Mexico as a "safe" third country? Instrumentalization of the right to asylum

México como tercer país ¿seguro? Instrumentalización del derecho de asilo

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ABSTRACT

This paper aims to argue that the United States has instrumentalized the right to asylum by converting Mexico into a "third 'safe' country" to divert Central American asylum seekers to Mexican territory and evade its international protection obligations. The methodological design is deductive, that is, such theorization was reached through documentary sources. Even with the limitations of the method, the paper is innovative because it analyzes migration management from critical legal studies and legal biopolitics by approaching securitization of migration through a genealogy of the discourses used by the United States to externalize its borders to Mexico, which have as their most recent strategy the "third 'safe' country" agreement. The consequences are the distortion of the right to asylum by removing its main protection: the non-refoulement principle and, in consequence, to let die Central American people fleeing from persecution and death geographies.

Keywords: 1. right to asylum, 2. critical legal studies and legal biopolitics, 3. securitization and borders externalization, 4. United States-Mexico border, 5. Central American migration.

RESUMEN

Este artículo argumenta que Estados Unidos ha instrumentalizado el derecho de asilo al convertir a México en un "tercer país seguro", en aras de desviar a los centroamericanos solicitantes a territorio mexicano, y de este modo evadir sus obligaciones de responsabilidad internacional. El diseño metodológico es deductivo; es decir, se llegó a dicha teorización a través de fuentes documentales. El análisis es innovador, aún con las limitaciones del método, porque analiza la gestión de las migraciones desde los Estudios Críticos del Derecho y de la Biopolítica Legal, al abordar la securitización de las migraciones a través de una genealogía de los discursos usados por Estados Unidos para externalizar su frontera con México, y que tienen como su más reciente estrategia un "tercer país seguro". Esto tiene como consecuencia la desnaturalización del derecho de asilo, al quitarle su principal protección: el principio de no devolución, y que se deje morir a los centroamericanos que intentan huir de las geografías de persecución y muerte.

Palabras clave: 1. derecho de asilo, 2. estudios críticos del derecho y biopolítica legal, 3. securitización y externalización de las fronteras, 4. frontera Estados Unidos-México, 5. migración centroamericana.

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INTRODUCTION

Since mid-October 2018, several caravans of migrants from Central America entered Mexico, trying to reach the United States. However, irregular entry[2] is not new: Central American migrants without any papers have been crossing the border for years in Mexico, trying to escape from a region that continually expels them due to poverty, civil war, environmental disasters, violence of all kinds, desires for family reunification, and other causes complicated with the existence in different countries of a weak Rule of Law and territories permeated by organized crime. Thus, the novelty is not that Central America is a region that originates forced migration, but the emergence of caravans as a form of massive, organized migration with a sense of belonging to a collectivity.

This article has as its central hypothesis that, in the last three decades, the United States, by using the regulations on migration, has brandished the discourse of securitization to contain irregular Central American migration by means of biopolitical approaches that externalize to Mexico the control of its borders. The most recent manifestation of this is the "safe third country" strategy, by which Central American asylum-seekers are diverted and returned into Mexican territory, making the country the first line of President Donald Trump's wall.

In the first place, this article approaches migration from the outlooks of Critical Legal Studies and legal biopolitics. Second, it analyzes the discourse of securitization in migration. Third, it makes a genealogy of the security discourse used by the United States during the last three decades to externalize its border with Mexico. And fourth, the article argues that American biopower exploits the right to asylum by making Mexico a "safe third country" to favor its racist and classist interests in migration management, which has two consequences: 1) denaturing the right to asylum by taking away its main guarantee, the principle of non-refoulement, and 2) letting to die Central Americans, whose lives are considered disposable and exchangeable for money, because they are seen as racially and culturally inferior, both in the United States and Mexico.

