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THE ENEMY AT THE GATES AND THE ENEMY WITHIN: MIGRANTS, SOCIAL CONTROL AND HUMAN RIGHTS

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INTRODUCTION

1. “Illegal immigrants only have to climb a fence in Calais to sneak into Britain” declared a headline in the UK’s Daily Mail newspaper on 7 March 2008. The story went on: “Illegal immigrants are bypassing supposedly foolproof border controls by simply climbing over a fence in Calais ... [Shadow Home Secretary David Davis said:] ‘Gordon Brown must answer our calls for a dedicated border police force – with proper police powers – to protect the UK from the scourge of illegal immigration and the crime that flows in with it.’ ... A Border and Immigration Agency spokesman said last night: ‘Our border with France is one of the toughest in the world. Last year we searched over one million lorries and prevented a record 18,000 attempts by illegal immigrants to cross the channel ... A spokesman for Calais ports confirmed that the fences were ‘regularly attacked’”.
2. The news report, a familiar example of the popular discourse on migration, contains many of the elements of the contemporary “moral panic” surrounding the issue of migrants and migration. There is the public fear of the shadowy “Other” who brings crime and criminality into the country with him (within the media, migrant “folk devils” tend overwhelmingly to be constructed as men). There is the issue of “illegality” and criminalization, and the centrality and importance of an inviolable border. There is the securitization of migration and calls for stringent policing as the solution. There is the panic in the government that it will be portrayed as a “soft touch” and the consequent scramble to appear tough (i.e. exclusionary) on immigration issues. And there is the language that is used: “sneaking in”, the “scourge of illegal immigration”, “flows” and “attacks”.
3. The issue of control is a familiar one within the contemporary discourse on migration. Across the world, governments assert their control of their borders, of the movement of migrants through these borders, and of their treatment of migrants once they are within the territory of the nation-state. The language used to demonstrate the need for such pervasive control is

illustrative; states of destination are engaged in a “fight” against illegal immigration, a struggle to hold back the hordes of “invading” migrants, they are “containing” a threat to their economies, societies and public health by migrants who seek to jump the (often imaginary) queue and “swamp” the country’s inhabitants, public services, and cultural and national identity. The migrant is thus constructed as a very real threat to the integrity and identity of the state. As one commentator notes; “Appearing to crack down on ‘unwanted immigration’ is increasingly regarded by governments as essential for safeguarding social peace”¹ At times of economic and social hardship, such as in the context of the current global financial crisis, such a policy agenda comfortably creates the problem (the migrant) and rapidly solves it (exclusion and removal).

4. As a symbol of allegedly sacrosanct sovereignty, the territorial border is a central preoccupation of the modern nation-state. Consequently “defending” the border from external threat is seen as the primary *raison d’être* of the state, including in the context of its treatment of non-nationals. This is not by any means an inevitable state of affairs (the state could, for example, choose instead to enhance its international reputation as a safe haven for migrants, or its economic competitiveness through a liberal migration policy), but for most countries of migrant destination today it is the most common one.
5. This paper will explore contemporary migration in the context of statist social control policies and international human rights principles. Noting that the dominant methodologies of social control in relation to non nationals are the twin policies of criminalization and exclusion, the paper will track the migrant’s experiences of social control throughout his or her migratory journey. It will analyse the social construction of the migrant as the “Other”, and that of the border as a physical and symbolic signifier of the divide between citizen and foreigner. Finally, the paper will explore critical perspectives in relation to migration and human rights, and investigate the place of human rights principles in protecting migrants from arbitrary and abusive social control policies.
6. While recognizing that “the state” encompasses different actors, ministries and public officials, who will often have diverse or even competing interests in the sphere of migration², in the interests of space this paper makes reference throughout to the state as a single entity operating, at a fundamental level, in defence of its sovereignty. In addition, the paper will mainly address the situation arising in developed and middle income countries i.e. traditional and emerging countries of migrant destination.

¹ S. Castle and M.J. Miller, *The Age of Migration: International Population Movements in the Modern World*, Palgrave Macmillan, UK, p. 306

² Ministries of labour seeking to import workers into the economy can, for example, be found at odds with the ministry of home affairs when the latter is seeking to restrict the entry of low or semi-skilled migrants into the country. The Global Commission on International Migration noted in this context that it had “learned of many situations in which different Government departments pursue conflicting objectives, in which information was not effectively shared amongst those departments, and in which the general public received mixed messages about migration policy.” Making a plea for ‘joined-up government’, the Commission recommended that “Where the governance of migration is divided between ministries, mechanisms of coordination need to be established and maintained.” GCIM, pp. 67-68.

The dilemma of definitions

7. Defining the subjects of much of the “moral panic” surrounding the issue of contemporary migration is not straight forward. On the one hand, alarm and hostility is directed at any group seen or declared to be the foreigner or the outsider in a given community. Difference, whether on national, racial, ethnic, gender or other lines, has from time immemorial been met with fear and antagonism. The vagrant who was accused of bringing disease and crime into Tudor England³, the witch in medieval Europe convicted of heresy and Satanism, and the Romani gypsy have all shared the common label of “folk devil” at one point in history. They also share in common the fact that those who labeled them as the Other perceived them as different and foreign, regardless of their actual origins and whether they “belonged” in the society that feared them. Contemporary society too has its share of folk devils; outsiders or misfits who are feared by the society in which they come to live. Not all of them are foreigners, as the example of Roma and other minorities who have lived for generations in the same place shows. Yet the migrant who seeks to enter and live in a country which is not his or her own is often accorded a particular disdain, and it is these individuals who are the subject of this paper.
8. Most modern states have developed a system of classification of such foreigners, and a plethora of terms abound to describe them, not all of which have a basis in international law. Such terms include; economic migrant, asylum seeker, bogus asylum seeker, alien, illegal alien, refugee, forced migrant, voluntary migrant, guest worker, migrant worker, immigrant, irregular migrant, wetback and clandestines. The issue of definitions is one of immense importance in the field of migration, and being included into or excluded from one or the other category can mean the difference between life and death for the individual migrant.
9. Yet the categories that currently exist to define the migrant experience are by no means exhaustive. Within international law, a migrant worker is a person “who is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national”⁴. A refugee is a person who “Owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of their nationality, and is unable to or, owing to such fear, is unwilling to avail him/herself of the protection of that country”⁵. An asylum seeker, on the other hand, according to the United Nations High Commissioner for Refugees is “someone who says he or she is a refugee, but whose claim has not yet been definitively evaluated”⁶. International law does not provide an authoritative definition of a migrant, and indeed this is an area in which there is a critical lack of universally accepted definitions.⁷ A migrant has been described as a person who “moves from

³ “The sixteenth-century”, wrote one commentator, “lives in terror of the tramp”. R H Tawney, *The Agrarian Problem in the Sixteenth-Century*, Longmans Green and Co, London, 1967 edn, p. 268.

⁴ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Article 2(1).

⁵ 1951 Convention Relating to the Status of Refugees, Article 1.

⁶ See <http://www.unhcr.org/pages/49c3646c137.html>, accessed on 7 June 2009. More formally, as asylum seeker has been defined as “a person seeking to be admitted into a country as a refugee and awaiting decision on his/her application for refugee status under relevant international and national instruments.” Global Migration Group, *International Migration and Human Rights – Challenges and Opportunities on the Threshold of the 60th Anniversary of the Universal Declaration of Human Rights*, October 2008, p. 10, at http://www.globalmigrationgroup.org/pdf/Int_Migration_Human_Rights.pdf

⁷ The Global Migration Group (composed of relevant UN agencies and other intergovernmental organizations such as the IOM) has noted in this context that “Definitions in this area are often vague, controversial or contradictory. This stems to some extent from the fact that migration is a phenomenon which has traditionally been addressed at

one place to another to live, and usually to work, either temporarily or permanently”. Similarly, an irregular migrant has been described as “someone who does not have legal permission to enter or remain in a host country”⁸.

10. Most irregular migrants are not criminals. Many will have fallen in and out of a regular status, including as a result of administrative incoherence, along their migratory journey. Statistically, most will have come into an irregular status after entering the country of destination legally. There are a myriad ways in which migrants become irregular or undocumented:
 - Some will have made the decision to migrate in an irregular manner from their country of origin to the country of destination, often through seeking the services of people smugglers.
 - Some will have been deceived by recruiting agents, smugglers or traffickers into believing that they were entering or working in a regular manner.
 - Some will have responded to the call of employers who prefer to employ irregular migrants, seeing them as more flexible, cheaper and/or compliant.
 - Some will have entered the country of destination with valid documentation which they will subsequently have lost; sometimes this will be as a consequence of human rights violations, such as arbitrary confiscation or unlawful withholding of documents by the authorities, or unlawful termination of their employment contract.
 - Some will have entered and worked in the country of employment regularly, and subsequently breached their visa conditions. Sometimes this comes about as a result of tying migrants’ work (and residence) permits to one employer.
 - Some will choose to overstay their visa in order to be able to continue to work to re-pay the crippling debt they owe to the recruitment broker back home.
 - Some will have had their asylum application rejected and be left in an irregular situation, and often destitute, because they are unable to be returned to their country of origin.
 - Some will have become undocumented after the permits they acquired as part of a previous regularization programme have expired.
11. Contrary to public perception, the legal status of irregularity is rarely as the result of a deliberate choice made by the migrant to defraud the country of transit or destination.
12. Asylum seekers in many countries are increasingly being faced with a “culture of disbelief”⁹. Far from extending a welcome to the small percentage of refugees that are able to leave their regions of origin in search of refuge, states are increasingly seeking to deter asylum seekers. This is done

the national level. Therefore the usage of migration terms differs from country to country.” GMG, International Migration and Human Rights – Challenges and Opportunities on the Threshold of the 60th Anniversary of the Universal Declaration of Human Rights, October 2008, p. 7, at http://www.globalmigrationgroup.org/pdf/Int_Migration_Human_Rights.pdf

⁸ Both of these definitions are put forward in Amnesty International, *Living in the Shadows – A Primer on the Human Rights of Migrants*, AI Index POL 33/006/2006, p. 5.

⁹ Cohen has noted that “For two decades, the media and the political elites of all parties have focused attention on the notion of ‘genuineness’. This *culture of disbelief* penetrates the whole system. So ‘bogus’ refugees and asylum seekers have not really been driven from their home countries because of persecution, but are merely ‘economic’ migrants, attracted to the ‘Honey Pot’ or ‘Soft Touch Britain’” (emphasis in original). Stanley Cohen, *Folk Devils and Moral Panics: The Creation of Mods and Rockers*, 3rd edn, London, Routledge, 2002, p. xix.

through outright denial of access to territory and asylum procedures via interception practices¹⁰, or through policies which make life unbearable and undignified for asylum seekers in the territory of the state, including mandatory detention, denial of the right to work and freedom of movement, or stigmatizing and discriminating against asylum seekers while they wait, for months or even years, for a decision.¹¹ Restrictive interpretations of the 1951 Convention result in extremely low recognition rates in some countries.¹² In many, but not all, cases, asylum seekers who are refused refugee status are unable to return to their countries of origin, but are instead subject to prolonged detention, or left to swell the ranks of irregular migrants.

13. In seeking to examine social control responses in the context of migration, this paper is primarily concerned with those persons who are seen by the state as having limited entitlement to its protection, and who are viewed with most official suspicion. Vulnerable migrants, particularly those migrants who are in an irregular situation, are routinely denied access to their fundamental human rights, and find themselves at the sharp end of official social control policies and methodologies. This vulnerability is compounded by their often indeterminate legal status. In countries with developed asylum systems, recognised refugees are usually, but not always, perceived as having the right to make greater claims on the state and accordingly as less threatening to society.¹³ The groups of people considered by this paper therefore include

¹⁰ In May 2009, for example, following a treaty of “friendship” with Libya, Italy instituted a policy of intercepting mixed flows of migrants in the Mediterranean and returning them to Libya without determining their protection needs. Human Rights Watch reported that migrants who had been apprehended after earlier trying unsuccessfully to leave Libya said they had been mistreated and subjected to indefinite detention, often in inhuman and degrading conditions, by Libyan authorities. Human Rights Watch, *Gaddafi visit celebrates dirty deal*, 9 June 2009.

¹¹ An example of the latter includes the system of vouchers put in place by the UK government in 2000. Under this system asylum seekers received a subsistence allowance in paper vouchers rather than cash, which could be exchanged in designated shops for food and clothing. Many voices were raised in opposition to the scheme, with the Transport and General Workers Union calling the vouchers “inhuman”, claiming that the system “provided fuel for the ugly face of racism and discrimination” BBC News, *Asylum vouchers to be reviewed*, 28 September 2000. In April 2002 the controversial scheme was abolished following widespread criticism, but re-instated in 2005 as a deterrent measure for so-called “hard cases”, i.e. rejected asylum seekers who could not be sent back to countries such as Zimbabwe, Somalia and Iraq, despite concerns that the move would stigmatise people who had no realistic hope of return to their country of origin.

¹² In Greece, for instance, concerns about the extremely low rate of refugee recognition has led non-governmental organizations to argue that it is not a safe place for persons seeking refuge. The European Council for Refugees and Exiles noted in 2008 that refugee recognition rates in Greece were the lowest in Europe, with a mere 0.04 percent of claims being successful in 2007 and 0.05 percent in 2006. In 2007, while 85 percent of Iraqi asylum seekers were granted refugee status in Germany, none were recognized in Greece. European Council of Refugees and Exiles, *Background Information: Transfer of Asylum Seekers to Greece*, 3 April 2008, see http://www.ecre.org/resources/press_releases/1065

¹³ An important caveat to this is where, particularly in the context of post 9/11 counter-terrorism policies, refugees who were previously accorded a protected status have this status challenged or revoked. Such individuals can be subject to extreme methods of social control and to human rights abuses. In one such case, Mahmoud Abu Rideh, a Jordanian Palestinian who had been granted refugee status in the UK in 1998, was rounded up following the events of 9/11, his refugee status was revoked and he was placed in detention without charge under the Anti-Terrorism, Crime and Security Act 2001 on suspicion of being involved in terrorism-related activity. The grounds for that suspicion were kept largely secret from him and from his lawyers. Following a 2004 House of Lords judgement that indefinite detention was a breach of human rights, Abu Rideh was released from detention in March 2005, although he continued to be subject to a Control Order under the Prevention of Terrorism Act 2005. Under the terms of this Control Order, he was required to stay inside his home for 12 hours a day, and to phone a monitoring company three times a day. Any visitors to his home had to be approved by the Home Office and he was not allowed to have an Internet connection in his home. Any breach of these obligations would be considered a criminal offence. In July 2009, the UK authorities finally permitted Abu Rideh to apply for a travel document that would enable him to leave the country, if another country was willing to accept him. See Amnesty International, *Urgent Action: Travel Hope for Palestinian Refugee*, AI Index EUR 45/008/2009. In another case, Human Rights Watch protested the German government’s decision in 2007 to revoke the status of more than 18,000 Iraqi refugees on the grounds that the

persons who have crossed a border in an irregular or unlawful manner, persons who remain in the country of destination in an irregular or unlawful manner, asylum seekers who are awaiting a decision, and asylum seekers who have had their claim for protection refused.¹⁴ Where the paper uses the general term “migrants” it will usually be referring to this broad group of people, while recognizing that in legal terms they will often have different claims to protection.

