkins University Press.
- Stalker, Peter. 2000. *Workers without Frontiers: The Impact of Globalization on International Migration*. Boulder, CO: Lynne Rienner Publishers.
- Taran, Patrick. 2000. "Human Rights of Migrants: Challenges of a New Decade," *International Migration* 38 (6): 7-51.
- Teitelbaum, Michael S., and Myron Weiner. 1995. *Threatened People, Threatened Borders: World Migration and US Policy*. New York: W.W. Norton & Company
- Teitelbaum, Michael. 1984. "Immigration Refugees and Foreign Policy," *International Organization* 38 (3): 429:450
- Tully, James. 2000. "The Challenge of Re-imagining Citizenship and Belonging in Multicultural and Multinational Societies." In *The Demands of Citizenship*, eds. Catriona McKinnon and Iain Hampsher-Monk, 212-234. London: Continuum.
- United Nations Population Division. 2002. *International Migration Report*. New York: UN Department of Economic and Social Affairs (ST/ESA/SER.A/220).
- United Nations Economic and Social Council. 2001. Report of the United Nations High Commissioner for Refugees.E/2001/46, 18 May.
- \_\_\_\_\_. 1998. Specific Groups and Individuals: Human Rights of Migrants, Report of the Working Group of Inter-Governmental Experts on the Human Rights of Migrants, Report E/CN.4/AC.46/1998/5.
- United States Bureau of Citizenship and Immigration Services. 2003. Media and Public Information. <http://www.immigration.gov/graphics/publicaffairs/presinfo2.htm#BorderPatrol>
- Venet, Fabienne. 1999. "La Otra Fr ontera." In *Migración: México Entre Dos Fronteras*. Ciudad de México: Foro Migraciones.
- Weiner, Myron. 1995. *The Global Migration Crisis: Challenges to States and Human Rights*. New York: Harper Collins College Publishers.
- Wendt, Alexander. 1999. *Social Theory of International Politics*. Cambridge: Cambridge University Press.
- Walsh, Thomas J. 2003. "Hoffman Plastic Compounds, Inc. v. NLRB: How the Supreme Court Eroded Labor Law and Workers Rights in the Name of Immigration Policy," *Law and Inequality: A Journal of Theory and Practice* 21 (Summer): 313-340.
- Wishnie, Michael J. 2003. "Immigrants and the Right to Petition," *New York University Law Review*: 78: 667: 748
- Zolberg, Aristide. 1999. "The Politics of Immigration Policy: An Externalist Perspective," *American Behavioral Scientist* 42 (9): 1276-9
- \_\_\_\_\_. 1981. "International Migrations in Political Perspective." In *Global Trends in Migration: Theory and Research in International Population Movements*, eds. M.M. Kritz, Charles Keely and Silvio Tomasi, 3-27. New York: The Center for Migration Studies.