MIGRATIONS FROM CRITICAL LEGAL STUDIES AND LEGAL BIOPOLITICS

The epistemological perspective of Critical Legal Studies (CLS) questions the juridical discourse institutionally consecrated by the dominant theoretical frameworks-legal positivism and natural law-that leave the political environment out of the juridical realm and

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[2] When referring to migrants, reference is made to people who, for different reasons, move outside their regular place of residence, whether within a country or across an international border, temporarily or permanently. People considered as "irregular migrants" are those who do not have the documentation required by the receiving State to remain legally within their territory, as indicated in article 5.b of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* 1990 (UN, 1990).

present the norms of the system as neutral, necessary and fair, when indeed they are instruments that regulate power relationships in society according to race, class, and gender (Kennedy, 2006; Fitzpatrick, Álvaro, & Atiles, 2010). From this perspective, political neutrality and objectivism promoted by the Western liberal state of law are unsustainable, since law and legal science are categories determined by politics and ideology, which allows law to operate in favor of the dominant power interests in a society (Priban, 2002). As Derrida points out: "No existing code or rule can guarantee what has to be decided" (Derrida, 1992, p.23). Thus, CLS do not accept law and its narratives as given, because they understand that law is indeterminate and is the mask of specific strategies of social control and discipline susceptible of being manipulated by the predominant powers, be they sovereign, disciplinary or biopolitical (Fitzpatrick, Álvaro, & Atiles, 2010; Golder, & Fitzpatrick, 2009).

This way of understanding law is compatible with the "analytic theory of power" developed by the influential French thinker Michel Foucault (1998, 2000, 2004). Such theory "does not intend to define power, but to establish how people function and submit to power. (Castro, 2004, p.204). The analytical theory of power has marked the work of exponents of critical legal theory such as Schmitt (2002), Agamben (2004), Esposito (2006), Derrida (1992), Deleuze (2007), Levit & Verchick (2016), Butler (2006), MacKinnon (1991), Horkheimer and Adorno (2002), Gadamer (1999), and Kennedy (2011), among others.

According to different authors, Foucault (2004) thinks that power is intended to subject people to an order that is legal and political at the same time (Esposito, 2006; Lemke, 2011). Therefore, modern power channels behaviors (not people), inducing them, facilitating them, making them difficult, limiting them or preventing them. Foucault (2000) distinguishes three overlapping types of power: *sovereign power* (the law), which works by applying laws in a given territory and punishing its transgressors, who thus damage their own sovereignty; the *disciplinary power* (knowledge and institutions), directly exercised over individual bodies to discipline them and make them docile, to monitor, train, use, and punish them as a function of economic productivity; and *biopower* (population regulation policies), applied to the life of a population as a political body using power/knowledge technologies that are called biopolicies (Foucault, 2000, 2004; Foucault Senellart, & Davidson, 2007).

Biopower aims to "make people live and let them die" and focuses on the particular processes of life such as birth, death, reproduction, disease, and migration. It controls a biological field, which is divided into a hierarchy of races where those who are considered as inferior are left to die. This is an "indirect murder", because without intentionally killing someone, whole populations die because the State does not do something for them (Foucault, 2006a; Foucault, 2006b; Estévez, 2018). This is done by means of neoliberal governance - the administrative apparatus of biopower or its rationality- which is understood as the set of techniques (institutions, procedures, analysis, reflections, calculations, and tactics) used to direct human behavior, which allows for the exercise of biopower (Foucault, 1997; Rose, O'Malley, & Valverde, 2012; Estévez, 2018). According to Foucalt's analysis, government is

an activity that leads individuals throughout their lives, placing them under the authority of a director responsible for what they do and what happens to them (Foucault, 1997).

Thus, at the center of the discussion is, not how power is distributed or is subordinated to the law, and not the type of regime or consensus it obtains, but how the life of populations is included in calculations of political power, to make it proliferate in the capitalist production process by administration and management of the population, such as birth control, vaccination, hygiene, and migration control campaigns. According to Esposito (2006), this is what Foucault understands as "*biopolitical*", which "produces subjectivity or produces death", that is, it either transforms its objects into subjects or definitively objectifies it: it is either a politics of life or about life (Esposito, 2006, p. 53). Biopolitics "leads life toward its expansion, precariousness, or extinction with the purpose of influencing the economic reproduction of current capitalism" (Estévez, 2018, p.50).

