IMMIGRATION CRISIS? HUMAN RIGHTS AND SECURITY CONCERNS IN THE MAKING OF MIGRATION POLICIES

Crise imigratória? Preocupações de Direitos Humanos e de segurança na elaboração de políticas migratórias

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The idea that the liberal industrialized countries are facing a crisis of migration control due to the increasing recognition of the human rights of foreigners by international and domestic institutions has became very popular in migration studies. This article aims to discuss that idea, showing that the effects of the recognition of immigrants' human rights, that despite of its importance, are insufficient to understand the recent developments in migration politics. In the last years, the continuous denial of political rights for immigrants and the securitization of immigration have to be taken into high consideration for the comprehension of the issue worldwide.
Keywords: Immigration Politics; Human Rights; International Migration Regime

A idéia de que os países industrializados estão passando por uma crise no controle da migração atribuída ao crescente reconhecimento dos direitos humanos dos estrangeiros pelas instituições internacionais e nacionais se tornaram bastante populares no estudo das migrações. O presente artigo visa analisar essa idéia, mostrando os efeitos do reconhecimento dos direitos humanos dos imigrantes, que apesar de ser importante, são insuficientes para entender os recentes avanços da política migratória. Nos últimos anos, a contínua negação dos direitos dos migrantes e a seguridade da imigração têm que ser altamente considerados para melhor compreensão do assunto no mundo todo.
Palavras-chave: Política de Imigração; Direitos Humanos; Regime Internacional de Migração

The sensation that we are living in a time of unprecedented international migration is part of the common sense nowadays. It shows up

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on television, journal, magazines, opinion pools, politician's interviews, and also in academic studies. Among demographers, however, it seems that this consensus does not exist, especially when we compare today's numbers with the ones of the beginning of the XX century. But even if we leave that historical comparison aside, and concentrate in what the numbers tell us now, the interpretation of the facts should be more careful. Especially if we consider the existing level of inequality among countries, the 3% of people living outside their home country doesn't seem to be too much. For good or for worse, in the words of Spellman, "ours remains a largely sedentary global community".[1] In spite of that, the idea that immigration is putting an enormous pressure on wealthy nations is very widespread, as well as the perception of a relationship between the existing immigration level and the economic difficulties that some receiving countries are facing in the present. But why is that happening?

There are not many answers for that question in the migration studies field, especially because for most of them, the "migration crisis" is a point of depart, not a hypothesis, and the majority of the researches performed on the last twenty years are devoted to understand the roots of what is already considered a critical situation.

Some studies relate the existing migration levels with the globalization process, and particularly with the dynamics of global economy. In that sense, immigration would be a necessary complement, although not necessarily a desired one, of the politics of economic integration and free movement of capital and production around the world. In those kinds of analysis, the State diminishing capacity of controlling borders would be related to a more broad process of decadence of the State itself, as a political institution. That is a recurrent argument in many globalization studies at the end of the XX century.

In a more sophisticated manner, Saskia Sassen argues in some of her works, that the economic dimension is important, but not enough to understand current international migration. Migration networks "are embedded in rather complex economic, social and ethnic networks. They are highly conditioned and structured flows"[2]. The reason for the poor performance of the State in controlling migration is related to its lack of recognition of the transnational characteristic of contemporary migratory flows. According to her, "while a national State may have the power to write the text of an immigration policy, it is likely to be dealing with a

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[1] SPELLMAN, William M. *Uncertain identity*. International migration since 1945.
[2] SASSEN, Saskia. "The de facto transnationalizing of immigration policy", p. 13.

complex, deeply embedded and transnational process that it can only partly address or regulate through immigration policy as conventionally understood".[3]

Sassen also adds another important dimension to the immigration management problem: the growing importance of the international legislation on human rights, which would be constraining the action of States *vis à vis* immigration and immigrants.

For others, it is not exactly the international legislation that matters, but the incorporation of human rights patterns in the domestic structure of the State. In that sense, for Christian Jopke, liberal States, in the last decades, are taking in a lot of "unwanted migration". Unwanted migration are the one that do not relate to State interests, but are accepted in respect to humanitarian and individual rights concerns, like familiar reunion, and refugees; or that are related to the inability of the State to control its own borders, as the illegal immigration. In each case, the reasons for the situation were to be found inside the State: "for domestic reasons, liberal States are kept from putting their capacity to use. Not globally limited, but self-limited sovereignty explains why states accept unwanted immigration"[4]. According to him, it is not the sovereignty itself that is changing, but the use that States are making of its sovereignty capacities are changing, mostly, due to human rights concerns.