14. In the main, this paper does not address the subject of criminal non-nationals, i.e. migrants who have committed a crime other than a breach of immigration regulations, as the vast majority of migrants are not criminals.¹⁵ However, the paper does seek to make the point, which will be expanded upon in later sections, that a large group of people are being criminalized today for no more than crossing a border without the authority to do so, or remaining in a country without authorization. Criminalisation of this population, for what is essentially an administrative infraction, has been widely criticized as disproportionate and counter-productive.¹⁶

A walk through the history of migration

15. The history of migration is at a fundamental level the history of human beings. We have always moved; to populate the earth, to acquire new lands and resources, to cement alliances, and to explore, conquer and escape persecution. Migration is part of the human condition, beginning with the movement of *homo sapiens* out of Africa into Eurasia around 70,000 years ago. Since then there have been near constant movements of people around the globe, punctuated by periods of greater migration such as the celebrated “age of exploration” undertaken by Europeans from the 15th century. Other parts of the world too have seen high levels of migration; including the southward migration of Bantu speakers from around 2500 B.C. until they reached modern-day Zimbabwe and South Africa around 1000 A.D, and the Arab conquest of the Persian and Byzantine empires between 632 and 713 A.D.¹⁷ The idea today that heterogeneous societies are a modern occurrence is belied by the facts; in 1620, for example,

political situation in Iraq had changed fundamentally and to encourage them to return to Iraq. The organization noted that persecution and generalized violence continued in Iraq, and that placing new restrictions on work and movement of these refugees could “place undue pressure on Iraqi refugees to return to an unstable Iraq.” Human Rights Watch, *Germany – End Efforts to Strip Iraqis of Refugee Status*, 9 July 2007.

¹⁴ Castles and Miller observe that such “unwanted immigration” is often seen as being at the root of public fears of mass influxes. It is therefore a catalyst for racism and is at the centre of extreme-right agitation.” Castles and Miller, *op. cit.*, p. 306.

¹⁵ In this context, however, it is pertinent to mention the disproportionate use of deportation made by some countries in their treatment of migrants who have committed minor criminal offences, and who are subject to automatic deportation following completion of their penal sentence. In a 2009 report on the deportation of both legal and irregular migrants from the United States, it was noted that some of the most common crimes for which non-citizens were deported were relatively minor offenses, such as marijuana and cocaine possession or traffic offences. Among legal immigrants who were deported, 77 percent had been convicted for such nonviolent crimes. Many had lived in the country for years and were therefore forced apart from close family members. See Human Rights Watch, *Forced Apart (By the Numbers): Non-Citizens Deported Mostly for Nonviolent Offenses*, 15 April 2009.

¹⁶ The Special Rapporteur on the Human Rights of Migrants drew attention in a recent report to the “increasing criminalization of irregular migration and the abuse of migrants during all phases of the migration process.” The report went on to observe that “The Special Rapporteur has received reports of the criminal justice practices used by States to combat irregular migration, including greater criminalization of migration offences (as opposed to treating them as administrative offences) and cross-national collaboration by police and other authorities, which have in certain cases resulted in increased violations against migrants.” UN Doc A/HRC/7/12, 25 February 2008, p. 6.

¹⁷ See John Haywood, *The Great Migrations – From the Earliest Humans to the Age of Globalization*, Quercus, London, 2008, pp. 56-59 and 106-109.

during the Dutch Golden Age, one in ten people in the Netherlands was foreign born. In towns such as Amsterdam this could be as much as one in four.

16. Important movements of people in search of refuge from persecution also occurred through the ages. In Europe, the Reformation in the sixteenth and seventeenth-centuries created the conditions for the movement of waves of forced migrants, including the Huguenots from France and Protestants from the Low Countries. In 1648, the Peace of Westphalia initiated a new European order based on the idea of state sovereignty and territorial integrity; an order that was soon to be exported to the rest of the world. The borders of nation-states began to be viewed as sacrosanct, and those seeking to enter were obliged to petition the state for permission.¹⁸
17. Modern migration, at least initially in the European context, is generally associated with the rise of industrialization. Millions of people were on the move during the late eighteenth and nineteenth-centuries, as Europeans sailed abroad in search of opportunity, adventure and freedom. Curbs on the slave trade in the mid-nineteenth century created a shortage of labour in tropical colonies, which was filled through the movement of contract and indentured labour from the Indian subcontinent and other colonies. In the early twentieth-century, political developments, including the collapse of the Ottoman Empire and the Russian civil war, but above all the aftermath of the Second World War and decolonization, led to an unprecedented surge in the forced and voluntary movements of people across the globe fleeing war and persecution, hunger and poverty, and the re-drawing of national boundaries.
18. “The age of migration”, one commentator has noted, “is now”.¹⁹ Since 1945, international migration has altered in scope and scale, with millions of people on the move, uprooted by war and poverty, and pulled towards wealth and opportunity. Migration in this period has been both temporary and permanent. The United States, Australia, Canada and New Zealand opened their doors to migrants who were permitted to settle permanently in the country with their families. However, in most cases these states sought to restrict entry to “kin” migrants, i.e. people who were white and European, and preferably British. In Europe, “guest worker” schemes were put into place by governments keen to attract temporary labour to rebuild economies and societies shattered by the war. However their expectations that the workers would vanish once the job was completed proved incorrect as workers were able to bring their families to live with them and settle permanently in the country.²⁰ In the 1970s and 1980s Asia witnessed a dramatic rise in migration, both within the region and outwards to destination like the Gulf where oil rich countries employed migrants on huge construction projects. Forced migration too reached new

¹⁸ See Liza Schuster, *The Use and Abuse of Political Asylum in Britain and Germany*, Frank Cass, London, 2003, pp. 72-77.

¹⁹ Haywood, p. 244.

²⁰ The guestworker system of the Federal Republic of Germany (FRG) is perhaps the best known of such schemes; initiated in the mid-1950s, the scheme recruited workers mainly from southern Europe, Turkey and North Africa. “German policies conceived migrant workers as temporary labour units, which could be recruited, utilized and sent away again as employers required. To enter and remain in the FRG, a migrant needed a residence permit and a labour permit [which were granted for limited periods] ... Entry of dependants was discouraged. A worker could be deprived of his or her permit for a variety of reasons, leading to deportation. However, it was impossible to prevent family reunion and settlement. Often officially recruited migrants were able to get employers to request their husbands or wives as workers. Competition with other labour-importing countries for labour led to relaxation of restrictions on entry of dependants in the 1960s. Families became established and babies were born.” Castles and Miller, p. 100. This experience has striking parallels with contemporary discussions about the efficacy of “temporary and circular migration programmes” which will be discussed in later sections.

global highs as conflict and persecution drove millions across borders; while the majority of refugees remained in their regions of origin (notably Africa, Asia and Latin America), a growing number of asylum seekers sought to claim refuge in developed countries, including Europe and North America.

19. The most recent “period” of migration can be said to have begun in the 1990s, following the fall of the Berlin Wall and increasing globalization. By the beginning of the new millennium, technological advances, including faster and cheaper transport and the spread of information through the internet, contributed to a dramatic increase in global migration levels. While large numbers of migrant workers moved from the developing to the developed world, equal numbers of migrants moved within the global South, usually making their way to relatively more prosperous countries within their own region.²¹ In Asia, for instance, the 1990s saw a sharp increase in the numbers of migrants moving within the region to newly industrializing countries such as Singapore and Malaysia, where migrants now make up around 28 and 12 percent of the workforce respectively.²²
20. Running alongside this history of movement is a no less pervasive history of resistance to the inflow of migrants, of attempts to control this movement. In the UK, for instance, legislation to restrict the entry of migrants was put in place to control the movement of Jewish refugees from the Russian pogroms of 1875-1914. The Aliens Act (1905)²³ was “passed for the purpose of checking the immigration of undesirable aliens” and restricted the entry of migrants who might place a burden on the state because they were poor or mentally disabled. At the same time, legislators introduced differences between groups of incoming migrants, providing an exemption for those who were fleeing “solely to avoid persecution or punishment on religious or political grounds”.²⁴ Different grounds for distinguishing between diverse groups of migrants were provided in the United States, where it was claimed that Southern and Eastern Europeans were “unassimilable”. Accordingly, legislation passed in the 1920s severely restricted the entry of migrants into the US from anywhere but Northwest Europe.²⁵
21. The introduction of passports and visas provides another example of the controls put in place by states on the movement of people. While there is a relatively long history of documents issued to facilitate travel and assist commerce²⁶, it was only around the First World War that

²¹ According to the final report of the Global Commission on International Migration, around 60 percent of all recorded migrants live in the most prosperous countries of the world. In addition, it is estimated that Asia has 50 million migrants, Africa has 16 million and Latin America and the Caribbean has some 6 million. GCIM, *Migration in an Interconnected World: New Directions for Action*, Geneva, 2005, p. 6.

²² ILO, *Realizing Decent Work in Asia: Fourteenth Asian Regional Meeting: Report of the Director General*, Geneva, 2006, p. 40.

²³ This legislation had been preceded by the Aliens Bill of 1793 which had itself been promulgated to restrict the flow of refugees fleeing the chaos of the French Revolution.

²⁴ Schuster notes that despite this exemption, the numbers of people who successfully appealed and entered the UK on grounds of persecution were small – just five in 1910. The later Aliens’ Restriction Acts of 1914 and 1919 suspended and then removed the right to appeal against refusal of leave to land. Schuster pp. 84-85.

²⁵ G.J. Borjas, *Friends or Strangers: the Impact of Immigration on the US Economy*, Basic Books, New York, 1990, pp. 28-29.

²⁶ The first reference to a document enabling passengers to travel across borders is said to be found in the Old Testament’s Book of Nehemiah, in which Persian king Artaxerxes gives a letter ‘to governors of the province beyond the river’ asking them to offer court official Nehemiah safe passage. See Paul Simpson, *A Short History of Passports*, *Wanderlust*, Issue 98, October 2008, http://www.wanderlust.co.uk/article.php?page_id=2507, last accessed 12 May 2009.

Europe and the United States introduced or reintroduced passport requirements and began to issue and require passports in a bid to ascertain identity and control entry to their territory. In 1920 the League of Nations held a conference in Paris on passports and customs formalities, followed six years later by a second international conference in Geneva on passport standardization. In 1924, the US *Immigration Act* established immigration quotas and required all aliens arriving in the United States to present a visa at the border. Today, visa restrictions are a daily reality for travelers around the globe. For the migrant from an “undesirable” part of the world, the visa is a reminder to them, even while they queue at the doors of the embassy or the high commission of the destination state, that they are “less equal” than other travelers. The control of their movement starts in their own countries. For others, being placed on a “high risk” list at the immigration desk in the airport, which can be an arbitrary decision with no means of appeal, will mean that the passport they carry with them has been, in a sense, appropriated by the country of destination as a means of control, sending coded messages to immigration officers that the movement of the traveler is to be monitored and, if necessary, restricted.

22. It is estimated that around 200 million people around the world today live outside their country of origin.²⁷ Of this, around 16 million are refugees and asylum seekers.²⁸ While the absolute numbers of migrants are relatively small, corresponding to around three percent of the world’s population, more people are on the move now than possibly at any other time in history, with the numbers of international migrants having doubled in the last thirty years. In many urban centres, migrants now make up a significant proportion of the city’s population; 20 cities around the world now have foreign-born populations exceeding one million people, or one in five of the world’s migrants.²⁹
23. It is, however, notoriously difficult to obtain accurate statistics about migrants, particularly in the case of irregular migrants who are rarely recorded in official figures and who are often extremely reluctant to expose their presence to the authorities by participating in any kind of census. There is in addition no authoritative global source of numbers and trends on irregular migration. It has been estimated nevertheless that there are between 3-8 million irregular migrants in the European Union.³⁰ In the United States, the number of irregular migrants is estimated at over 10 million, with 500,000 unauthorised arrivals every year. While 20 million irregular migrants live in India, Russia has an estimated 2 million irregular migrant workers. Thus the numbers of irregular migrants in the world today are significant, and the issue could be and is justifiably of concern to policy-makers.
24. However, neither the situation within which this migration is taking place nor the absolute numbers bear out the alarmist scenarios being painted of perilous mass influxes. The GCIM has estimated that a relatively few 2.5 to 4 million migrants cross international borders without authorization every year.³¹ As Koser points out, it is important to distinguish “stocks” from “flows” of irregular migrants, observing that “in many countries stocks far outnumber new

²⁷ As compared to 82 million international migrants in 1970. See GCIM, Migration at a Glance, <http://www.gcim.org/attachements/Migration%20at%20a%20glance.pdf>

²⁸ See the UNHCR website at <http://www.unhcr.org/pages/4a0174156.html> last accessed on 8 July 2009

²⁹ Maria Price and Lisa Benton-Short, Counting Immigrants in Cities across the Globe, Migration Policy Institute, January 2007.

³⁰ See Clandestino Project Consortium, 18 February 2009 <http://clandestino.eliamep.gr/> last accessed 12 June 2009.

³¹ GCIM, <http://www.gcim.org/attachements/Migration%20at%20a%20glance.pdf>

arrivals. Most irregular migrants worldwide are already present in destination countries. And very often these people have found work, have somewhere to live, and even have children at school. In other words they are already part and parcel of the societies in which they live.”³² Yet, the political and societal “noise” created by this movement of people is perhaps even more significant, as migration now makes news headlines and tops the political agenda in countries across the globe. The numbers of asylum seekers in Europe is a case in point. While the issue tops the political agenda of parties across the spectrum, and occasions a raft of emotive headlines in the popular press³³, the fact remains that in 2006 under 200,000 asylum seekers lodged applications for asylum within the entirety of the European Union.

25. At the border, states can choose from myriad legal and administrative categories in which to locate the migrant who is seeking to enter, including; refugee, asylum seeker, highly skilled migrant, unskilled migrant, permanent migrant, tourist, business traveler, and student. These labels assign entrants more or less rights accordingly.

The construction of deviance: migration and theories of social control

26. Cohen defines social control as “the organized ways in which society responds to behavior and people it regards as deviant, problematic, worrying, threatening, troublesome or undesirable in some way or another.”³⁴ While there would be little disagreement with the contention that non nationals are frequently the subjects of state social control methodologies, their inclusion in the category of “deviance” is less obvious. Objectively, and contrary to the apparent belief of many right-wing commentators today, the overwhelming majority of migrants are not criminal or malevolent. Asylum seekers have been forced out of their countries as a result of violence and human rights violations and arrive at borders to seek refuge, migrant workers arrive to work and live, legitimately if they can, illegally if they must. In the main, migrants are criminalized by administrative regulations that place a disproportionate criminal sanction on irregular entry and presence. “Deviance” in this context is created as a result of the policies and regulations of the state and the perceptions of society.
27. Sociologists make the point that social problems are largely constructed. Such constructivist perspectives focus on how people create and respond to certain conditions, and how these conditions are then categorized and understood. Social problems, in other words, are what people *view* as social problems. In the case of migration, a condition that could be viewed as either beneficial in social and economic terms, or neutral in terms of the level of “threat” to the receiving society, has instead been constructed as a problem, a condition requiring a “solution”.

³² Khalid Koser, *International Migration: A Very Short Introduction*, Oxford University Press, Oxford, 2007, p. 60.