Power uses the ideal *discourse,* which is the set of elements or blocks of tactics in the relationships of force that determine subjectivities and has the effects of truth. Power establishes subjective visions, objects, and knowledge that divide the false from the true. Discourse is produced and distributed through *devices*, which are political, legal, and economic apparatuses that make it possible to establish the division between false and true, the ways in which both are sanctioned, the techniques and procedures used to obtain the truth, and the status of subjects whose function is to say what works as true (Foucault, 2006b; Estévez, 2018). More broadly, "a device is anything capable of capturing, orienting, determining, intercepting, modeling, controlling, and ensuring the gestures, behaviors, opinions, and discourses of living beings" (Agamben, 2009, p. 14).

Under the lens of Foucault, sovereign power positivizes law into laws/ codes; on the other hand, in cases of non-compliance, disciplinary power applies law institutionally to people with will by means of sanctions; and finally, it exploits biopower to maintain relationships of domination: the law is used for strategic purposes to serve as a norm (or pattern) and thus to impose conformity and homogenize bodies and entire populations. Therefore, "life, much more than law, is the bet of political struggles, even if these are formulated as an assertion of the law" (Foucault, 1998, p. 81). As Castro points out, it is not that "the law disappears or that justice institutions tend to disappear, but rather that the law functions more and more as a norm, and the judicial institution becomes more and more integrated into a continuum of devices (medical or administrative) whose function is mostly to regulate" (Castro, 2004, p. 219).

Biopolitical studies on migration focus on analyzing how institutions, laws, migrant and refugee detention centers, courts, non-governmental organizations, and other bureaucracies are a means to manage and control migrant people's lives in a way that is functional to the reproduction of global capitalism. These analyzes study the different discourses and technologies (biopolicies) by which migrants who promise higher productivity and surplus value to the neoliberal capitalist system are taken in, be it due to their job skills or

socioeconomic vulnerability to exploitation. Thus, "migration is regulated by a biopolitics that administers, controls, constructs, and expels migrants from a country" (Estévez, 2018, p. 53). And the control of migration is a biopolitical device that produces subjectivity, manages mobility, and governs the population (Mezzadra, 2005; Walters, 2006; Rigo, 2007; Vaughan-Williams, 2009).

Framing the study of migration under this perspective is useful to critically analyze how biopower, by applying the migration regulation device, uses discourse such as securitization to contain unwanted, generally irregular, non-white, and poor migration. This is achieved by means of biopolitical approaches, for example, in migrant detention centers, refugee camps, and the externalization of border control, as well as figures such as the "first country of arrival" and the "third safe country" in the context of the international refugee regime. All of this has the purpose of making entire populations live and die.

THE SECURITIZATION DISCOURSE ON MIGRATIONS

"Securitization" is a term developed by the Copenhagen School of Critical Security Studies to name the process by which a political and social phenomenon is understood by means of a "security-based approach" that justifies the adoption of special measures beyond the legal framework and ordinary political decision-making procedures (Waever, 1995). It is the process by which a phenomenon becomes a security problem, regardless of its objective nature or the specific relevance of the supposed threat.

Migration has undergone a process of securitization over the past decades that has been widely studied by social science (Huysmans, 2000; Huysmans, 2006; Bigo, 2002; Ceyhan, & Tsoukala, 2002; Campesi, 2012; Karyotis, 2007, and Guild, 2009), and irregular migration specially has been restated as a set of dangers, threats, and disorder. This has justified the increase in both border controls and police powers, which has since exceeded its traditional tasks of assisting law and justice to punish crime. At the same time, "the administrative institutions in charge of managing migration have been increasingly empowered to restrict the personal liberty of migrants, thus becoming similar to penal institutions" (Campesi, 2012, p. 3). This has given rise to a migratory control regime that is situated between criminal law and administrative law, but lacking the rules and guarantees of criminal law (Weber & Bowling, 2004).