James Hollifield develops a similar argument. According to him:

> These economic and sociological factors were the necessary conditions for continued migration; but the sufficient conditions were political and legal. In the last three decades of the twentieth century, a principal factor that has sustained international migration (both south-north and to a lesser extent east-west) is the accretion of rights for foreigners in the liberal democracies, or what I have called elsewhere the rise of rights-based liberalism.[5]

The emergence and consolidation of the rights-based liberalism would explain the increasing gap between the States interests and the outcomes of the immigration policies. According to Cornelius, Hollifield and Martin[6], in all the most important industrial countries there is a huge difference between the objectives of the national immigration policy (laws, regulation, executive acts, etc.) and the effective results of the policies

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[3] *Ibidem*, p. 13.

[4] JOPKE, Christian. "Why liberal states accept unwanted immigration", p. 270.

[5] HOLLIFIELD, James. "The politics of international migration, how can we bring the State Back in?", p. 148.

[6] CORNELIUS, Wayne; MARTIN, Philip; HOLLIFIELD, James. *Controlling immigration*: a global perspective.

in this area (policy outcomes), thus causing a greater public hostility in relation to immigrants in general (regardless of their status) and exerting a huge pressure on the political parties and the government officials for the adoption of restrictive measures.

What these diverse set of explanations have in common is the idea that the immigration issue in liberal wealthy countries nowadays is somehow related to the lack of capacity of the State to perform his traditional roles. The increasing recognition of immigrants rights as human rights, both in the international as well as the domestic institutions are considered the main causes of that problem. In that sense the immigration crisis would be a crisis of immigration control.

For that reasoning to be truth, two conditions must be satisfied, previously to any other consideration. First, the State's interest should be clear. If the argument affirms that States can't satisfy their own interest, we should be able to compare intentions and results. Is that easy, or even possible? And secondly, we should verify an increasing institutionalization of immigrant's rights over the last years, before analyzing the influence of that process in the immigrants' life.

In relation to the State's interest issue, we will see that the meaning of immigration politics is not always easy to establish. Instead of being a coherent institution, States are made of a variety of bureaucracies, working with different logics, and permeated by contradictory interests. To point clearly what is the State interest in relation to immigration is a complicated task, as it is difficult to establish societies interests in that matter.

In my own research in American and French immigration politics, I found that there is a considerable level of disagreement in the receiving societies over the priorities and best ways to deal with immigration. For example, one of the most important legislation efforts in the US to deal with illegal immigration, the *Immigration Reform and Control Act,* of 1986, took several years of negotiation in the Congress before it came to existence.

There were a lot of disagreements among civil rights defenders, Unions, companies, and bureaucracies over the targets and the means of the new legislation. In the end, when IRCA was finally approved, it turned out to be a very confuse legislation that did not satisfy the liberals nor the proponents of a more restrict immigration approach.[7] This outcome, however, had little to do with "rights-based liberalism", and it is representative of a situation where disputing interests couldn't find a point of compromise.

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[7] EDWARDS, James R; GIMPEL, James G. *The congressional politics of immigration reform.*

It is never too much to point out that immigration decisions are related to the distribution of assets, of opportunities, and have material consequences, not only for the people who want to come in, but also to the receiving society. The shape of the immigrant policy produces winners and losers, and that is why it is such a controversial issue.

In addition, concerning the State's capacity for implementing policies, it is quite evident that given the technological advances, States are more able than ever to implement immigration control measures. That makes very difficult to sustain the hypothesis that States have no means to control migration flows. Nonetheless, the door is still open for the influence of human rights in immigration policies, which leads us to our next point: the recognition of immigrant's human rights.

First of all, it should be said the immigration is not considered a right by international law. The States' right to determine who has the right to enter and to establish in its territory is not under question. The international law recognizes, however, the right to leave, and that is a very important one, especially for people fleeing persecution. For those, there is a particular legislation, the 1951 Convention related to the status of Refugees, that states that every human being has the right to leave when it "has a well-founded fear of persecution because of his or her race, religion, nationality, membership of a particular social group or political opinion".