³³ In the UK, for instance, tabloid newspapers such as the *Daily Mail* have run features entitled “Script for a scam: In letters back home asylum gypsies tell their friends how to get to Britain” 24 October 1997, “Britain ‘swamped’ by asylum seekers”, 22 April 2003 or “Asylum seekers raising HIV risks”, 6 August 2004.

³⁴ Stanley Cohen, *Visions of Social Control: Crime, Punishment and Classification*, Blackwell, UK, 1985, p. 1.

28. Best and Loseke explain in addition that “what is and what is not evaluated as a social problem depends on the characteristics of the larger social, political and cultural environments in which the condition exists.”³⁵ In the case of migration, certain claims-makers³⁶ which includes government officials and the media have tended to present and typify the “problem” of migration in particular ways. The use of language is an important signifier in this context. When migration is defined primarily within the terminology of alarm, crisis and panic, the policy paradigm that dominates is one of defence of the country’s borders and societal integrity.³⁷ In addition, the use of terminology which indicates that unbearable numbers of migrants are “flooding” or “swamping” the country and society tends to lead policy-makers to focus on numbers and quotas as the definition of the problem, and border control and containment of these numbers as the solution.

Babies Overboard in Australia

On 6 October 2001, the HMAS *Adelaide* intercepted a vessel carrying 223 Afghan asylum seekers as it sought to enter Australian waters. Australia was preparing to vote in a general election, and two months earlier the government led by John Howard had refused to allow a boatload of asylum seekers to disembark in Australia after they had been rescued at sea by the Norwegian freighter MV *Tampa*.

On 7 October the immigration minister Philip Ruddock reported to the media that “Disturbingly a number of children have been thrown overboard [from the intercepted vessel] with the intention of putting us under duress ... It was clearly planned and premeditated”. Photos were released by the government which purportedly showed children in the sea who had been thrown out of the boat by their parents. Much of the subsequent election campaigning by the government highlighted this incident, pledging that they were strong on border control, and would protect Australia from the influx of hordes of similarly barbarous migrants who were presumably unfit to enter Australian society. “We shall control who comes to this country, and in which way they come” promised John Howard. In November 2001 the Howard government was re-elected with an increased majority. One commentator noted at the time that “the election triumph marked an extraordinary comeback for a man whose government was languishing 14 points behind the Labour opposition earlier [in 2001]”. (Andrew Herd, *Amplifying Outrage Over Children Overboard*, *Social Alternatives*, Vol. 25, No. 2, Second Quarter 2006, pp. 59-63)

In 2002 a Senate Select Committee inquiry (albeit one in which the Howard government did not participate) concluded that no children had been thrown into the sea during that incident, that the description of the photos was inaccurate, and that the Howard government had indeed deliberately misled the Australian public in the lead-up to the 2001 election. The politics of fear had been used to dramatic effect to create a moral panic about asylum seekers and to ensure political victory for the political party of John Howard.

³⁵ Donileen R Loseke and Joel Best, ‘Examining Social Problems – Introduction’, *Social Problems, Constructionist Readings* (Chicago Guides to Writing, Editing, and Publishing), Aldine Transaction, 2003, p. 4.

³⁶ “Within a constructionist perspective, a *claim* is any verbal, visual or behavioural statement that tries to persuade audience members to take a condition seriously and respond to it as a social problem, *claims makers* are the people who make claims and *audiences* are the people who evaluate the believability and importance of claims”. Loseke and Best, p. 39.

³⁷ Such defensive migration policies are exemplified by situations in which the army is mobilized to deal with “panic” caused by the presence of migrants. Countries such as Malaysia and South Africa have stationed troops on their borders to stop the inflow of migrants, while Egypt has been criticized by human rights groups for allowing its army to use excessive force to prevent the movement of migrants across its border into Israel, leading in 2008 to the deaths of at least 28 migrants. Meanwhile, in 2008 Italy authorized the army to patrol the streets of major cities in order to “stem illegal immigration”. By calling on the defence forces to take on police functions, a clear policy line has been drawn in the sand.

29. The concept of fear is a central factor in this construction of deviance. The “otherness” of the stranger is translated into a variety of popular fears; including of the society being “swamped” and losing its racial or ethnic, cultural, religious or otherwise “national” identity. Other fears include losing out on employment, social welfare or public housing to the migrant, fears of the allegedly heightened criminality of migrants, and, particularly in the post 9/11 context, of the migrant as a security threat.
30. The state has played a central role in constructing and communicating this fear through its official pronouncements, and in the policy choices it makes *vis a vis* migrants. Altheide observes that “Resourceful leaders use the propaganda of fear to connect one problem with another, as in numerous news reports that join the ‘war on terrorism’ with ‘protecting our borders’ and stopping the ‘invasion’. At this point the process becomes a moral panic as emotions run high and people proclaim that a ‘way of life’ is in jeopardy.”³⁸ To illustrate this point, take a recent pronouncement of Nick Griffin, leader of the far-right British National Party, and recently elected Member of the European Parliament in response to migration across the Mediterranean; “Europe has sooner or later to close its borders or it is simply going to be swamped by the Third World”.³⁹ Fear is, then, itself socially constructed, whether intentionally by political actors who use the fear of the “Other” to win elections or garner support for restrictionist public policies, or even unintentionally as a by-product of other official actions. A process of selection takes place by claims-makers, whereby migrants and migration are selected from a range of possible threats, and categorized as the primary threat to amorphously defined “security” by claims makers. In a world becoming ever closer through globalization, this process of selection can take place across societies as politicians and publics in different countries share with each other common fears of the foreigner, this fear often being heightened by racial designations.
31. The sociological concept of “moral panic” too has resonance in a discussion of migration and social control. According to Cohen, a moral panic occurs when “A condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media and politicians.”⁴⁰ As Welch has observed, moral panic theory is particularly useful to the study of migration and social control “because it encourages us to see clearly the marginalization process.”⁴¹ By constructing migrants as dangerously different and a threat to the receiving society, claims makers are able both to undermine their humanity and to institute exclusionary policies towards

³⁸ David Altheide writing in the Arizona Republic, *Politics of fear driving debate on immigration*, 18 February 2008. He explains in addition that the “politics of fear refers to decision makers’ promotion and use of audience belief and assumptions about danger, risk and fear in order to achieve certain goals.” David L Altheide, *Terrorism and the Politics of Fear*, AltaMira Press, Lanham, 2006, p. 15.

³⁹ Griffin goes on to say; “[T]he only measure, sooner or later, which is going to stop immigration...is to get very tough with those coming over. Frankly, they need to sink several of those boats.” BBC News, *Sink immigrants’ boats – Griffin*, 8 July 2009.

⁴⁰ Stanley Cohen, *Folk Devils and Moral Panics: The Creation of Mods and Rockers*, MacGibbon and Kee, London, 1972, p.9. Interestingly, presentations of the “benign” side of migration are not entirely absent from the media and the public sphere, yet in making much migration policy, such characterizations are usually ignored in favour of “louder” representations involving danger and alarm.

⁴¹ Michael Welch, ‘Moral Panic, Denial and Human Rights: scanning the spectrum from overreaction to underreaction’, in Downes et al (eds), *Crime, Social Control and Human Rights – From Moral Panics to States of Denial*, Essays in Honour of Stanley Cohen, UK, Willan, 2007, p. 96.

such migrants. As one commentator in Europe has noted; “the reference to immigration largely overlaps, especially in much local and tabloid press, with reference to crime”.⁴²

32. Language used to describe “deviant migrants” in such media is also replete with negative, de-humanising images; of floods, invasions, disease, and inherent difference. By concentrating overwhelmingly on stories that convey the sense of an emergency, such as the mass arrivals of migrants to the southern borders of Europe or the influx of Mexican and Central American migrants across the US border, and covering these emergencies in terms of a “panic”, the media creates a distorted landscape within which migration is discussed. This discourse is then given a broader audience and legitimacy when political actors either use such language themselves, or appropriate the sense of emergency conveyed by the language when making policy.⁴³
33. Migrants are subject to varying social controls throughout their migratory journey and at all stages of the migration “life-cycle” (pre-departure, during movement and while in transit, at the border, once in the country of destination, and during return). The following sections will focus on social control practices and constructs at particular points along the journey. This analysis is centred around the border (examining the interaction between the migrant and the state before, at, and within the border) as it is both the physical and symbolic signifier of the difference between migrant and citizen. Bigo describes the border as a “site of control”, a place where the founding myths of the nation-state are invoked and reified.⁴⁴ Yet in a globalising world, where the theoretical construct of sovereignty is daily breached by the movement of goods, capital, information and ideas, it is significant that the movement of people, the “breach” of the border by migrants, should continue to inspire often visceral reactions by the state.

Controlling migration before the border: Freedom of movement and interception

34. The life-cycle of migration begins well before the migrant has moved from his or her country of origin, indeed sometimes before he or she has even moved out of the place of origin. As the migrant is weighing options and making decisions about how and where to migrate, states are devoting increasing time and resources into trying to stop this movement happening in the first place, or in turning people back before they can reach international borders.

⁴² Dario Melossi, Security, migration and "social control" in the context of the "constitution" of the EU, Eurozine, 12 February 2004, <http://www.eurozine.com/articles/2004-02-13-melossi-en.html>, last accessed 9 July 2009. Such stories can often reach the realm of the bizarre, as this report from the British tabloid newspaper *The Sun* shows. Headlined *Asylum gang had two swans for roasting*, the story revealed that “callous asylum seekers are barbecuing the Queen’s swans” attributing the crime to “Eastern European gangs”. The story ended with a quote from an unnamed police source who lamented “It’s tragic that people from abroad don’t respect our traditions.” It was later acknowledged by the paper that conjecture rather than fact had largely been used as the basis for the report. *The Sun*, 4 July 2003.

⁴³ In the context of the recent electoral rise of far-right parties in Europe, Ian Birrell writing in *The Independent* noted of the UK that “By talking of schools being ‘swamped’ by immigrants, or demanding ‘British jobs for British workers’, or even by constantly trying to define ‘Britishness’, politicians...in tandem with elements of the populist press, the net and radio talkshows – have coarsened the public discourse.” *The Independent*, How our politicians failed to stop the rise of the far right, 9 June 2009.

⁴⁴ Didier Bigo, Criminalisation of “immigrants”: the side effect of the will to control the frontiers and the sovereign illusion, in B Bogusz et al (eds), *Irregular Migration and Human Rights, Theoretical, European and International Perspectives*, Martinus Nijhof, 2004, p. 98.

35. In this context, state efforts to combat human trafficking are an instructive example of policies of control. Trafficking, which is defined as the transport of persons for the purposes of exploitation, has rightly been criminalised by the international community within the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the UN Trafficking Protocol).⁴⁵ Anti-trafficking measures include policies designed to reduce the likelihood of trafficking as well as protective measures once a person has been trafficked, in addition to law enforcement and criminal sanction in relation to the traffickers. Yet in a number of countries, persons believed to be at risk of being trafficked are “protected” in law or administrative practice by being deprived of their liberty; either by having their freedom of movement severely curtailed or by being detained in protective custody “for their own good”. In Nepal, where the mobility of women is frequently a matter of public scrutiny and social stigmatization, a common counter-trafficking policy is to restrict the migration of women. Nepal’s Foreign Employment Act accordingly explicitly prohibits the international migration of women for work, without the permission of both the government and the woman’s “guardian”⁴⁶.
36. Governmental initiatives, and other programmes put in place at the behest of governments, can also inhibit freedom of movement in the name of counter trafficking. Agencies such as the International Organization for Migration (IOM) run counter-trafficking initiatives on behalf of governments around the world, including programmes which target “at-risk” persons (also known as “potential victims of trafficking”) in order to prevent their forced movement. However, such counter-trafficking initiatives can be concerned almost exclusively with preventing migration, viewing all movement as forced and undesirable. Counter-trafficking then becomes a euphemism for migration control. A leading anti-trafficking NGO has thus observed that “more efforts are being put into intercepting people who *may* be in the process of being trafficked (but may just be ordinary migrants), than into stamping out the various forms of exploitation listed in the UN Trafficking Protocol”⁴⁷. In Nigeria, anti-trafficking interventions

⁴⁵ The definition of trafficking provided in Article 3(a) of the UN Trafficking Protocol is the “recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”

⁴⁶ For the purposes of the act, a guardian is defined as either the woman’s parents or her husband. Article 11, Foreign Employment Act 2042 (1985). A 2001 joint report of the Population Council and the Asia Foundation observed that a significant percentage (85 percent) of women interviewed for the report expressed a desire to migrate as a means of escaping the poverty of their places of origin. The report quoted an unnamed adolescent girl who said; “we are not allowed any freedom of movement and at times when we do go out alone people say evil things to us.” Population Council and Asia Foundation, *Trafficking and human rights in Nepal: Community perceptions and policy and program responses*, August 2001, p. 4. Buckland notes that Greece operated a similar policy in the early 20th century, whereby young women were forbidden to leave the country without a special permit, ostensibly to “protect” them from trafficking. Benjamin S Buckland, *More than just victims: the truth about human trafficking*, Public Policy Research, International Institute of Public Policy Research, March-May 2008, p. 43.

⁴⁷ Global Alliance Against Traffic in Women, *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights Around the World*, GAATW, Bangkok, 2007, p. 12. In the context of anti-trafficking measures in Africa, Chapkis has observed the emphasis placed on “eliminating any distinction between intentional (if exploitative) migration for work and forced enslavement of millions of Africans [which] creates a moral imperative to stop the flow of undocumented workers regardless of their desire to immigrate. Attempts to restrict immigration can then be packaged as anti-slavery measures; would be migrants are would be victims whose safety and well-being are

are reportedly responsible for actually driving more people to seek out the services of smugglers and traffickers, as young Nigerians looking to migrate are forced to find unorthodox migration routes in order to evade emigration restrictions and strict visa regimes.⁴⁸

37. A further facet of social control is exercised when anti-trafficking measures are conflated with combating prostitution, also within the context of migration policies premised on control and containment. The desired outcome is the same as the initiatives described above, i.e. the prevention of movement. Augustin thus criticizes the “rescue industry” where counter-trafficking measures are constructed and promoted as measures to “save” migrant women from having to sell sex. She claims that “[S]ocial helpers [i.e. government and civil society actors engaged in counter-trafficking initiatives] consistently deny the agency of large numbers of working-class migrants, in a range of theoretical and practical moves whose object is management and control...Social agents’ current practices in services, education, outreach, publications and policy-making...perpetuate a constructed class—‘prostitute’—which justifies their actions and serves an isolationist immigration policy”⁴⁹. Women, particularly poorer women, are judged to be better off staying at home than risking potentially dangerous movement, despite evidence of the increasing feminization of migration whereby large numbers of women are making independent and rational decisions to migrate for employment. Accordingly, women seeking to migrate to Europe from certain countries in Africa and Latin America are stereotyped as either potential prostitutes or trafficked victims, and “rescued” by being returned to their countries of origin.⁵⁰

Interception

38. At borders, and often well before migrants can reach borders, interception practices control and restrict movement. Such practices range from stopping a vessel carrying migrants, to visa regimes and carrier sanctions, transit processing centres and offshore

Interception in Thailand

In December 2008, Thailand was accused of intercepting boatloads of migrants and abandoning them at sea. The Thai navy reportedly pushed back up to 1000 migrants from the Rohingya minority in Myanmar from its territorial waters after they were discovered trying to enter Thailand, many of them en route to other countries in the region where most were seeking to find employment within the shadow economy, as construction workers or manual labourers. The vast majority of Rohingyas have been recognized by the international community as being in need of international protection. The Rohingyas were set adrift by the Thai army in unseaworthy boats with little food and water, and many later died at sea. Human rights groups raised concerns that there had been no attempt to determine the protection needs of these migrants, nor to ensure that any push-backs would not result in *refoulement* to Myanmar. For the last three decades hundreds of thousands of Rohingyas have fled systematic persecution to neighbouring countries in Asia, the vast majority to Bangladesh. UNHCR has observed that “There are 28,000 Rohingya recognized refugees in two UNHCR camps in Bangladesh and some 200,000 unregistered Rohingya living outside the camps there. For several years now, many of them have been desperate enough to risk their lives at sea in small boats sailing from Bangladesh or Myanmar, often turning up in Thailand, Malaysia or as far away as Indonesia.” *UNHCR Seeks Access to 126 Muslim Rohingya Boat People in Thailand, 20 January 2009*

ostensibly served by more rigorous policing of the borders.” W. Chapkis, *Trafficking, migration and the law: protecting innocents, punishing immigrants*, Gender and Society Vol. 17, No. 6, 2003, pp. 926-7.