This is confusion between internal and external security: "Internal security borders are increasingly projected outward, whereas the sphere of action of external security tends to penetrate into the political sphere" (Campesi, 2012, p. 4). This has created what Didier Bigo defines as a *security continuum,* within which a group of bureaucrats devoted to security "beyond the State" move, redefining threats and developing the powers and institutions to govern beyond State sovereignty (Bigo, 2000).

The nexus between migration and security has broadened the scope of the migration control systems of neoliberal states by systematically reducing the rights and freedoms of migrants and asylum-seekers, and by expanding the powers and prerogatives of States in this regard, which used to be a trait of emergency states (Agamben, 2004). Under this lens, not only the integrity of political sovereignty or the maintenance of internal public order are at stake, but the survival of society and, therefore, the maintenance of its basic identity and its economic and social characteristics. "Securitist discourse reinforces the reproduction of a political imaginary focused on fear and populated by enemies" (Campesi, 2012, p. 6).

The creation of the legal status of irregular migrants has been very useful for the security discourse, since irregularity entails breaching the legal and sovereign rules that regulate access to the territory of the State. This offense without victims has progressively increased to the rank of a security threat because:

> 1) It evidences the State's inability to protect its territory by means of border control because migration laws and policies fail to produce the desired results and rather contribute to irregular migration, which is contrary to its goal of controlling and reducing migration (Ortega Velázquez, 2014, 2017).

> 2) It indicates the social dangerousness of the person who intends to evade surveillance and the controls established for legal access to the territory of a State, thus characterizing and defining irregular migrants as risk bearers: "The individual is characterized as 'illegal', and legality itself has to do with safety" (Guild, 2009, p. 52).

As a result of securitization, the irregular migrant represents "the archetype of all the transnational clandestine actors on whom the security agencies seek to extend their control by reinforcing police and surveillance powers" (Campesi, 2012, p. 8).

For Campesi (2012), the security discourse has constructed migrants in three ways:

> 1) *Migrants as a threat to public order and national security*: they are seen as a danger to internal public order because they increase urban disorder and common crime, and as a threat to State security because migration is associated with transnational criminal phenomena or threats such as organized crime and terrorism. This justifies securing and militarizing borders.

> 2) *Migrants as a political and cultural threat*: they are seen as a danger to the ethnic and cultural balance of the target society, and as a powerful factor of social fragmentation and increased political violence, which justifies a police approach to the matter. Thus, there is a new form of racism and a radical identity policy that builds borders within societies and creates differences between the legitimate members of a community -the citizens- and the others-the invaders, the migrants.

> 3) *Migrants as a socioeconomic threat*: they are seen as unfair competitors in the labor market because they "take advantage of" the assistance provided by the welfare state systems of Western countries. It is emphasized that the excessive presence of migrants can trigger conflicts over access to public services, and that indiscriminate provision of such services is an attractive factor for new "beneficiaries", which places at risk the socioeconomic system of target societies.

The process of securitization of migration can be read from the point of view of Agamben (2004), as an example of the state of exception of contemporary democracies, which regard migration as a threat to national security, a phenomenon exacerbated by the emergence of international terrorism after September 11, 2001 (Agamben, 2004). When migrants are identified as potential enemies, capable of endangering the very existence of society, political actors-such as George W. Bush or Donald Trump-use this rhetoric for electoral purposes and implement exceptional political strategies and measures, because they consider that these are the only solutions capable of facing an existential danger. Thus, security discourse produces spaces of exception for migrants and asylum-seekers identified as a security threat, subjecting them to intrusive forms of surveillance and control and to exceptional police powers.