The Geneva Conventions originally was meant to be applied only for people affected by events prior to 1951; it was only in 1967 that the New York Protocol extended the terms of the Geneva Conventions to the rest of the world.

The legislation does not establish a State obligation of receiving refugees. It only requires States not to send people back to the country they are fleeing from, the *non-refoulement* clause. Unfortunately, the right to leave without a complementary right to enter has not been enough for the hundreds of thousands of people fleeing for their lives.

The International regime on refugees is, without any doubts, an important step in the international recognition of human rights, but as many other human rights international instruments, it lacks mechanisms of enforcement, and it depends basically of the interpretation and the will of the States to be enforced. The interpretation and application of the International law in the last twenty years has not been very favorable to the asylum-seekers. On the contrary, many of the recent changes in legislation both in the US and in Europe are meant to discourage asylum-seekers, and to make more difficult for people to get refugee status.

In relation to the more broad issue of the recognition of human rights of immigrants, the United Nations Declaration of Human Rights has being playing an important role. The Declaration guarantees to individuals, in its article 15, the right to have rights, that is, the right to have a nationality, and not to lose it and to be able to change nationalities; in article 14, the right to look for asylum in cases of persecution; and in article 13, paragraph 2, the right to leave the country of origin and to go back whenever one feels like it. The articles of the Declaration have also been used for immigrant's rights defenders to fight for family reunion, education, and health care. The major problem here is that, for some, the Declaration is supposed to be an instrument that regulates the relationship between the State and its citizens, not between States and aliens. The need to build parameters for this last relationship became evident.

The first international body to produce a specific legislation about immigration was the International Labor Organization. In 1949, the ILO produced the "Migration for Employment Convention" (n. 97), and after that, in 1975, the "Migrant Workers Convention" (n. 143). The conventions recommended an effort from States towards the divulging of information that could facilitate the immigration process and the guarantee that immigrants would receive the same treatment and would have the same rights as national workers, regardless of their nationality, race, religion or gender. The greatest difference between them is the inclusion of articles related to the question of illegal immigration and the traffic of people, and also the inclusion of paragraphs relating to cultural rights.

The two ILO conventions have a low ratification rate, mainly the second one (47 countries the first one, and 23 countries the second one), and in both cases, countries receiving the greatest numbers of immigrants are not included, such as Australia, the United States and France.

In 1993, after a long period of negotiation, the United Nations has approved International Convention on the protection of all immigrant workers and their families, that was intended to establish "some minimal standards for the protection of migrant workers and their families, that would be universally recognized".[8] It recognized rights for legal and illegal immigrants, but it left aside the most controversial issues, like family reunion, which received a very superficial treatment. Even so, some of the most important countries involved in the migration networks have not signed the Convention yet.

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[8] OTEIZA, Enrique. "Migraciones. La tierra prometida", p. 7.

Immigrant related issues are also present in regional instruments, and other UN conventions, such as the World Conference of Human Rights (part 2, paragraphs 33-35), the International Conference on Population and Development (chapter 10); the World Summit of Social Development (chapters 3 and 4), and the Fourth International Conference on Women (chapter IV). Besides, in the last years, migration has been the theme of some international and regional meetings and conferences, both inter-governmental and non-governmental.

In the international legislation it seems to be a consensus that States have some legal obligations to individuals that are regularly in their territories. The complications began when dealing with illegal immigrants. Even so, international conventions recommend that States act, above all, by restraining work to illegal aliens and the international networks of people traffic,[9] and not punishing the illegal aliens themselves. Nevertheless, there seems to be a growing concern in receiving countries, that granting many rights to people without documents may serve as an incentive for more people to migrate illegally.

Anyway, it is fair to say that, especially in respect to legal immigrants and refugees, international legislation has been very important in establishing patterns, and leverage for immigrants' rights defenders. And it is also true that domestic Courts have had an important role constraining Government measures that harm immigrant's rights. The decision of French State Council, in 1978, that recognized the immigrant's right to family reunion is one important landmark in this sense, as was the US Supreme Court decision, in 1984, that overruled a California government decision to forbid the illegal children to attend public school.