⁴⁸ Ibid., p. 173.

⁴⁹ Laura Maria Augustin, *Sex at the Margins – Migration, Labour Markets and the Rescue Industry*, Zed Books, London, 2007, p. 8.

⁵⁰ GAATW, p. 13.

processing facilities. Migrants are often physically prevented from reaching the territory of the destination state, and in the process of interception are exposed to serious human rights violations which could include *refoulement*.⁵¹ Vessels fulfilling their duty to rescue people at sea encounter problems as states refuse to let migrants and refugees disembark, and those who rescue migrants in humanitarian distress are themselves punished by states intent on controlling movement. In 2007, for example, seven Tunisian fishermen were put on trial in Sicily on charges of aiding and abetting irregular migration, amidst concerns that the fishermen had actually rescued the 44 people found on their boat from a flimsy rubber dinghy⁵².

39. Interception raises a host of human rights concerns. States that practice interception as a social control mechanism aim to send public signals that they are in control of their borders, and that “unwanted” migration will be resisted with the full force of the state.⁵³ However, the consequences of harsh interception practices on the rights of migrants are often unacceptable, with such practices themselves being responsible for violations and abuse, not least of which is denial of the right to seek asylum. According to Brouwer and Kumin, visa regimes are “the main reason why asylum seekers and other migrants resort to the services of people smugglers, use false documents, and otherwise find themselves in situations where they may be intercepted.”⁵⁴ Disproportionately onerous visa requirements will, thus, create the conditions for human rights abuse. In the case of asylum seekers, in addition, visa requirements could interfere directly with their right to seek asylum. Many asylum seekers will not possess valid travel documents and will be reluctant to approach their own governments (who are often responsible for the persecution they are seeking to flee), making them ineligible to apply for or be granted visas. Countries of destination have also on occasion imposed visa requirements for citizens of countries which produce large numbers of asylum seekers. In July 2009, for instance, Canada re-imposed visa requirements on citizens of the Czech Republic, arguing that spurious asylum claims were a burden on its immigration and asylum infrastructure. However, critics of this decision have

⁵¹ This refers to the legal obligation on all states not to return any person in any manner whatsoever to a country or situation where s/he would face torture or other cruel, inhuman or degrading treatment. Widely acknowledged to be a norm of customary international law, the principle of *non-refoulement* is contained in Article 33(1) of the 1951 Refugee Convention, as well as Article 3 of the Convention Against Torture.

⁵² Since the creation of the European Agency for the Management of Operational Cooperation at External Borders (or 'Frontex') in 2005, a series of high-profile joint interception operations by various EU member states have taken place in both the Mediterranean and the Atlantic leading to concerns about *refoulement*, and that states are ignoring the conditions of migrants in humanitarian distress. William Spindler, *Between the Devil and the Deep Blue Sea: Anti-immigration policies, reckless smugglers and cold commercial calculations*, UNHCR News Stories, 5 October 2007.

⁵³ Despite international norms to the contrary, states have also sought to affirm that migrants intercepted outside their territory were not of their concern. In 2009 the Italian government announced that in intercepting and returning migrants to Libya (the country of transit) from Mediterranean waters, it had “developed a new model to fight clandestine immigration — that is, to repulse at sea all those who try to enter illegally”. *New York Times*, *Italy returns 227 migrants to Libya*, 8 May 2009. Yet, the principle of extraterritorial responsibility clearly dictates that states that engage in interception have the responsibility and obligation to ensure that their actions, whether directly or indirectly, do not result in human rights violations. This applies in all cases where the state exercises effective control, regardless of whether this control is exercised outside its territorial borders. Lauterpacht and Bethlehem observe consequently “It follows that the principle of non refoulement will apply to the conduct of State officials or those acting on behalf of the State wherever this occurs, whether beyond the national territory of the State in question, at border posts or other points of entry, in international zones, at transit points, etc.” E Lauterpacht and D Bethlehem, ‘The Scope and Content of the Principle of Non-Refoulement’, in E Feller, V Turk and F Nicholson (eds), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, Cambridge, Cambridge University Press, 2003, p. 111.

⁵⁴ Andrew Brouwer and Judith Kumin, *Interception and asylum: when migration control and human rights collide*, *Refuge*, Vol. 21, No. 4, 2003, p. 8.

pointed out that virtually all Czech claimants were Roma, a minority with a long history of discrimination and persecution in the Czech Republic, and that over 85 percent of Roma asylum claims heard in Canada had been successful.⁵⁵ Numerous studies have shown in addition that the deterrent effect of harsh interception practices is limited; with the more likely outcome being resort by the migrant to ever more desperate measures and more dangerous routes to entry.⁵⁶

Profiling and biometrics

40. In seeking to prevent the entry to their territory of “unwanted” migrants, states operate myriad processes of selection, in order to determine who fits into this category. Profiling people on the move is one such method of selection. Based on such characteristics as race, ethnicity, nationality or gender, profiling advances the state’s social control agenda by sending out messages about the migrants it is selecting for scrutiny. These messages often impute criminality and deviance. Whether on gender grounds, as in the anti-trafficking initiatives detailed above, or on racial and ethnic grounds, as was instituted by several states in the aftermath of 9/11, profiling has been criticized as a blunt instrument which in most cases has limited effect.⁵⁷
41. In this sphere states often fall prey to the “technology fallacy”, whereby believing in a system of technological surveillance is not enough to ensure that it will achieve its purpose, and ignores the implicit costs in terms of rights and civil liberties. Both the UK and the US are currently in the process of setting up comprehensive databases which will contain the biometric information of non nationals and of criminals. The conflation of migrants who have committed no offence with convicted criminals, particularly in electronic databases vulnerable to hacking, tampering and improper disclosure, is worrying. Ever more sophisticated biometric data is entered into such databases, and ever greater numbers of people (including migrants, asylum seekers and other non nationals) are brought into a web of surveillance and tracking.⁵⁸ The costs of running a vast apparatus of surveillance and social control are often prohibitive and frequently miss the mark by a wide margin.

⁵⁵ BBC News, Canada toughens its visa demands, 14 July 2009.

⁵⁶ Human Rights Watch, the International Catholic Migration Committee, the World Council of Churches, *NGO Background Paper on the Refugee and Migration Interface*, UNHCR Global Consultations on International Protection, Geneva, 28-29 June 2001, p. 8.

⁵⁷ Harcourt argues in the context of counter-terrorism that, despite academic disagreements about whether racial profiling constitutes discrimination within human rights law, or whether non-discrimination is a derogable right, the main argument against the use of such profiling is that it is simply ineffective to its given purpose. He states that “there is no reliable empirical evidence that racial profiling is an effective counter-terrorism measure and no solid theoretical reason why it should be...[indeed] it may well encourage the recruitment of terrorists from outside the core profile and the substitution of other terrorist acts.” B E Harcourt, ‘Muslim profiles post-9/11: Is racial profiling an effective counter-terrorist measure and does it violate the right to be free from discrimination?’, in B J Goold and L Lazarus (eds), *Security and Human Rights*, Hart Publishing, USA, 2007, pp. 74-95.

⁵⁸ A 2009 news report entitled ‘Hair test can spot terrorist’ claimed that “Scientists have devised a hair test that the government hopes will help check the alibis of terrorist suspects and asylum seekers. They believe new laser scans of individual hair strands can reveal where a person has been living for the previous two months.” Concerns were raised that relying on new technology, without putting the findings into context, and appreciating the margins for error, can result in abusive policy. *The Observer*, UK, 12 July 2009.

42. From a human rights perspective, the implications of such measures on individual privacy are considerable.⁵⁹ For migrants seeking to cross borders, the use of biometric information within profiling activities can lead to severe abuses such as arbitrary arrest and detention, and arbitrary interference with freedom of movement. Biometric data can also be sifted for religious, ethnic or racial characteristics that can be used for profiling unconnected with security or immigration concerns. Privacy International has noted in addition that “The sharing of data between agencies introduces purpose-creep where data collected for one purpose is used for another, but also introduces highly sensitive data to arms of government that cannot be expected to protect the data adequately.”⁶⁰

Controlling migration at the border: Detention and deportation

43. As migrants continue on their journey to the border, they continue also to be subject to control by the state. The most common response to irregular migration is detention and removal. Acting under the assumption that migrants with no or limited permission to be in the territory are a challenge to the sovereignty of the state, and often actively harmful to its citizens, the state constructs its migration policy with the primary aim of containment and exclusion. Policies of detention and deportation reinforce the divide between citizens and migrants, between “Us” and “Them”, by literally placing physical barriers to movement, and emphasizing images of criminality.

The Belmarsh Decision

On 18 February 2009, the European Court of Human Rights upheld a 2004 decision of the UK House of Lords in the case of *A and Others v. the United Kingdom*. The case concerned 11 foreign nationals who were held in indefinite detention for varying periods of time between December 2001 and March 2005 under Part IV of the 2001 Anti-terrorism, Crime and Security Act. In 2005, when the above legislation was repealed, all were released from prison but some continued to remain under Control Orders which severely restrict freedom of movement and could, according to Amnesty International, be tantamount to a deprivation of liberty.

The judgement of the European Court stated “The choice by the Government and Parliament of an immigration measure to address what was essentially a security issue had the result of failing adequately to address the problem, while imposing a disproportionate and discriminatory burden of indefinite detention on one group of suspected terrorists.” The European Court concurred with the House of Lords that there was no significant difference between the potential adverse impact of detention without charge on a national or on a non-national who in practice could not leave the country because of fear of torture abroad. While UK citizens suspected of involvement in terrorism were able to remain at liberty until charged, non-nationals had been deprived of their liberty, potentially indefinitely, without police interview, charge or trial.

The court also found that the appeals proceedings against indefinite detention, a regime that was only applicable to foreign nationals, did not give detainees a meaningful opportunity to challenge the lawfulness of their detention. The court accordingly examined the issue of the use of special advocates in cases involving national security-related sensitive material. These appeals to the Special Immigration Appeal Commission (SIAC) involved closed sessions in which the detainees were not allowed to be present, nor to see the evidence that was being used against them.

⁵⁹ Article 17 of the International Covenant on Civil and Political Rights provides that “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful attacks on his honour and reputation.” Article 14 of the Migrant Workers’ Convention similarly protects the privacy of migrant workers and members of their families. Article 21 provides additional protection of the identity documents of migrant workers, asserting that “In no case shall it be permitted to destroy the passport or equivalent document of a migrant worker or a member of his or her family.”

⁶⁰ Privacy International, ‘Increased Abuse of Data and Disregard for Protections’, Press Statement, 9 August 2004, available at www.privacyinternational.org, last accessed 15 July 2009.

Detention

44. Around the world, detention is a common measure of social control. Despite international normative standards which discourage the detention of asylum seekers and migrants⁶¹, many governments routinely incarcerate non national populations, often for prolonged or even indefinite periods, in response to such infractions as irregular entry and stay, and breaching the conditions of their original visa. Detention can take place in purpose-built detention centres, “transit zones” at the border, temporary or semi-permanent camps, or even within regular penal institutions amongst convicted criminals. Indeed, detention is often used as the default social control mechanism, and today large groups of non-criminal foreigners are locked up by the state as a routine practice. The numbers are often staggering; in Australia 8,587 non nationals were detained in immigration detention between 2004-2005; in Malaysia at the end of 2007, officials reported that 10,136 people were being held in immigration detention centres; and in the United States, which maintains the largest immigration detention infrastructure in the world, 32,000 non nationals were detained as of January 2009.⁶²
45. A critique of disproportionality and arbitrariness is often leveled at the administrative detention of migrants, who have not committed a crime nor been charged with a recognizably criminal offence.⁶³ Far from being used as a last resort, as befits a measure which has such a drastic effect on its subject, administrative detention is routine and, in some cases, mandatory. In many cases there are less procedural safeguards surrounding administrative detention than criminal detention, including a lack of measures to determine the arbitrariness of the arrest and continued detention. One UN agency “has long expressed concern about the absence of standards for administrative detention of foreigners, an issue which is not regulated in the same way as criminal detention, for which very clear standards apply”⁶⁴.
46. Migrants can often be held in detention for excessive periods of time; in the case of rejected asylum seekers and other irregular migrants who cannot be returned to their countries of origin because it is too dangerous for them to return, for instance, detention can potentially be

⁶¹ Human rights standards contain a strong presumption against detention, centred around the right to liberty (Article 9(1) of the International Covenant on Civil and Political Rights and Article 16(1) of the International Convention on the Protection of the Rights of Migrant Workers). All persons are protected against arbitrary detention, regardless of their legal status. In its General Comment No. 8 on the Right to Liberty and Security of the Person, the Human Rights Committee has confirmed that Article 9(1) of ICCPR is relevant in the circumstances of immigration control, noting that “the right to control by a court of the legality of the detention, applies to all persons deprived of their liberty by arrest or detention” (para. 1). UNHCR has advised in addition that the detention of asylum seekers is “inherently undesirable” and that “as a general rule, asylum seekers should not be detained”. See UNHCR, Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, February 1999.

⁶² See the website of the Global Detention Project at www.globaldetentionproject.org

⁶³ The Human Rights Committee has observed that “the notion of ‘arbitrariness’ must not be equated with ‘against the law’ but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not considered necessary in all circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context.” *A vs Australia*, Human Rights Committee Communication No. 560/1993: Australia 30/04/1997. CCPR/C/59/D/560/1993, para. 9.2.