GENEALOGY OF SECURITIZATION DISCOURSE USED BY THE UNITED STATES TO EXTERNALIZE ITS BORDER WITH MEXICO: BIOPOLITICS TO CONTAIN CENTRAL AMERICAN MIGRATION

A process of territorial and administrative expansion of migration surveillance and border management in other countries has taken place over the past decades (De Genova, 2013). Regional and bilateral agreements have been established to allow the States of destination to exercise "remote control" (Zolberg, 2003), or a "remote government" (Miller & Rose, 1990). Visas, passports, sanctions on transport companies, biometric controls, the development of liaison officers' networks, readmission or return agreements with countries of origin or transit, and the figures of a "safe third country" and a "first country of arrival" to divert asylum seekers, as well as economic aid and transfers, early warning systems, humanitarian aid, or the creation of safe zones in the vicinity of conflicts to prevent displacement of people are some of the manifestations of this control. The incorporation of this control into the border regime has taken three forms: "A vertical movement up and down the State administration; a geographical shift toward other border control points; and an externalization of responsibilities toward third-country governments and the private sector" (Gil Araujo, 2011, pp. 24-25).

Borders represent not only the physical boundary between one State and another, but are also the network of relationships that "sanction, reduplicate, and relativize other geopolitical divisions" (Balivar, 2002, p. 79). They are anywhere or everywhere, or even in many places at once, and do not necessarily coincide with physical borders (De Genova, Mezzadra, & Pickles, 2014). Thus, these borders of the nation-State have been transcended, and control is no longer exercised only in these areas and by State administrations, but also in practices aimed at determining where potential migrants are, in order to restrict or redirect their mobility (Gil Araujo, Santi, & Jaramillo, 2017). The main goal of the border and migration regimes is to filter, select, and authorize entry and length of stay of movements, more than merely expel or reject them (Mezzadra & Nielson, 2014).

In this way, the security discourse of migration materializes not only in the militarization of borders and the existence of detention centers for migrants and asylum-seekers, but also in the *outsourcing of border controls*. In other words, coordination mechanisms among countries of destination, transit, and origin of migrants are aimed at directing the behavior of migrants and discouraging their arrival to destination states. Border externalization is a biopolitics that prevents migrants and asylum-seekers from entering the territories of countries of destination, characterizing them as legally inadmissible, regardless of the reasons for their requests for protection. To that end, the States enter into agreements, sometimes with the involvement of private actors, or implement -direct and indirect- prevention and prohibition policies, such as supporting security practices or handing the management of migration to third parties (Crepeau, 2014; Frelick, Kysel, & Podkul, 2016; Gammeltoft-Hansen & Tan, 2017).

North America and Europe set the benchmark for the outsourcing of border control in the twenty-first century, specially after the terrorist attacks of September 11, 2001. In the case of the United States, by virtue of the 2001 *Immigration Act*, the *Homeland Security Department*, an agency with migration and anti-terrorism faculties that has new identification and surveillance methods and units in charge of external controls: the *Immigration and Customs Enforcement* and the *Coast Guard* (Ziaotti, 2016). However, since many years before the global threat of terrorism, the process of externalizing borders in the region had already begun to emerge from other discourses, such as drug trafficking. Of course, Mexico has actively participated in this process, specifically to contain Central American migration, that has become a bargaining chip to advance its commercial interests at the expense of the life and human rights of migrants and asylum-seekers.

This can be seen in a panoramic view over the past three decades, regardless of the political party in power (PRI, PAN, or Morena). In the Carlos Salinas administration (1988-1994), for instance, the North American Free Trade Agreement (NAFTA) was achieved in 1992 and the work of Mexico as a "frontier country" began. Years later, the government of Andrés Manuel López Obrador (2018-2024) avoided the imposition of tariff rates on Mexican imports in June 2019, at the expense of turning Mexico into a "safe third country", militarizing for good the southern border and becoming a real wall for Central American migrant caravans. Thus, securitization of migrations has been used to externalize US borders to Mexico for years. Over this period, three types of discourse can be distinguished:

Discourse: migrants as drug traffickers (1988-2001)

To outsource control of the US border to Mexico, the first discourse may be associated with the security construction of irregular migrants as a socioeconomic threat and a danger for public order, as Campesi (2012) argues. This discourse was created in the period following the approval of the *Immigration Reform and Control Act* (IRCA), which "regularized 2.3 million Mexicans and criminalized the employment of irregular migrants" (Durand, 2013,

p.7), and in the context of the "war on drugs" (entering from Mexico and Colombia) (Alba, 1999, pp. 21-22). In this first moment, to militarize its border and externalize its border controls to Mexico, the United States used the discourse of the *fight* against irregular migration and the *war* against the drug trade.