The increasing recognition of the responsibilities of the receiving States in granting the human rights of immigrants was very important in diminishing the vulnerability of immigrants. Nevertheless, we cannot ignore that these progresses are accompanied by measures that have made more and more difficult not only to immigrate for liberal wealthy countries, but also to exercise rights such as family reunion and refugee demands. Many of the legislation changes of the 1980's and 1990's established new requirements for bringing family members in, for conceding nationality for married couple, and illegal immigration was criminalized in many receiving countries.

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[9] In November 2000, the UN approved two protocols related to the traffic of illegal people. The protocol against people traffic (especially women and children), and the protocol against the smuggling of immigrants by land, sea or air. The difference between traffic and smuggling is that traffic refers to a process of immigration that involves coercion, and smuggling is the facilitation of the illegal movement of people though frontiers.

In the dispute over immigration politics, human rights mechanisms have become a key component of the immigrants' struggle for better life conditions. "No man is illegal", "Immigrant workers have human rights" are some of the usual slogans of the immigrants' associations.

However, it is important to highlight that immigration in itself is not recognized, internationally, as a human right. As we stated before, the State's sovereignty is recognized both in relation to the entrance of foreigners and to the decision of citizenship. Human rights are used more as parameters than as a unique source for the definition of these policies. Economic, racial and cultural arguments also play an important role, and lately, security arguments are increasingly framing the debate over migration. In addition, there is no authority able to impose this decision to the State and not even a consensus about which would be the adequate criteria for entrance and membership.

Although economic arguments occupy an outstanding position in the rhetoric of associations and political parties who work with the immigration issue, they are seldom used as an exclusive foundation of their propositions, maybe because they are the most controversial ones. Subjects like the effects of illegal immigration on the welfare state and the impact of immigration in the economy overall play an important role in the political disputes. While some argue, mainly in States with many immigrants, that illegal aliens exert a tremendous pressure on the services of education and health care, others emphasize the contribution of immigrants to the receiving economy, and the virtual dependency of many sectors of the economy from the immigrant work.

The effect of illegal aliens on salaries is also a controversial issue. Some believe that they reduce the natives' salaries, mainly of the poorest ones, while others argue that immigrants create a unique work market. In Western Europe, the economic arguments are even more complicated. Despite the unemployment rates, many different organizations, such as the European Union and ILO, recognize that, due to the low birth rates, immigration will be fundamental to the health of European economies in the next years, as well as to the functioning of the welfare state.

In sum, it is very difficult to find definitive arguments in the economy field. Lately, they are usually incorporated in a more broad discourse that frames immigration as a security issue. The same process is happening with racial and cultural arguments. They usually are inserted in a rhetoric that considers that the "values of society" were being threatened by the "invasion" of foreigners with other habits and laws.

The use of culture and race to explain a nation's specificity is quite common, although the use of racist and cultural arguments to justify immigration policies is restricted. Especially after World War II, racial arguments are usually discarded, and faced with suspicion in both sides of the Atlantic, although they continue to underline many of the propositions made in this area. The discussion about the compatibility between Muslim religion and democracy, or between Latin American, "used to an authoritarian political tradition" and democracy, are examples of the permanence of racial arguments in the political discourse.

In some aspects, this discussion is very similar to that which in the beginning of the century considered that the immigration of Catholics to the United States would hurt the American democracy, because Catholics were loyal to the Pope, or to the French newspaper articles of the beginning of the century that condemned the immigration of Belgians, because they were "culturally incompatible."[10]   Under other aspects, however, the treatment given to race in the political field today is much different from that of the beginning of the century.

Peter Brimelow, one of the representatives of modern nativism and author of the book *Alien Nation*, in which he signals about the dangers of the immigrant invasion in the United States, considers that Americans suffer from the "vengeance of Hitler". "They were so obsessed with the idea of ending racism, they are so afraid of repeating the past, that they feel ashamed even of talking about restrictions to immigration."[11]

In France, the subject is less of a "taboo" than in the United States and is a repeating part Jean Marie Le Pen's political rhetoric, which questions the existence of concentration camps and makes constant references to racial differences. "In the Olympic games, there is an inequality between the black race and the white race (...) It is a fact, I verify that races are unequal (...) it is a banality".[12]

The differences between races, cultures and ethnicities are not necessarily treated today in a hierarchic form, which is characteristic of racism, but as insurmountable inequalities. Thus, racism loses ground to xenophobia, to the belief that cultures are mutually excluding, incompatible, static, homogeneous and unchangeable.[13] This conception that mixes up race and culture will be diffused through society as a whole.