⁶⁴ Pirkko Kourula, Director of the Europe Bureau, United Nations High Commissioner for Refugees (UNHCR, Geneva) on “*Assessment of recent EU asylum policy and legal developments*”, March 2009. See <http://www.eurasylum.org/Portal/March2009.htm> The Office of the High Commissioner for Human Rights has also recommended that governments “progressively abolish the administrative detention of migrants”.

indefinite.⁶⁵ The Working Group on Arbitrary Detention (WGAD) has, however, provided clear guidance in this regard that “a maximum period [of detention] should be set by law and the custody may in no case be unlimited or of excessive length.”⁶⁶ In 2008, the European Union adopted a Returns Directive to address the situation of irregular migrants on the territory of EU member states, which will come into force in 2010. It *inter alia* contemplates a detention period of a maximum of 18 months for migrants who have committed no crime but lack the authorization to remain on EU territory, a period of time which has been widely criticized as excessive and disproportionate to its stated aims.⁶⁷

47. Numerous authoritative human rights sources have recommended that in contemplating the administrative detention of non nationals, states should first seek to institute alternative non-custodial measures.⁶⁸ These could include community-based alternatives, fair reporting requirements or an affordable bond or guarantor requirements. However, it should be noted in this context that, from a human rights standpoint, restrictive programs such as electronic ankle bracelets and burdensome curfews constitute alternative forms of detention which should generally be considered to constitute punitive custody, as opposed to adequate alternatives to detention itself.⁶⁹ While the search for rights-respecting alternatives to unnecessary detention is a laudable goal, there is a clear danger of such actions themselves becoming implicated in the state’s detention and social control agenda. The point of departure for human rights advocates must first be to interrogate the necessity for the administrative detention of migrants in the first place, calling where appropriate for independent oversight of the reasons for this detention, and in all cases for the prior contemplation of effective alternatives to detention.
48. In many countries, asylum seekers have been detained while the state seeks to assess their claim for protection; this is often a clear breach of the principle of proportionality, particularly in cases

⁶⁵ In Japan, detention for the purpose of deportation is not subject to time limitation, and a person can be detained indefinitely under a deportation order. Reports have shown that the average length of detention for immigrants at the Japan Immigration Center is 13 months. See Meryll Dean, *Japan: Refugees and Asylum Seekers*, Writenert Report, commissioned by the United Nations High Commissioner for Refugees, 2006.

⁶⁶ Principle 7 of the WGAD, Deliberation No. 5, E/CN.4/2000/4, Annex II, 2000.

⁶⁷ See United Nations Press Release, *UN experts express concern about proposed EU Return Directive*, 18 July 2008. The Commissioner for Human Rights of the Council of Europe also wrote a strongly worded critique of the measure, asserting: “I would like to reiterate my grave concern about the possibility of detaining irregular migrants in EU member states for a maximum period of 18 months. This possibility is provided for by the legislative resolution on the Returns Directive which was adopted by the European Parliament last June. This was a mistake and an unfortunate response to the urgent need to harmonise European policies in this area. Political decision-makers should not lose the human rights perspective in this discussion and should try to formulate a rational long-term strategy. Such an approach has to include the need for migrant labour to perform the jobs which nationals very often refuse to take. In other words, European states should face up to the reality that irregular migrants are working because migrant labour is in demand.” Thomas Hammerberg, “It is wrong to criminalise migration”, *New Europe*, 29 September 2008, <http://www.neurope.eu/articles/89923.php>

⁶⁸ The Australian National Human Rights Commission has noted that in its experience community-based alternatives to detention were substantially cheaper and often more effective to their purpose than closed detention centres, whereby most migrants housed in community-based centres complied with reporting and other conditions and the rates of absconding were low. See speech of the Director of Strategic Projects of the Australian Human Rights Commission, United Nations Press Release, Human Rights Council holds panel discussion on human rights of migrants in detention centres, 17 September 2009.

⁶⁹ Amnesty International has further clarified that “Reporting requirements should not be unduly onerous, invasive or difficult to comply with, especially for families with children and those of limited financial means. Conditions of release should be subject to judicial review.” Amnesty International USA, *Jailed Without Justice: Immigration Detention in the USA*.

where there is little or no risk that the asylum seeker will abscond.⁷⁰ Detention is also used in order to deter other asylum seekers from arriving in the country to pursue an asylum claim, or to coerce claimants into abandoning their claim. UNHCR has noted in this context that “[detention] should not be used as a punitive or disciplinary measure for illegal entry or presence in the country.”⁷¹ While all cases of unnecessary detention should ideally be avoided, the detention of children is particularly pernicious, and certainly in breach of the international legal requirement on states to ensure that all actions regarding children are taken in the best interests of the child.⁷²

49. Ironically, an individual migrant can pass through several different legal statuses while remaining in some form of detention; from asylum seeker to temporary protected status to rejected asylum seeker to irregular migrant, the one constant will be that he or she will continue to be deprived of his or her liberty.

Deportation and Removal

50. In the majority of cases, administrative detention precedes the removal, or attempted removal, of unauthorized migrants from the territory of the host state. Here again, the state acts on its construction of migrants as undesirable and excludable, with similarly severe human rights consequences.
51. In contravention of international norms, states have deported people to situations where they would face severe human rights violations including torture. The practice of accepting “diplomatic assurances”⁷³ prior to removing people from the territory has contributed in addition to a weakening of the absolute prohibition on return to torture. In 2007 the UK deported two foreign nationals labeled as security threats to Algeria following assurances from the Algerian embassy in London that they would receive immunity from prosecution. According to Amnesty International, these assurances were disregarded and the men were taken into custody upon their return to Algeria, “a country with a known record of torture and other ill-treatment of people suspected of involvement in terrorism.”⁷⁴ Other states seek routinely to expel large numbers of irregular migrants collectively, with no examination of whether individuals within this group would be at risk of torture if deported.⁷⁵ Countries will also deport

⁷⁰ In the United States, asylum seekers awaiting a “credible fear determination” spent an average of 64 days in detention in 2005, with nearly a third of detained asylum seekers remaining in detention for more than 90 days. US Commission on International Religious Freedom, 2005

⁷¹ UNHCR, Detention Guidelines 3(iv)

⁷² Convention on the Rights of the Child, Article 3(1). The Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, has noted in this context that the detention of children “will never be in their best interests. Hence, the ideal utilization of a rights based approach would imply adopting alternative measures for the entire family.” OHCHR, Immigration control must not compromise human rights, 22 September 2009, available at <http://www.ohchr.org/EN/NewsEvents/Pages/MigrationPanel.aspx>

⁷³ These are promises or assurances made by one country to another in respect of the treatment of the former’s citizens who are under threat of deportation. Human rights groups have questioned the validity of diplomatic assurances noting that they are frequently used to circumvent states’ international legal obligations. In the context of the “war on terror”, diplomatic assurances are often used as a basis for sending certain individuals to countries where the sending government acknowledges that it would otherwise be prohibited from sending them because they would risk torture or other ill-treatment. Amnesty International, ‘Diplomatic assurances’ - No protection against torture or ill-treatment, AI Index ACT 40/021/2005

⁷⁴ Amnesty International, *United Kingdom: Deportations to Algeria at all Costs*, AI Index EUR 45/001/2007

⁷⁵ In 2002 Malaysia carried out a mass deportation of around 300,000 irregular migrants, resulting in the deaths of dozens of people from dehydration and disease while they were stranded in transit areas for months. Human Rights Watch protested that such actions also put refugees at risk of further persecution. See Human Rights Watch, *Mass*

migrants without considering the health implications of this, such as whether HIV treatment will be available in their country of origin. South Korea, for instance, routinely expels migrants who are found to be HIV-positive; and HIV-positive individuals deported from the US to Haiti have been detained upon their return with no access to medication.⁷⁶ Migrant workers who fail a mandatory medical test for communicable diseases such as HIV in the Gulf Cooperation Council (GCC) countries will be declared “unfit”, have their visa cancelled and be deported, usually without access to adequate medical advice or treatment. Women migrants found to be pregnant are also declared “unfit” and deported.⁷⁷

52. Far from being an exceptional measure, deportation has, like detention, come to signify a state’s sovereign control over its borders. In demonstrating that “unwanted” migrants are being physically excluded from its territory, the state aims to send out a public message of reassurance and strength. States will accordingly set quotas for removals, in a bid to send messages of deterrence to incoming migrants, and also to calm their domestic audience’s anxieties about “the enemy within”. In the UK, the removal of irregular migrants and rejected asylum seekers is high on the political and media agenda, with the Home Office regularly reporting on and having to defend its record on deportations.⁷⁸ In 2008, the UK removed over 65,000 migrants from its territory. In 2006, the French Interior Ministry instituted the controversial practice of establishing targets for deporting irregular immigrants each year. Since then, the government has increased police raids to arrest unauthorized immigrants, with nearly 30,000 deportations taking place in 2008.⁷⁹ In Italy, the Home Affairs Minister announced in 2009 that the government had set a target of deporting 500,000 immigrants by the end of the year. However policies of control that require the removal of migrants from territory can be counter-productive. For instance, following the mass deportation of hundreds of thousands of migrant workers from Malaysia in 2002, serious labour shortages were experienced by the construction and plantation sectors, forcing the government to expedite new approvals for recruiting foreign workers into these industries.

Expulsion Puts Migrants At Risk, 22 November 2004. The Migrant Workers’ Convention provides an explicit prohibition against the collective expulsion of migrants, regardless of their status (Article 22), requiring any expulsion decision to be made individually and in accordance with law.

⁷⁶ Human Rights Watch, *Discrimination, Denial and Deportation: Human Rights Abuses Affecting Migrants Living with HIV*, 18 June 2009.

⁷⁷ Caram-Asia, *State of Health of Migrants*, 2007

⁷⁸ In 2006, as the media reported the “lowest quarterly figures” for the removal of failed asylum seekers for more than a year, Home Office officials, accused of neglect by the media and opposition political parties, announced the secondment of 440 police officers to the immigration service and recruitment of a further 360 new staff to boost efforts against “illegal immigration”. BBC News, *Failed asylum removals decrease*, 21 November 2006. The anti-immigration group MigrationWatch UK often attacks the government’s record on deportations, claiming that it is failing to meet removal targets, and thereby endangering the public. See for example MigrationWatch UK Press Release, Sir Andrew Green commenting on the release of the latest asylum statistics today, 28 February 2008

⁷⁹ Aaron Lakoff, *Not wanted after the voyage: The politics of immigration in France and Canada*, Global Research, 5 September 2008 www.globalresearch.ca. For deportation figures, see www.globaldetentionproject.org

53. Deportations are also carried out with disproportionate and excessive force, causing injuries and mental distress to migrants being deported, and in extreme cases can even cause death. As states put in place targets and quotas for removal, security personnel come under increasing pressure to remove irregular migrants and rejected asylum seekers from the territory.

Controlling migration within the border: Exclusion

54. Social control paradigms do not stop at the border. Despite myriad efforts to prevent the movement of “undesirable” migrants, movement continues due in no small part to the fact that migration, including irregular migration, is now structurally embedded in economies and societies. Migrants are both “pulled” by the need for cheap, flexible labour in countries of destination and “pushed” by under-development and poverty in regions of origin.
55. Migrants and asylum seekers within the country of destination are subject to numerous restrictions on their ability to access public housing and social welfare, their permission to work and to change jobs is limited, they are frequently denied the ability to live with their family, and to obtain equal access to justice and due process. These are justified by the state as necessary measures to protect the economic welfare of citizens, to protect the integrity of the asylum system, or to protect limited public services. Yet the overall effect of such measures is to ensure that migrants, and in particular irregular migrants, are effectively excluded from, and administratively invisible in, the societies in which they live and work. The extent to which such measures “protect” host societies is doubtful; instead they create and exacerbate inequalities and hinder integration. Such measures force migrants into a parallel universe where, in the midst of developed societies, their health and nutrition levels are alarmingly poor, their housing is insecure and inadequate, the workplace is violent and dangerous, and the rule of law all but absent. The former UN Special Rapporteur for the Human Rights of Migrants has observed that the vulnerability of migrants stems in part from prevalent cultural biases against the foreigner (expressed in stereotyping,

Death during deportation

In 2003, five Belgian police officers were found guilty of assault, battery and negligence in carrying out the forcible deportation of Semira Adamu in 1998. Adamu, a Nigerian national, had died of asphyxia after officers had used the controversial “cushion technique” to restrain her during her deportation. The Committee against Torture expressed concern about “insufficient measures of protection in cases of individuals under an order of deportation, which are not in conformity with the provisions of Articles 3 and 11 of the Convention” in commenting on the death of the Nigerian national, Marcus Omofuma, during his deportation from Austria in May 1999. Article 3 of the Convention against Torture prohibits the expulsion of any person to a situation of torture, and Article 11 governs the treatment of persons subjected to any form of arrest, detention or imprisonment. *UN Doc. CAT/C/XXIII/Concl.2 - paragraph 4d.*

Amnesty International commented in 2001 that “Since 1993 [it] has been aware of the deaths of six individuals during or immediately following forcible deportations from Austria (Marcus Omofuma in 1999), Belgium (Semira Adamu in 1998), Germany (Kola Bankole in 1994 and Aamir Ageeb in 1999), Switzerland (Khaled Abu Zarifa in 1999) and the United Kingdom (Joy Gardner in 1993). [In addition, in May 2001 Samson Chukwu, a Nigerian national, died while Swiss authorities attempted to deport him]. All the cases have been accompanied by the use, shortly before death, of dangerous methods of restraint impeding the respiration of the deportee. *AI, Switzerland: Death during forcible deportation: An exchange of correspondence following the death of Samson Chukwu, AI Index EUR 43/005/2001*

Other abusive methods employed by authorities during forcible deportations include the use of sedative drugs not in accordance with purely medical criteria, racist abuse, deprivation of food and drink while awaiting deportation, and physical assault.

racism and xenophobia) but is also the result of the structural distribution of power within the nation state.⁸⁰

56. Lacking a political and a social voice, migrants (and particularly irregular migrants) are unable to protest this exclusion. Yet it is also the case that social policies that legislate and entrench such exclusion frequently contravene human rights norms and standards.

Employment

57. While not all migration is motivated by economic reasons (the largest entry category for foreigners in many countries is family reunification), it is a fact that the overwhelming majority of migrants will be in some way economically active in the country of destination. Several commentators have made the point that migrants are most often to be found working in jobs described as “the 3 Ds”, i.e. dirty, degrading and dangerous. Structural and market forces pull semi and low-skilled migrants into jobs that citizens in wealthy and ageing societies are unwilling to perform, such as in the care and hospitality industries, construction, agriculture, manufacturing and domestic work. While waiting for months or even years for a decision on their claim and having been denied formal permission to work, asylum seekers are often forced to seek out clandestine employment in order to survive. Often driven or attracted out of their own economies by the absence of incentives and opportunity, migrants make a rational decision to move to economies that need labour and offer work, and by doing so help to maintain the economic activity and competitiveness of the societies they adopt. Yet these labour market realities are very often ignored by states which, in setting their migration policies, choose to respond foremost to societal “panic” about the influx of foreign workers. As the ILO has noted “The recent rise in labour trafficking may basically be attributed to the imbalances between labour supply and the availability of legal work in a place where the jobseeker is legally entitled to reside...The extent of the flows of irregular workers is a strong indication that the demand for regular migrant work is not being matched by the supply, with migrants serving as the buffers between political demands and economic realities.”⁸¹
58. States therefore choose to encourage and legitimise the migration of so-called “highly skilled migrants” (business professionals, nurses, computer technicians, young university graduates), eager to attract the brightest and most skilled personnel to their economies and societies. At the same time, they ignore and delegitimise the movement of less skilled migrants.⁸² The proposed common European Union immigration policy, for instance, is solely focused on the “highly qualified work force”, while no additional protections or legal channels for the movement of lower skilled migrant labour are included.⁸³ The European Trade Union Confederation has criticized this proposal, arguing that it would create “a two-tier migration policy that favours and facilitates migration of the highly skilled while denying access and rights to semi- and lower

⁸⁰ See UN Doc. E/CN.4/2000/82, pp. 15-16.

⁸¹ ILO (2004) *Towards a Fair Deal for Migrant Workers in the Global Economy*, International Labour Conference, 92nd session, report VI.