Under the Carlos Salinas administration (1988-1994), in 1993, the first year of the NAFTA, the National Migration Institute (INM) was created to manage migration and contain irregular migration in transit. Detention and deportation mechanisms were the basis of this process, and they are the backbone of Mexican migration policy up to this day. In 1996, the Ernesto Zedillo administration (1994-2000) instrumentalized the General Population Law to allow for migratory checks in places other than those established by Article 151, that is, throughout the country. In that year, the Mexican government trained Mexican migration agents and military and security personnel to professionalize their work. "Operación Sellamiento", the equivalent of Operation Gatekeeper (1994), was launched in 1998 (Munguía, 2015, p.106), deploying coordinated actions between Mexico and the United States along the Guatemalan border to detect irregular migrants (Cortés, 2003). Additionally, under this operation, Mexico had the task of acting as a liaison between the United States and Central America to create coordinated actions on migration matters, which was done with the 1996 Puebla Process (Regional Conference on Migration, 2011).

By the time when Vicente Fox became President (2000-2006), there was one migratory station in Mexico City and 24 provisional shelters, most of them in the south of the country (Casillas, 2002). This administration's program was the "Plan Sur" (2001), whose discourse was to protect the dignity of migrants and fight corruption and impunity (Grayson, 2002). In practice, it entailed operations by the National Institute of Migration (INM), the Federal Preventive Police (PFP), and the Attorney General's Office (PGR) in important crossing points for Central American migrants (Anguiano & Trejo, 2007, p. 50), as well as the construction of new migratory shelters, investment in technology, and the hiring of public servants to professionalize the process of deportation of irregular migrants to their countries (Casillas, 2002). By the end of the Fox administration, the INM already had 52 immigration detention centers (Casillas, 2008).

Discourse: Migrants as terrorists (2001-2018)

The security discourse changed due to the terrorist attacks of September 11, 2001, when migration and terrorism were associated with the security construction of migrants as a threat to national security, as argued by Campesi (2012). In the United States, migration management was reconfigured: institutions were created (*Department of Homeland Security* and its different agencies) and laws were issued (like the *Patriot Act*, that made irregular migration a matter of national security); also emergency military orders authorized the indefinite detention of foreigners suspected of terrorism ("a manifest state of exception",

Agamben, 2004, p. 6). Additionally, the border wall with Mexico was reinforced, work place operations intensified, and the number of Border Patrol agents increased (Durand, 2013).

In Mexico, bilateral and multilateral agreements and actions to control Central American migration were undertaken. The High-Level Border Security Group (Gansef) between Mexico-Guatemala (2002) and Mexico-Belize (2005) was formed to work against terrorism, organized crime, irregular migration, illicit traffic in goods, and public security on the border (Calleros, 2009). The "Operativo Escudo Comunitario (2005) sought to contain the flow of Central American gangs in transit through Mexico to the United States" (Carreón, Herrera, & Córdova, 2009, pp. 247-248). In 2005, the INM was recognized as a national security agency. In 2006, the governments of Mexico, El Salvador, Guatemala, Honduras, and Nicaragua signed a Memorandum of Understanding for the "dignified, orderly, agile, and secure repatriation of Central American migrants by land" (Rodríguez, 2016, p. 111).