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[10] BERNARD, Phillipe. *L'immigration*.

[11] Interview to the newspaper *Folha de São Paulo*, 07/16/1995.

[12] *Le Monde*, 09/11/1996.

[13] STOLCKE, Verena. "Cultura européia: uma nova retórica da exclusão?".

The identity issue at the end of the twentieth century took a leading role in human sciences as well. Samuel Huntington's theory about the Clash of Civilizations is one of the most important attempts to transpose the question of identities to an international relations field. For him, "In the post-Cold War world, banners are important and the same happens with other symbols of cultural identity, including crosses, crescent moons and even head covers, because culture counts and cultural identity is what means the most for most people"[14].The main conflicts will occur between "people belonging to different cultural identities", in this sense, the purpose of the immigration policy in the countries of the "Western civilization" should be to preserve and strengthen its cultural identity. In relation to Europe, he considers that:

> a continuous substantial immigration will probably produce countries divided in Christian and Muslim communities. This result can be avoided to the extent that governments and European peoples are willing to bear the costs of the restriction to this kind of immigration, which included the direct budget cost of the anti-immigration measures, the social costs of alienating even more the current immigrant communities and the potential economic costs, in the long run, of lack of work force and lower growth rates.[15]

In relation to the United States, in the field of immigration, the theory of the Clash of Civilizations is much more difficult to fit because, for Huntington, the main challenge imposed by immigration is the massive entrance of Mexicans. However, he is not sure whether Latin America (in which he includes Mexico) is part of the Western civilization or not, after all it incorporates

> a corporative, authoritarian culture, which existed in much lesser extent in Europe and did not exist at all in North America (...) Latin America could be considered a sub-civilization within the Western civilization, or a separate civilization, closely linked to the West and divided as to belonging or not in the West.[16]

Thus, it is difficult to understand, according to the logic of his own argument, to what extent the entrance of Mexicans in the United States can be considered a threat to the Western paradigm of civilization. Perhaps the "Mexican threat" fits better in Jean-Christophe Rufin's theory, to whom the main explaining factor of the dynamics of contemporary international relations is the existence of a frontier that separates the South, poor, from the North, rich. The best tool to understand international relations currently

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[14] HUNTINGTON, Samuel. *O choque das civilizações e a recomposição da ordem mundial*, p. 18.

[15] *Ibidem,* p. 255-256.

[16] *Ibidem,* p. 52.

is not, according to Rufin, Huntington's paradigm of multi-civilizations, but the paradigm of the Frontier, of the opposition between civilization and barbarianism:

> The *frontier* is, above all, the ideological limit between what the Empire recognizes as belonging to it and what is rejects as foreigner. On one side and the other of the *frontier*, man does not have the same value, does not follow the same rules, and History does not have the same meaning (…) In the beginning, the *frontier* is tranquilizing: by limiting civilization, by keeping it apart from barbarism, it protects civilization and allows its development. It is an instrument of progress and peace. But through the inequality it produces and fuels, the frontier throws impetuously one against the other, the worlds it intended to separate. It finally leads to a violent clash.[17]

The frontier that best suits this paradigm, according to Rufin, is that which separates the United States from Mexico. "The Mexican frontier proved to be a dangerously open door to an over-populated miserable and politically unstable Latin American world – of which Mexico (...) was the symbol".[18]

The second most important point of the *Frontier* would be the Mediterranean frontier that separates both sides of this sea. This frontier was created by the European unification and by the end of the colonization in North Africa, particularly by the war in Algeria. These two phenomena helped to create a gap between the two regions. "In the beginning of the seventies, the European countries were already convinced of the demographic peril and placed significant obstacles in the way of the economic immigration. This policy is currently impressive."[19]

The best territorial expressions of the *Frontier* paradigm are the two examples mentioned above. But the *Frontier* is overall a symbol of the separation between rich and poor in the world. A recent testimony from Iranian movie director Jafar Panih, detained in a New York airport (before September 11) on his way to Montevideo, where he was going to receive an award, illustrates Rufin's theory. The movie director, who was coming from Hong Kong, had not been informed of the need of a transfer visa in order to change planes in New York. Panih describes his situation as follows:

> Soon after landing on JFK airport, the American police took me an Office and, because of my nationality, told me that they would have to take my fingerprints and my identification photos. I refused and showed them my invitations for the festivals. They threatened to arrest me if I did not leave

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[17] RUFIN, Jean Christophe. *O império e os novos bárbaros*, p. 25.