⁸² Yet, as one official has noted “Despite what the politicians or commentators might think, it is the labour market that regulates how many immigrants arrive.” Franco Lorenzon, head of the Treviso branch of the CISL union, *Italy’s migrants slowly integrating*, BBC News, 6 February 2009.

⁸³ Communication from the European Commission - Policy Plan on Legal Migration {SEC(2005)1680}/COM/2005/0669.

skilled workers.”⁸⁴ Such unrealistic migration policies can have very real human rights consequences as migrant workers take greater risks to reach the employment that they know is there, but to which physical access through legal channels is denied to them.

59. The recent global financial crisis has, not surprisingly, led to public calls for greater exclusion of migrants from economies and societies. States have responded in a number of ways to the often erroneous assumption that restricting foreign workers from their economies would significantly mitigate the effects of the crisis. In 2008 several countries announced reductions in the quota of foreign workers legally entitled to enter and work, with Australia reducing its skilled migrant intake by 14 percent and the US cutting the numbers of skilled migrant workers allowed in on H1B visas. In early 2009 Malaysia announced a ban on the hiring of foreign workers in key manufacturing and services sectors, and Malaysian companies were directed to lay off foreign workers first in the context of any planned retrenchments.⁸⁵ In the United Arab Emirates, migrant workers were laid off with no labour protection and often in breach of their contracts. South Korea stopped issuing new visas to temporary migrant workers in February 2009, and in Thailand the government announced, also in 2009, that it would not issue new work permits to migrant workers. Spain has offered unemployed migrants a lump sum payment to return to their country of origin if they agreed not to return to Spain within a period of three years. As a consequence, some are predicting an increase in irregular migration and the strengthening of the informal labour market, as well as more severe human rights violations such as a global increase in trafficked persons.⁸⁶
60. For migrant workers who continue to arrive in countries of destination, and for those already present, the impact of policies and rhetoric which blame them explicitly or implicitly for the economic downturn, coupled with a long-term lack

Vigilantes in Malaysia and Italy

The Ikatan Relawan Rakyat Malaysia (or, “Volunteers of Malaysian People” known as “Rela”) is a volunteer force of some half a million civilians that carries out raids in search of irregular migrants and assists in running immigration detention centres. Members of Rela, many of whom lack even basic training, are authorised to bear and use firearms, stop, search and demand documents, arrest without a warrant, and enter premises without a warrant. Until July 2007, Rela members were paid for every person they arrested. Human rights groups assert that Rela is an unaccountable body, and that its members are responsible for numerous cases of illegal detentions, unlawful and excessive use of force, extortion, and unlawful destruction of the documents of legal immigrants in order to secure more arrests. A 2005 amendment to Malaysia’s security legislation granted Rela members effective legal immunity from prosecution.

In 2009 the Italian Senate gave final approval to new security legislation targeted mainly at irregular migrants. The law allows civilian vigilantes (known as *ronde*) to conduct organized patrols in order to alert police to public order offences or suspected criminals. While these vigilante groups would not have the power of arrest, critics of the law (which also criminalises irregular migration) fear that it will enable extremist groups to embark on campaigns of violence and intimidation against migrants in Italy. Acknowledging that the intent of the law was punitive, a member of Italy’s ruling coalition asserted that “This legislation introduces harsher punishments to ensure more security - this is what Italian citizens want.”

⁸⁴ European Trade Union Confederation, ETUC Position Regarding European Commission’s Proposal’s on Legal and “Illegal” Migration, 7 December 2007, <http://www.etuc.org/a/4415>

⁸⁵ Aljazeera.net, *Malaysia bans foreign labourers*, 22 January 2009. According to the World Bank the Malaysian government has reportedly cancelled the work visas of some 55,000 Bangladeshi workers.

⁸⁶ The International Organization for Migration has observed that “Previous downturns in the economy at both global and regional levels (e.g. the oil crisis in the early 1970s and the 1998 Asian financial crisis) indicate that migration will continue regardless (and irregular migration may even increase) because of the continuing structural demand for labour in certain sectors of the economy and despite increases in unemployment ... The Asian financial crisis also demonstrated that keeping markets open to migrants and migration is important to stimulating a quicker economic recovery. IOM Policy Brief, *The Impact of the Global Financial Crisis on Migration*, January 2009.

of integration within these societies, can be severe. An increase in racist violence against migrants in Russia, for example, is attributed in part to the economic downturn. In 2008, there were 97 murders and 428 assaults categorized as hate crimes, nearly double the number recorded in 2004. Young Guard, the youth wing of President Vladimir Putin's United Russia party, announced plans in early 2009 to begin patrolling construction sites to hunt down illegal migrant workers. The group calls its campaign "Our money for our people." Projecting a further increase in such violence, one commentator noted "There will be people angry at being laid off, who will attack those that they believe are responsible for their misfortune."⁸⁷

An adequate standard of living – healthcare and housing

61. Exclusion from the formal labour market is accompanied for many migrants by exclusion from the same standards of living enjoyed by the majority of the societies in which they live and work. Migrants in an irregular situation, rejected asylum seekers, and in some cases also asylum seekers waiting for a decision are excluded from effective access to such essential elements of a dignified life as adequate healthcare and housing.
62. Given their over representation in labour markets that have been described as "the bargain basement of globalization"⁸⁸, migrants are extremely vulnerable to occupational health risks and injuries. So-called "3D" jobs are often extremely physically demanding, require long working hours with little rest, and take place in work sites where labour protections are limited or non-existent.⁸⁹ In addition, in cities around the world, migrants can be found living in inadequate and substandard housing, further compromising their health and human rights. A study of migrant

The Duty to Denounce

Public institutions often play a role in enforcing the social control agenda. Teachers, healthcare professionals, social workers and local police officers are, in many countries, obliged by law to report the presence of irregular migrants. Laws also exist which criminalise the extension of assistance to irregular migrants.

In Germany, the duty placed on all public servants to inform the Foreigners' Office of the presence of irregular migrants restricts access to the Social Welfare Centre, and restricts also the ability of migrants in an irregular situation to access affordable healthcare in practice. In South Korea the Immigration Control Act obliges all public officials to report the presence of migrants with an irregular status, thereby compromising the ability of migrants to seek legal remedies for discriminatory or abusive treatment. In Belgium, inspectors seeking to discover and prevent abusive labour conditions are obliged to report the presence of irregular migrants in workplaces, which can often lead to the deportation of these migrants. In Italy recently amended legislation obliges civil servants and public employees (doctors, teachers and municipal employees) to report irregular migrants to the police or face criminal charges.

Practices which oblige public officials to denounce irregular migrants undermine the principle of equal access to socio-economic rights, and in the case of health professionals could contravene the latter's independence and obligation of confidentiality.

Private individuals too are sometimes press-ganged into the role of immigration enforcement authorities. In the European Union, legislation requiring criminalization of assistance to irregular migrants has made it difficult, if not illegal, for landlords to rent properties to migrants in an irregular situation. In Italy, recent legislation provides that anyone who knowingly rents property to a migrant in an irregular situation is liable to a prison sentence of up to three years.

⁸⁷ Chicago Tribune, Fueled by a worsening economic crisis, ethnic violence is reaching new levels in Russia, 16 March 2009.

⁸⁸ ILO, Towards a fair deal for migrant workers in a global economy, ILO, Geneva, 2004.

⁸⁹ Carballo and Mboup observe that "occupational accidents are approximately two times higher among immigrant workers in Europe, and in the agriculture sector chronic and unprotected exposure to pesticides and other chemical products is associated with high incidences of headaches, depression, neurological disorders and, in the case of women, miscarriage." Global Commission on International Migration, International Migration and Health, September 2005, pp. 8-9 <http://www.gcim.org/attachements/TP13.pdf>

agricultural workers in southern Spain found that 85 percent lived in makeshift and temporary accommodation with little running water, poor sanitation, and no heating. Migrants are also disproportionately likely to be homeless; in the European Union, migrants comprise around 20 percent of the homeless population, while in Copenhagen as many as 33 percent of the city's homeless population are migrants.⁹⁰

63. State policies which restrict or deny migrants' access to public services compound health risks and can lead to multiple human rights violations. Migrants in an irregular situation are often denied access to adequate healthcare. Some provisions of international law, such as Article 28 of the Migrant Workers Convention, appear to restrict the minimum level of healthcare that irregular migrants can obtain as a right to "emergency medical care". This might mean that interventions could be restricted to those measures necessary to save life or avoid irreparable harm to the health of irregular migrants, and could exclude early diagnosis or follow-up.⁹¹ Yet, CESCR's General Comment No. 14 explicitly prohibits states from limiting or denying equal access to preventive, curative or palliative health services to "illegal immigrants". In addition, Chetail and Giacca assert that "such inequalities in healthcare are evidently neither legally permissible nor, from a general public health perspective, justified and reasonable."⁹² As well as contravening the fundamental principle of non-discrimination, restricting access solely to "emergency healthcare" could mean that irregular migrants are denied access to primary level health interventions, resulting in treatable conditions becoming chronic and risking the propagation of contagious diseases.
64. Harsh and often discriminatory legislation will often have the result of denying migrants access to adequate housing. While bodies such as the Committee for the Elimination of Racial Discrimination (CERD) have called for greater housing rights for non nationals, including by calling on states to 'Guarantee the equal enjoyment of the right to adequate housing for citizens and non-citizens, especially by avoiding segregation in housing and ensuring that housing agencies refrain from engaging in discriminatory practices'⁹³, the actual practice of states is far from ideal. In Italy, recent legislative changes will remove all homeless people and those living in run-down housing or mobile homes from local residents' registries. Registration in a municipality is a precondition for obtaining access to health care, social assistance, education and public housing. Irregular migrants, as well as excluded minorities such as the Roma, are the usual occupants of inadequate housing or mobile homes, so the target of such a law is evident. Despite guidance to the contrary from authoritative human rights bodies, in many countries migrants are seldom allowed access to public housing services, and are almost never included in national plans on public housing.⁹⁴ To the contrary, states have instituted policies which result in

⁹⁰ Ibid., p. 7

⁹¹ The Migrant Workers' Convention provides the expanded right to health, encompassing a holistic understanding of health, only to migrants in a regular situation (Article 43). As such it is clearly narrower than corresponding provisions in general human rights law. However, note must be taken of Article 81(1) of the Migrant Workers' Convention which grants to all migrant workers the protection of more favourable international standards where such exist. See Chetail and Giacca, *Who Cares? The Right to Health of Migrants*, 2009, p. 232

⁹² V Chetail and G Giacca, *Who Cares? The Right to Health of Migrants* in A Clapham and M Robinson, *Realizing the Right to Health*, Swiss Human Rights Book Vol. 3, p. 228.

⁹³ CERD, General Recommendation 30, *Discrimination against Non-Citizens*, 1 October 2004

⁹⁴ The Committee on the Rights of the Child (CRC) has stated that States should provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing to unaccompanied and separated migrant children. CRC General Comment 6 on the treatment of unaccompanied and separated children outside their country of origin, CRC/GC/2005/6, 1 September 2005. Perhaps reflecting its date of drafting (1991),

the ghettoisation of migrants in under-serviced and run-down neighbourhoods. In France, for example, since the 1970s social policies have concentrated immigrants in particular areas, leading to the creation of ethnically concentrated *banlieues* (the urban periphery) which were separated geographically and socially from the resident population.⁹⁵ In many countries, in addition, asylum seekers who have received a negative decision on their claim are ejected immediately from social housing, leading in many cases to destitution and homelessness.⁹⁶

65. In 2006 the Parliamentary Assembly of the Council of Europe adopted a resolution on the human rights of irregular migrants which stated that “adequate housing and shelter guaranteeing human dignity should be afforded to irregular migrants” and also that states should provide emergency healthcare and should “seek to provide more holistic healthcare”.⁹⁷ However, actual standards of treatment in respect of the economic, social and cultural rights of migrants are often considerably lower, both in Europe as well as in other regions of the world, and contribute both to pervasive social exclusion as well as a breach of fundamental human rights.

Criminalisation

66. As previously described, a dominant methodology of social control throughout the world is the criminalisation of migration and of migrants. Ironically, even as trans-national movement becomes easier and faster, it is outlawed and stigmatised. However, clear race and class-based sub-texts to these controls cannot be ignored either. It is not the wealthy Ghanian businessman that such laws and regulations target, nor is it the skilled Indian computer technician; it is the poor and unskilled, the desperate and the disenfranchised who feel the full force of laws designed to criminalise and exclude foreigners. Multiple layers of marginalization and discrimination accompany the poor as they attempt to migrate across borders; despite the harsh fact that it is the poor and the socially excluded that are most in need of migration as a survival strategy.
67. The increased securitization of migration, particularly evident after 9/11, has considerably enhanced this trend as foreigners are more closely equated with security threats and terrorism, and considered unworthy of more restrained treatment. In the context of a world where technological advances have made it easier than ever for us to travel great distances with ease, the gulf for some (those living in poverty, those suffering from entrenched discrimination) between the principle of freedom of movement and the practical ability to move has perhaps never been wider.
68. In 2009, Italy instituted legislation criminalizing the movement and residence of irregular migrants. Far from being unique, however, such laws are increasingly evident around the world. New laws adopted in Italy have made irregular entry or stay a crime, punishable by a fine from

CESCR’s General Comment No. 4 on the right to adequate housing does not specifically mention the situation of migrants. However, it does assert that ‘individuals, as well as families, are entitled to adequate housing regardless of age, economic status, group or other affiliation or status and other such factors. In particular, enjoyment of this right must, in accordance with article 2 (2) of the Covenant, not be subject to any form of discrimination.’ CESCR, General Comment 4 on the right to adequate housing (Article 11(1)), 13/12/1991.

⁹⁵ Castles and Miller, pp. 258-263.

⁹⁶ See, for example, Amnesty International UK, *Down and Out in London: The Road to Destitution for Rejected Asylum Seekers*, November 2006.

⁹⁷ Parliamentary Assembly of the Council of Europe (PACE), *Human Rights of Irregular Migrants*, Resolution 1509 (2006), see <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta06/eres1509.htm>

between 5,000 to 10,000 euros. In addition, being present irregularly in the country has been made an aggravating circumstance for migrants who commit an offence.⁹⁸

69. ⁹⁹Yet, criminalization of migration could be and has been viewed as disproportionate and unjustly punitive by human rights bodies. The Working Group on Arbitrary Detention has asserted that “criminalizing irregular entry into a country exceeds the legitimate interest of State to control and regulate irregular immigration and can lead to unnecessary detention.”¹⁰⁰ The Office of the High Commissioner for Human Rights has declared that “The mere fact of being at odds with immigration procedures does not mean that the irregular migrant is a criminal.”¹⁰¹ The High Commissioner has declared in addition that “The association of irregular migration with criminality promote[s] the stigmatisation of migrants and encourage[s] a climate of xenophobia and hostility against them.” And the Human Rights Commissioner of the Council of Europe has noted that “Such a method of controlling international movement corrodes established international law principles. It also causes many human tragedies without achieving its purpose of genuine control.”¹⁰²
70. Policies of criminalization of human beings that are being drawn into economies and societies that need their labour are perverse and can have serious human rights consequences as migrants are condemned to live on the fringes of society. The right to seek asylum is severely damaged by such policies, forcing asylum seekers to seek out the services of traffickers in order to gain access to territory and asylum procedures. A spiral of visible exclusion and stigmatization reinforces the message that migrants are unwanted and dangerous to the receiving society, messages that carry a pernicious sub-text of racism. Yet, international human rights law places narrow limits on permissible distinctions that can be made between citizens and migrants and affirms that any potential distinctions should be subject to necessity, proportionality and tests of reasonableness.¹⁰³

Regularisation

71. One solution available to states in order to retrieve irregular migrants from exclusion and the “limbo” of illegality is the grant of amnesty through a regularization of legal status, which gives migrants the legal and practical ability to challenge abuse through the national courts and to

⁹⁸ The UN Working Group on Arbitrary Detention noted in this context that “In other words, if an Italian citizen and an irregularly present foreigner steal a car together, the foreigner is to receive a significantly higher sentence than the Italian. This is a provision that does raise some concern.” Statement of the WGAD on the conclusion of its mission to Italy

⁹⁹ United Nations Press Release, Human Rights Council holds panel discussion on human rights of migrants in detention centres, 17 September 2009.