The Felipe Calderón administration (2006-2012) produced the Puebla-Panama Plan (2008), whose discourse was to boost infrastructure and energy investments in the Central American region and Mexico in order to reduce poverty, inequality, and violence (Carreón *et al.*, 2009, pp. 247-248). However, this plan externalized the US border with Mexico based on a regional security approach that avoided the entry of potential terrorists into the United States' southern border and, at the same time, allowed regional coordination of deportations and containment of irregular migration to the north. This plan, now called the Mesoamerican Integration and Development Project, entailed the transfer of 4 529 million United States dollars to Mexico from 2008 to March 2017 (Amexcid, 2018). Finally, the Mérida Initiative (2008) recognized that bilateral cooperation on security matters between the two countries was needed to achieve the goal of reducing drug violence. To that end, the United States provided equipment and training to Mexican public servants that fight criminal networks, drug and people trafficking, and control irregular migration flows (U.S. Embassy Mexico, 2008). With this initiative, from 2008 to May 2017 the United States transferred $ 2 800 million to Mexico (Seelke & Finklea, 2017).

In 2014, the "Programa Integral Frontera Sur" came into force during the Enrique Peña Nieto administration (2012-2018). The Program was meant as a national strategy focused on the protection of migrants' human rights, the development of border states, and the strengthening of security in the area (Segob, 2015). Once again, its goal was to reaffirm Mexico's role as a dam for Central American migrants by means of aggressive operations in corridors and *hotspots* of migrants in Chiapas, Tabasco, Oaxaca, and Veracruz (Redodem, 2015; Boggs, 2015). For its implementation, a specific item was created in the Federation's Expenditure Budget. The funds were directed to the Coordination Agency for the Integral Attention to Migration in the Southern Border, which in 2020 still exists (SHCP, 2020).

Outsourcing of the US border to Mexico has visible results. For example, the *Global Detention Project* stated that, from 2010 to 2016, the United States was the country with the largest increase in migrant detention, followed only by Mexico, number two in the list of 12

countries that detain more migrants (Global Detention Project, 2017). This, regardless of whether the detainees are under age, since from 2013 to 2017 these two countries led a list of countries that detain migrant children (Global Detention Project, 2018 and 2019). Thus, countries of destination like the United States have increased the number of people arrested before arriving into their territory, and they do so with the help of transit countries as Mexico.

Discourse: migratory caravans as "invasions" (2018-2019)

Mexico has been a regular route to the United States. The reasons for Central American migration, which is mostly forced, include poverty, civil war, environmental disasters and even climate change, violence of all kinds (institutional, market, family, organized crime), or family reunification desires, together with a weak rule of law and territories impregnated by organized crime (UNHCR, 2018). The precarious and violent Central Amercian reality is strongly associated with the ravage caused by the longstanding armed conflicts of the region between 1960 and 1990. Despite the signing of peace agreements in Central America and the establishment of "democratic regimes", many situations that provoked those conflicts still prevail (Cuevas, 2017). The political, economic, and military oligarchies remained almost intact, and they took new directions with the support of the United States, to where an important Central American migration headed during the years of civil wars (UNHCR, 2008). Some of these migrants organized themselves into criminal gangs and were deported by the George W. Bush government between 1989 and 1993. Back in the region, gangs such as Barrio 18 and Mara Salvatrucha (MS-13) expanded and brought violence and death to civilian populations. Thus, generalized violence became a reality in the region, resulting in forced displacement of people (Andino, 2016; Santamaría, 2007).

Since the end of 2018, migratory caravans have emerged as a new form of massive, colorful, and organized migration that provides visibility, accompaniment, and protection to migrants by social organizations, the media, and human rights organizations. They are relatively safe and inexpensive, when compared with the very high costs of people smugglers ("coyotes") (Colef, 2018). Caravans have been described as a form of survival (Torre-Cantalapiedra, 2019), or a new form of self-defense and transmigration, "a new form of migrant struggle" (Varela & McLean, 2019, p.167). Joined by a considerable number of young people, caravans have been considered as a "mobility strategy and a space for protection, autonomy, and solidarity with Central American teenagers" (Glockner, 2019, p. 145).