[18] *Ibidem,* p. 138.

[19] *Ibidem*, p. 141.

my fingerprints. I asked for an interpreter and a phone. They refused. Then they handcuffed my as if I were a medieval prisoner, put me in a police car and took me to another area of the airport. There were many people there, men and women from different countries. The guards that accompanied me handed me to others policemen. They chained my feet and handcuffed me to other people, all tied to a very dirty bench. For ten hours, with no question or answer, I had to stay seated on that bench, squeezed between other people. I could not move. I was suffering from an old disease, however, nobody noticed. Once more, I asked them if I could call someone in New York, but they refused. Not only had they ignored my requests, but also the ones from a young man from Sri Lanka who wanted to talk to his mother. They were all moved by the boy's weeping, people from Mexico, Peru, Eastern Europe, India, and Pakistan.[20]

Through the ideology of the frontier, the North was able to project away all the evils, the authoritarian temptation, and the disrespect to human rights. As Rufin sums up, "to the man of the North, the ideology of the frontier offers what he wants most in the world, security."[21]

The discussion about immigration in the last twenty years seems to be more and more centered on the dichotomy security and human rights – security in the sense of preservation of the social order, by the identification of the immigrants with the rise of criminality as well as by the criminalization of immigration itself.

The security issue is reinforced by the existence of globalizing processes that help to strengthen the idea that the frontiers of the State are becoming increasingly porous. Phenomena such as the economical-technological competition, the environmental imbalances, the population explosion and the drug traffic.

Against the uncontrollable invading wave that comes from abroad, this side evocates the political will of closing the doors. The protectionist tenderness turns in the same way against drugs and arms smugglers who endanger the internal security, as well as against the overflowing of information, the foreign capital, the immigrants looking for jobs and the waves of fugitives, who supposedly destruct the local culture and the level of life.[22]

Security becomes a concern of the individuals' daily lives. Danger is no longer conceived as a threat coming from an enemy country and that may, as a last resource, be solved through war. Immigration is understood as a transnational threat, which cannot be handled in the traditional way.

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[20] Available at www.no.com.br. Accessed on: 04/30/01.

[21] RUFIN, Jean Christophe, *op. cit,* p. 187.

[22] HABERMAS, Jurgen. *A constelação pós-nacional e outros ensaios.* São Paulo: Littera Mundi. 2002, p. 103.

The securitization of immigration gave birth to policies that help to stigmatize every foreigner; either he is illegal, legal or even a citizen. The adoption of the identity controls in France, where the police is authorized to approach any person who looks foreign, "as long as the criterion adopted is not race"; the insertion of immigration in the European summits that discuss terrorism and drug trafficking, under the same subject as "security problems"; the militarization of the frontier with Mexico are all symptoms of what Aristide Zolberg called the "wall built against the poor" in the rich countries. The increase of intolerance, of xenophobia and of the success of the extreme-rights parties in many parts of Europe is very much related to this kind of policy.

Security was the main issue of the electoral campaign for the French presidency in the beginning of 2002. The first measure of impact by the rightist elected government was a public security plan. In the United States, the connection between security and immigration may be traced since the Reagan administration, which emphasized the struggle against the communists in Central America, up to the link established between terrorism and immigration after the September 11. Security and migration were also in the forefront of Berlusconi's coming back in the recent elections in Italy.

The interests involved in the process of construction of the migratory policies are the most varied: foreign policy purposes, economic or demographic interests, action of ethnical lobbies, labor interests. It is important to point out that the language, the arguments that the political actors who represent these interests use to justify their stances and to attract the adhesion to their proposition are increasingly placed somewhere in the line between security and human rights.

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