¹⁰⁰ Report of the Working Group on Arbitrary Detention, E/CN.4/1999/63 of 18 December 1998

¹⁰¹ OHCHR, Migration, Asylum, and trafficking related detention, Information Note 7, Dignity and Justice for Detainees Week, 2008, http://www.ohchr.org/EN/UDHR/Documents/60UDHR/detention_infonote_7.pdf

¹⁰² Thomas Hammerberg, “It is wrong to criminalise migration”, New Europe, 29 September 2008, <http://www.neurope.eu/articles/89923.php>

¹⁰³ The standard of ‘reasonableness’ has been considered a useful methodology to set a threshold for acceptable state conduct in respect of economic, social and cultural rights. It has been developed by South African courts, which have asserted that ‘A Court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable.’ *Government of the Republic of South Africa and Others v Irene Grootboom and Others*, Case CCT 11/00, para 41. See also Amnesty International, Human Rights for Human Dignity: a primer on economic, social and cultural rights (AI Index POL 34/009/2005), 2005

obtain remedies for such abuse, and generates tax revenue for the state as well as more complete information regarding the population on its territory. Regularisation programmes can take, and have taken, a number of forms. Historically, states have differed as to what constitutes regularisation; while some award temporary legal residence and authorisation to work to migrants on this basis, others have taken it to mean the permanent right to residence which may or may not lead to eventual naturalisation. Regularisation programmes can be random or predictable, frequent or occasional, applicable to groups or applicable to individuals in certain circumstances. De facto regularisation programmes grant legal status to irregular migrants on the basis of long term residence. “One off” programmes tend to target particular groups of migrants, whether on the basis of length of residence, employment status, family ties or integration, absence of a criminal record (these programmes can also be known as “earned regularisation” where individuals “earn” the entitlement to be regularised through their behaviour or circumstance). These latter programmes are often aimed at irregular migrants who cannot be returned to their countries of origin for legal, humanitarian or practical and administrative reasons. States that have put in place regularization programmes include the UK, the US, Spain, Italy and France. In Europe, up to six million migrants have been regularized through such programmes since 1995.¹⁰⁴

72. Yet, having excluded them, states are increasingly reluctant to reinterpret their policies. Amnesties have been criticized for “rewarding” migrants for their irregular entry and presence and for “queue jumping”, and fears are raised that amnesties will act as magnets for the influx of even more migrants.¹⁰⁵ In this discussion there is little place for the fact that in many countries it is almost impossible for low and semi-skilled workers to enter the country through legal migration channels. Yet, studies have shown that regularization measures carried out in tandem with further reforms of the migration system have produced a net positive outcome. A 2007 review of the Spanish regularization of almost 500,000 people in 2005 found that any “pull factor” attracting irregular migrants to Spain was offset by policy reforms which simultaneously gave more scope for regular labour migration and challenged illegal employment.¹⁰⁶

“Migration management” and social control

73. Despite evidence that the majority of migrants in an irregular status in most countries entered legally, there is a deeply held belief amongst most states that tougher border control and stricter enforcement is the magic bullet required to maintain the integrity of migration policies.¹⁰⁷ The

¹⁰⁴ International Centre for Migration Policy Development, REGINE: Regularisations in Europe – Study on Practices in the area of staying third-country nationals in the Member States of the EU, Final Report, September 2008.

¹⁰⁵ Within the EU, for instance, France proposed the imposition of an EU-wide ban on mass regularization of irregular migrants during its presidency in 2008. While states such as Spain have insisted that regularisation remain a national competence, since October 2005 Member States are required to consult with the rest of the Community before putting in place any national regularization schemes.

¹⁰⁶ Migrants’ Rights Network, Irregular Migrants: The Urgent Need for a new Approach, May 2009, p. 22.

¹⁰⁷ In the UK, for instance, asylum applications have declined since 2002 as the result of tougher government policies, and the indefinite suspension of Tier 3 (low-skilled temporary labour) migrant entry. Yet, despite these increasing controls, studies have noted that “estimated numbers of irregular migrants in the UK have risen roughly 50 percent from roughly 430,000 in 2001 to 660,000 (on an equivalent basis) at the end of 2007.” Ibid., p. 14. According to the IOM an estimated US\$ 25-30 billion are spent by the twenty five richest countries on the enforcement of immigration restrictions every year. It is a matter of debate whether states receive proportional “gains” in terms of increased security and economic well-being from such a large amount of money. See A Pecoud

global regime of migration governance is thus similarly premised on control and containment. Aggressive populist rhetoric against the presence of irregular migrants can be contrasted with state tolerance and in some cases even complicity in allowing irregular migrants to enter and work in the informal, shadow economy. As some commentators have noted, there is in existence a “common hypocrisy” on the part of states, which encourages the labour of irregular migrants, yet condemns their presence in countries of employment.¹⁰⁸

74. The paradigm of “migration management” as defined in intergovernmental processes such as IOM’s Governing Council and the Global Forums on Migration and Development, has been criticized for its state-centric bias and its dominance by an agenda of control.¹⁰⁹ The concept of temporary circular migration is central to contemporary migration management, and has been posited as an “ideal” (or “win-win”) model for migratory movement. The “circularity” of the concept refers to the supposed ability of migrant workers to move back and forth between their countries of origin and countries of destination. The “win-win” refers to the gains to countries of origin, which do not lose skills or tax payers permanently as well as to the benefits reaped by countries of destination who gain much needed labour without having to make provisions for their long-term integration.
75. The GCIM has noted, more perhaps in hope than in contemporary fact, that ‘the old paradigm of permanent migrant settlement is progressively giving way to temporary and circular migration.’¹¹⁰ However, the selling point of this idea, particularly to countries of destination, is the very fact of its temporary nature. There is thus an expectation that workers will remain in the destination country only as long as their original permission to enter and work remain valid, and will return as soon as it expires. Often or even usually such migrants are denied the right to bring their families with them to the country of employment, and can also be denied the practical ability to integrate into society, often being obliged to live in specified accommodation provided by their employers and thus effectively segregated from mainstream society. States prefer to conduct unilateral or bilateral agreements for temporary low and semi-skilled migration, and to keep in place high barriers to migrant entry, only lowering them to let in migrant workers who are politically palatable.¹¹¹

and P Guchteneire, International Migration, Border Controls and Human Rights: Assessing the Relevance of a Right to Mobility, *Journal of Borderlands Studies*, Vol. 21, No. 1, Spring 2006, p. 71.

¹⁰⁸ See presentation by Dr Mamphela Ramphele (former co-chair of the GCIM) to IOM’s International Migration Dialogue, Geneva, 30 November 2004, http://www.iom.ch/jahia/webdav/shared/shared/mainsite/about_iom/en/council/88/ramphele_301104.pdf

¹⁰⁹ The concept of migration management is premised on the notion that “the humane and orderly management of migration benefits both States and migrants” and that “the prime responsibility for the management of migration lies with States: each State has the right and duty to develop its own legal framework on migration and to protect the security and well-being of its population, consistent with existing international principles and norms.” In 2001, the Berne Initiative was launched by the Swiss government as a states-owned consultative process focused on fostering better management of migration at the regional and global levels through enhanced cooperation between states. In 2004, the Berne Initiative produced the *International Agenda for Migration Management* which is described as ‘a non-binding policy framework aimed at facilitating cooperation between States in planning and managing the movement of people in a humane and orderly way.’ Berne Initiative, *International Agenda for Migration Management*, IOM and the Federal Office for Migration, Swiss Federation, 2004, available at: www.old.iom.int/DOCUMENTS/OFFICIALTXT/EN/IAMM_E.pdf (last accessed 25 Aug. 2008)

¹¹⁰ GCIM, p. 31.

¹¹¹ As discussed in previous sections, there are clear differences between policies in place to regulate the entry of highly-skilled migrants, as opposed to lower-skilled migrants. In Germany, for instance, following the failure of a

76. Clearly, however, while there are a number of temporary migration programmes in existence today, a world in which migrant workers are in perpetual motion as they travel around the world from job to job in an economically efficient manner is far from the reality. Many, if not most, of the world's migrant workers enter and remain outside legal migration channels.¹¹² Given the importance placed on the return of migrants within the regime of global migration governance, there are fears that greater emphasis on temporary and circular migration will lead to more draconian enforcement of return, including through greater use of mandatory detention and forcible removal. Human rights advocates fear that temporary migration programmes will merely provide states with cheap and flexible labour without having to invest long-term resources, such as for the integration of migrant workers, or the provision of social services for their families.¹¹³ In addition, the OECD has sounded a warning note on temporary migration, asserting that "constructing a country's migration policy on the assumption that labour immigrants will only stay for a short time is not the way to go. It is neither efficient nor workable ... [C]ycling repeated waves of temporary workers in and out of a country to work at the same jobs is inefficient and enforcing such a scheme on employers entails substantial economic and political costs."¹¹⁴
77. Immigration law and policy could in fact inhibit the very movement that state policies of migration control are hoping to foster. Until 2008, for example, people who had fallen into an irregular situation in the UK could leave the country and apply for a new re-entry visa. Since March 2008 however changes in legislation mean that anyone who has been in breach of immigration regulations is prohibited from applying to enter the UK for between one and ten years. Current models of global migration governance, such as the intergovernmental Global Forum on International Development, do not appear to have the political will to adequately address such contradictions. Despite the increasing disorder and abuse surrounding international migration, states seem content to let particularist national agendas drive global migration policy.

Critical perspectives on migration, sovereignty and social control

78. The journey that most migrants make often takes a torturous route. Migratory journeys begin from their place of origin as migrants will often set out to large or larger urban centres within their country of origin. From here they can move to one or several countries of transit as they seek to enter the country in which they hope to live and work; some will seek or be forced to move permanently, but many more leave with the aim of returning eventually to their places of origin. As they go through this journey, they will fall in and out of myriad "categories", and be assigned an often bewildering array of labels and legal statuses. Some migrants will consciously

2000 scheme to attract 20,000 ICT specialists which did not allow family reunion or opportunities for permanent settlement, the immigration law was reformed in 2004 to allow highly-skilled migrants to apply immediately for permanent residence.

¹¹² Philip Martin, *Migrants in the Global Labour Market*, 2005

¹¹³ A prominent concern with temporary or circular migration is the effect that such programmes have on the right to family unity. A family's right to live together is protected by international human rights law, derived *inter alia* from Article 16 of the UDHR, Articles 17 and 23 of the ICCPR and Article 10 of the ICESCR. There is universal consensus that, as the fundamental unit of society, the family is entitled to respect, protection, assistance, and support. Respect for the right to family unity requires not only that states refrain from actions which might result in family separation, but also that they take positive measures to maintain the unity of the family and reunite family members who have been separated.

¹¹⁴ BBC News, *Migration Fears Unjustified*, OECD, 10 September 2008.

seek out one or the other status, others will remain unaware of such definitions, usually until they are confronted with the need to define themselves to state authorities.

79. The allocation of labels to human movement has a long history on the agenda of social control. By defining migrants, states were able to define their own obligations of protection and, crucially, where and when those obligations could be restricted. Conscious choices of inclusion and exclusion were made in 1951 as states negotiated the current definition of a “refugee”. In the aftermath of the Second World War, and as the Cold War began to take shape, the primary drafters of the refugee definition concerned themselves above all with the European refugee problem, of forced migrants fleeing political persecution in the midst of relative material affluence, and effectively ignoring the contours of forced migration in the rest of the world.¹¹⁵ The geographical and temporal limitations of the 1951 Refugee Convention have subsequently been lifted, and the Convention refugee definition has been enlarged through UNHCR guidance and judicial practice to include *inter alia* gender and sexual orientation, while in many developed asylum systems complementary forms of protection can apply to refugees fleeing situations of generalized violence.¹¹⁶
80. Nevertheless, the international refugee regime centred around the 1951 Convention remains relatively tightly bounded, extending the grant of “genuine refugee” status to a small fraction of international migrants, generally those who satisfy a test of individualized persecution. Further hierarchies are created between those who have suffered violations of their civil and political rights, as opposed to those who have been denied their economic, social and cultural rights. As Bhabha notes, the refugee regime currently acts as a “filtering process that is designed to separate eligible from ineligible travelers ... a strictly limited humanitarian safety valve ... [which] produces benefits for a somewhat arbitrarily selected minority of forced migrants.”¹¹⁷
81. Human rights advocates and refugee advocates have over the years, and unsurprisingly, used the narrowly defined categories found in international law to defend the rights of forced migrants. For years, the argument has been made and repeated, by refugee advocates as much as by states, that refugees and asylum seekers are not “mere migrants”, that their claim to protection stems from a vulnerability not shared by “economic migrants”¹¹⁸. Thus a hierarchy of need has been created and legitimized. Yet, it is apparent today that the established categories and labels are

¹¹⁵ In 1951 the Indian delegate had argued during the drafting of the Convention that “the UN should try to help not only special sections of the world’s population, but all afflicted people everywhere ... For the UN to attempt a partial remedy involving discrimination, whether accidental or deliberate, would be contrary to the great principles of the Charter.” A parallel debate took place at the same time between proponents of legal protection and those who argued in favour of material assistance as the form of protection most needed by refugees; the latter group of states arguing that the guarantee of legal rights without concomitant material assistance was a hollow concept. See Pia Oberoi, *Exile and Belonging: Refugees and State Policy in South Asia*, New Delhi, Oxford University Press, 2006, pp. 22-24.

¹¹⁶ See the OAU Convention and Cartagena Declaration, where the refugee definition is expanded to include events seriously disturbing public order and conditions of generalized violence.

¹¹⁷ J Bhabha, *Internationalist gatekeepers? The tension between asylum advocacy and human rights*, *Harvard Human Rights Journal*, Vol. 15, Spring 2002, p. 161.

¹¹⁸ On its website, UNHCR advocates that: “refugees and migrants, even if they often travel in the same way, are fundamentally different, and for that reason are treated very differently under modern international law. Migrants, especially economic migrants, choose to move in order to improve the future prospects of themselves and their families. Refugees have to move if they are to save their lives or preserve their freedom. They have no protection from their own state - indeed it is often their own government that is threatening to persecute them. If other countries do not let them in, and do not help them once they are in, then they may be condemning them to death - or to an intolerable life in the shadows, without sustenance and without rights.” See www.unhcr.org

increasingly irrelevant to the lives of many of those on the move, creating a vast underclass of the “undeserving”.

82. The dangers of the creation of a “hierarchy of need” are apparent today, not least because this has been taken, particularly by states eager to advance their social control agenda, as a short hand for a hierarchy of rights. States in search of greater control, and confronted by unprecedented movement, are constructing and categorising the vast majority of people who appear at their borders as the supposedly rights-less “mere migrant”, restricting the category of “genuine refugee” to an ever smaller group of people. And having argued for so long that the people they seek to defend are not “mere migrants”, advocates are confronted with a dilemma. Either to argue that the legal regime of refugee protection is no longer adequate to its task given the realities of contemporary migration, or to make increasingly complicated legal efforts to fit new categories of migrants into the hallowed category of “genuine refugee”. Both are imperfect alternatives, with critics of reform arguing that widening the “refugee” category would erode asylum seekers’ rights and face opposition from states reluctant to sign up to new laws obliging them to provide protection for more people. Consequently, some have argued for the protection of individuals on the basis of humanitarian need¹¹⁹, others that “new” categories of protection need to be developed.¹²⁰
83. More radically, Schuster argues that “in light of the enormous human costs of the current system, there is an obligation to search and argue for radical alternatives ... [such as] the prospect of a world without borders, or of borders that are open, existing only as administrative conceits.”¹²¹ While the argument is made that opening borders would dilute the “scarce resource” of asylum, it is surely equally compelling to want to put an end to the human rights

¹¹⁹ Goodwin-Gill has argued that “the existence of danger caused by civil disorder, domestic conflicts, or human rights violations generates a valid presumption of humanitarian need” which “has important consequences for ... the entitlement to protection of individuals or specific groups.” Guy Goodwin-Gill, *Non-Refoulement and the New Asylum Seekers*, *Virginia Journal of International Law*, Vol. 26, No. 4, 1986, p. 905.

¹²⁰ Betts and Kaytaz have recently promoted the use of the term “survival migrant” (a term first used by Anne Gallagher to describe migrants, including asylum seekers, who had the fewest choices and were most in danger of being smuggled or trafficked. See Anne Gallagher, *Trafficking, Smuggling and Human Rights: Tricks and Treaties*, *Forced Migration Review*, No. 12, 2002), to describe those fleeing “an existential threat to which they have no domestic recourse” due to a combination of state collapse, livelihood failure and environmental disaster. Noting that states would be unlikely to adopt this as a new legal obligation, Betts and Kaytaz suggest that a soft law regime analogous to the IDP regime could be established. However, and apart from the almost inevitable hostility of states to such a concept, it is not clear that the suggested definition of “survival migrants” would be wide enough to extend protection to those migrants most in need to protection of their fundamental human rights. It also fails to take into account the current reality that protection is often needed by migrants as a result of the situation into which they have arrived, rather than solely on the basis of the situation from which they are fleeing. See UNHCR, *New Issues in Refugee Research No. 175, National and international responses to the Zimbabwean exodus: implications for the refugee protection regime*, July 2009. In her report in 2000 to the UN Human Rights Commission, former Special Rapporteur on the Human Rights of Migrants Rodriguez Pizarro proposed a definition of “migrant” that takes into consideration only an individual’s *current* status in the receiving country – not how he or she got there. She noted that “definitions that are related to the reasons why people leave their countries of origin are perhaps the least suitable kind of definition. [...] In order to give a definition of a migrant that is based on human rights, the first and most important step is to see whether or not the rights of those persons enjoy some form of legal, social and political protection.” Another category of protection has been proposed in light of recent attention to the issue of climate change; the so-called “environmental refugees” or “environmentally displaced migrants”. Here again, the concept is not without controversy with more than one source disputing the legal basis on which to rest a definition of “environmental refugee”, and concerns that the term seeks to cover far too many categories of movement, and that it will be too broad to lend itself to a defined regime of protection. See UNHCR Policy Paper, *Climate change, natural disasters and human displacement: a UNHCR perspective*, 23 October 2008, <http://www.unhcr.org/protect/PROTECTION/4901e81a4.pdf>

¹²¹ Schuster p. 276.

violations that are made possible in the name of closed borders, including the denial of practical access to asylum, the rise in human trafficking, and the fate suffered by hundreds of thousands of people who are dying or being injured along migration routes.

84. It is hard to disagree with analyses that argue for radical re-thinking of the protection regime surrounding the issue of migration, not least because it is very clear both that the situation of migrants is increasingly intolerable from a human rights perspective, and also that the current protection regime is fraying at the seams. Yet, the issue of open borders will generate implacable opposition from states, at least in the short and medium terms. Pechoud and Guchteneire make the counter argument, however, that opening borders would not necessarily lead to an unstoppable wave of human movement. They give the example of the European Union, where opening its wider borders to eastern European states did not result in the tidal wave of uncontrollable migration that had been predicted. They contend further that the logical answer to the contradictions of contemporary migration policy and practice must lie in acknowledging a right to mobility, if only to question the “utopian” notion that mere tinkering is going to rescue the current system of human mobility and the human rights abuse which it engenders.¹²² Any debate on a putative “right to mobility” will inevitably be a long and complex one, but such a discussion is both important and timely, given the state of migrants’ rights today.
85. International law is premised on the existence and legitimacy of a world of separate, sovereign states with the right to control entry to their territories. At the same time, control over migration is interpreted as being somehow intrinsic to what is it to be a nation, to ‘stateness’ and to the core notions of membership and national identity. Sovereignty as a paradigm is thus reinforced and raised as a practical and theoretical barrier to migration. Yet such a conceptualization tends to ignore the fact that states are obliged to uphold their voluntarily assumed human rights obligations, even where these might conflict with sovereign action. If it is conceded that states have the right to control their borders, it is necessary as a corollary to assert that they also have the sovereign obligation to respect their voluntarily assumed international legal obligations, including the human rights of migrants. A state cannot pick and choose which rights it will apply, or how and when it will apply them. Sovereignty cannot be raised as a defence to acts which would otherwise be unlawful as a matter of international law. Nor can it be raised as a shield to protect states from liability for action extra-territorially.¹²³ Thus sovereignty is already undermined, at least to some extent. A conceptualization of the absolute primacy of sovereignty also disregards the notion of global justice, wherein it is difficult to simply accept that “one’s life chances are limited by where and to whom one is born.”¹²⁴

¹²² “[R]estrictive policies do not keep people from trying to migrate illegally”, they argue, “More liberal policies would have little impact on those who leave their country, whether it is authorized or not; it would only reduce the dangers they are exposed to.” Pechoud and Guchteneire, p. 77.

¹²³ See UN Human Rights Committee General Comment 31.

¹²⁴ Juss., 275. Pechoud and Guchteneire note in addition that “Mobility is a privilege that is unevenly distributed among human beings; citizens from developed countries may travel and settle down almost anywhere in the world, while their fellow human beings from less-developed countries depend upon the uncertain issuance of visas and residence permits to migrate. Pechoud and Guchteneire, p. 75.

86. So, can (or should) freedom of movement (which must inevitably be bound up with access to other fundamental human rights in the case of many of today's migrants) be curtailed for the sake of freedom (of public order, security and well-being) for the citizen population?¹²⁵
87. While it is inevitable that non nationals seeking to cause harm to the nation-state or injury to its population will on occasion cross borders for this purpose, we have seen in this paper that the majority of migrants pose no immediate threat to countries of destination, and could in fact bring considerable socio-economic and cultural benefit. In the case of people fleeing persecution and severe human rights violations, in addition, it is an established principle of international law that the state is duty bound to extend hospitality. Yet as we have seen, in the context of migration, human rights advocates have in general been extremely timid about confronting the state on the issue of sovereignty and in particular on the limits of sovereignty in relation to non nationals. At a time when there have been other breaches of the concept of sovereignty, such as growing acceptance of the concept of a "responsibility to protect"¹²⁶ for example, it may be an opportune time to question such unquestioning deference to sovereignty in the context of migration and the human rights of migrants.¹²⁷

Conclusions: the human rights framework and the protection of migrants

88. But can the contemporary human rights framework, using its admittedly imperfect parameters in this regard, still be of use in challenging exclusionary and criminalizing policies of social control?
89. Yes. The human rights framework can raise a number of important questions in the context of social control, and provides methodologies for enabling protection. Most importantly, this framework locates the individual human being at the forefront of the analysis and establishes a legal framework of state and non-state actor accountability for protecting, promoting and respecting the rights of all migrants. Individual rights-holders are thus empowered to hold duty-bearers to account, and to seek remedies for violations committed against them.

¹²⁵ See Robin Cohen, 'The Free Movement of People: ethical debates before and after 9/11' in D Downes et al, *Crime, Social Control and Human Rights: From Moral Panic to States of Denial – Essays in Honour of Stanley Cohen*, Willan Publishing, 2007, p. 217.

¹²⁶At the 2005 World Summit, the United Nations General Assembly unambiguously recognized a collective international responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. The concept has been recognized as placing on every state the responsibility to protect their population from these four egregious crimes, and the international community, through the United Nations, has also been granted the responsibility to protect these same populations. In 2006 the Security Council unanimously adopted resolution 1674 (S/Res/1674 2006) in which the concept was reaffirmed. On 12 January 2009, UN Secretary-General issued a report entitled *Implementing the Responsibility to Protect* (RtoP). The report is the first comprehensive document from the UN Secretariat on the Responsibility to Protect, following the Secretary General's stated commitment to turn the concept into policy. See www.responsibilitytoprotect.org

¹²⁷ Robin Cohen has observed in the aftermath of the events of 9/11, that while "liberal political theorists have articulated a modest defence of migrant rights, these have remained firmly constrained by their acceptance of the primacy of national sovereignty and the need for 'realism'". R Cohen, p. 213.

90. The human rights approach is intended to place a spotlight on marginalization, disempowerment and exclusion, and champions the principles of non-discrimination and equality. Genuine participation in planning and decision-making and effective access to information underpin the concept of empowerment.¹²⁸ From a human rights point of view, accordingly, individual migrants and their communities have a right to be integrated into decision-making processes that affect them. Thus migrants and their communities should be enabled to participate actively in the construction and implementation of policies which affect their lives and well-being. In addition, the human rights approach stipulates that there should be mechanisms to monitor the implementation of this policy to ensure that it does not entrench vulnerability, marginalisation and exclusion. Migrants should be engaged in discussing migration policies at all levels, from meaningful participation in the Global Forum on Migration and Development¹²⁹ and other international fora to in-depth contact with local government on such issues as housing and healthcare, and other factors which could have an impact on their integration.

The human rights approach

Human rights encapsulate the fundamental interests of human beings grounded in shared ideas about the requirements for a dignified life, which States and others are legally and morally bound to recognize and realize.

A human rights approach is centred on the notion that basic human needs are not a matter of charity but of justice, and should therefore be embodied in clear, preferably legally-binding, standards. This would provide a clear mandate for public officials to take action and rights-claimants to hold duty bearers accountable.

Taking a human rights approach means far more than just targeting those that are easy to reach. All human beings are entitled to enjoy their human rights equally without discrimination.

Human rights are fundamentally concerned with empowerment. Genuine participation and access to information are a cornerstone of empowerment, which is defined as an expansion of people's capabilities and freedoms to participate in, negotiate with, influence, control and hold accountable the institutions that affect their lives. The human rights approach values participation, particularly by the excluded, in all decisions.

The reality is that poor people tend to be less organized, less capable of articulating their concerns politically, less able to gain access to public services and legal protection, less connected to influential people, and most vulnerable to economic shocks.

Adapted from OHCHR, Claiming the Millennium Development Goals: A Human Rights Approach, New York and Geneva 2008

91. In seeking to promote the human rights of migrants, there are a number of directions for advocacy. Firstly, there is a need to make sustained arguments for a universalist application of human rights norms to all migrants regardless of their legal status. In addition, where particular regimes of protection apply, such as to refugees, asylum seekers, trafficked persons, stateless persons and migrant workers and members of their families, these norms of protection should be applied without discrimination. Care should be taken to avoid creating hierarchies between different groups of migrants, while recognizing that protection needs might, in given situations,

¹²⁸ M. Darrow and A. Tomas, 'Power, capture and conflict: a call for human rights accountability in development cooperation', *Human Rights Quarterly*, vol. 27, No. 2 (May 2005), 494

¹²⁹ Despite the fact that civil society is allocated dedicated (but separate) space within the GFMD agenda, migrants organizations have complained that there is little opportunity or room for migrants themselves to participate in the debate. In this context, an umbrella group of Asian migrants' organizations noted in the run-up to the Manila GFMD that "the civil society day has been managed and directed mainly by non-government organizations or NGOs. While we respect the efforts of NGOs to support causes of migrants, still the best representatives for migrants are the migrants themselves." GFMD must hear migrants from the ground – Migrants alliance prepares to challenge migration and development frame of global confab in Manila, Press release of the Asian Migrants Coordinating Body, 11 June 2008.

be different. It is important to recognize, though, that labels have their limitations in conferring appropriate protection to migrants. The labeling of foreigners is an integral part of the state's construction of individuals and groups as "friend" or "enemy", usually defined in relation to the citizen.¹³⁰ Labels divide human migrants into relatively arbitrary categories of risk and vulnerability, which do not always resonate with contemporary mobility patterns. Yet as Juss points out in this context, "labels have become all important. They are indispensable."¹³¹ Labels signal to states those who are worthy of protection, and to advocates those whom it is their duty to defend. In defending the rights of migrants, however, it is important to recognize the limitations of contemporary label regimes, and to utilise universal human rights standards as a basis for advocacy of the rights of all migrants regardless of their legal status.

92. In light of the fact that the specific legal standards applicable to irregular migrants are still relatively indeterminate, one concrete advocacy goal would be to press the human rights treaty bodies and other authoritative sources for more specific legal guidance in this respect. Issues such as the scope of the right to health and the obligations of states in this respect, and of the parameters of the right to housing of irregular migrants could be a starting point.
93. A second avenue for advocacy goes down the route of recognizing the realities of much contemporary migration as a movement in response to rational market forces. The overwhelming majority of today's migrants are moving to take up employment in economies that need their labour, despite the fact that their initial impetus to move might be spurred by poverty and inequality. Most do not want charity, just the chance to live and work, free of the very discrimination and abuse that prompted their movement in the first place. The advocacy agenda in this case would be to argue for more responsive and more transparent legal channels of entry, to recognize labour market realities, and to end the hypocritical situation where states condemn the movement of irregular migrants while their economies and societies benefit from the labour of these same individuals.
94. Ultimately, migrants have the right to expect their fundamental human rights to be respected, protected and fulfilled wherever they are and regardless of their legal status. In the light of an ongoing, if erroneous, construction by influential claims makers of migrants as burdensome and indeed actively harmful to the societies in which they live and work, the enduring challenge for advocates of migrants' rights will be to see the implementation of these same human rights principles in the daily lives and realities of all migrants.

¹³⁰ As Guild notes; "Without a clear category of 'citizen', 'migration' can only describe the wanderings of people, not the relationship of movement across international borders and the acquisition of rights. Without the category of 'citizen', the justifications which states put forward for treating some individuals more favourably, and others less so, tend to sound suspect to modern ears." Elspeth Guild, *Security and Migration in the 21st Century*, Polity Press, Cambridge, 2009, p. 29.

¹³¹ Satvinder Singh Juss, *International Migration and Global Justice*, Ashgate Publishing, UK, 2007, p. 198.