However, to migrate in caravans from Central America is not a novelty, since these types of movements have taken place before. For example, the Central American Mothers' Caravan has been in place since 2004. In search for lost migrant children in Mexico, these mothers walk "along the routes their children traveled, stopping at migratory stations, and looking along the train tracks. They visit Mexican prisons, brothels, and dance centers, and they look for the bodies of their children in hospitals and morgues" (Varela, 2015, p. 335). Since 2011,

the Viacrucis Migrante (or Migrant Way of the Cross, a simile between Christ's difficult way and the journey of migrants) represents another type of caravan that links the religious with the political and collective conflict. It is used by migrants in transit and their defenders as a way to publicize their demands (Vargas, 2018; Martínez Hernández-Mejía, 2018).

The caravans that began in 2018 were novel because they were formed in territories where migrants came from (for example, Honduras), they are large-scale, they have a large presence of women, children, and young people, and they receive an important media coverage. Additionally:

> [...] they involve a complex network of actors: migrants and deportees who already know the routes, human rights defenders, international agencies responsible for managing humanitarian crises, the media, and organized and fragmented experts, officials, and populations from communities through which these caravans pass (Varela & McLean, 2019, p. 175).

These new migratory caravans have given a new twist to the securitarian discourse of migration: they have been literally equated with "invasions" (Trump, 2018), condensing the three constructions of the irregular migrant under the security lens: a threat to public order and national security, a sociocultural threat, and a socioeconomic threat (Campesi, 2012).

The responses of the Mexican and American governments were immediate:

In the López Obrador administration (2018-2024), the first response -consistent with its electoral promises- was to create a "humanitarian" policy, which included the granting of visas for humanitarian reasons. In 2019, 10 571 visas were granted to nationals from Honduras, El Salvador, and Guatemala (Segob, 2019). However, the humanitarian strategy did not last long: the political alternation taking place in Mexico, the "new" human rights vision of the incoming government, and the ongoing humanitarian crisis in Central America had a "summons effect", and the Central American caravans continued arriving at the southern border. There happened a shift in migration policy and old strategies shared by all Mexican governments were resumed: the granting of humanitarian visas was drastically decreased, while arrests, separation from families, overcrowding in migration stations, access to health care, and violations of due process and international protection rights increased (Alianza las Américas, 2019; CNDH, 2019).

By November 2019, 151 547 Central American migrants had been arrested and 115 237 deported (Segob, 2019). In other words, 76 percent of migrants from that region were deported, which demonstrates the Mexican government's "effective" approach to the migration crisis by means of detention and deportation measures. Besides, the recently-launched National Guard was used to "order" irregular migration by means of violent deployments. This is shown by its performance in the second half of 2019 and by the reception given to the migrant caravan in January 2020, in an operation very similar to those carried out by the United States border patrol (Pradilla, 2020a).

At the same time, using the same rhetoric as in previous administrations, the Mexican government presented the *Comprehensive Development Plan: El Salvador, Guatemala, Honduras, Mexico*, prepared by the Economic Commission for Latin America and the Caribbean (Spanish acronym CEPAL), so that people in the region do not have to migrate. This project revolves around four axes: 1) economic development: taxation and investment, commercial integration, energy integration, and logistics; 2) social welfare: education, health, and work; 3) environmental sustainability and risk management; and (4) comprehensive management of the migratory cycle with human security: rights, livelihoods, and people-centered security (CEPAL, 2019).

Since the caravans began in October 2018, in the US the Donald Trump administration categorically called on Mexico to halt the unwanted migration and closed its asylum system for Central Americans through different policies, the most effective of which was to make of Mexico a "safe" third country through two agreements:

The first agreement foresaw the implementation, starting in January 2019, of *Migrant Protection Protocols* (MPP), also called *Remain in Mexico Policy*. Through these protocols, the Department of Homeland Security devolves irregular migrants and Central American asylum-seekers arriving by land to the United States to Mexico, where they wait for their immigration and asylum resolutions. This clearly undermines their chances of being granted asylum by making it difficult for them to obtain a lawyer to represent them in that country. According to figures from the Department of Homeland Security, by October 2019, 55,000 migrants had been deported to Mexico under this program (US Department of Homeland Security, 2019a).

The second agreement is the "Mexico-United States Joint Declaration", signed on June 5, 2019 after a veiled media threat by President Trump. The president declared that tariffs on Mexican products would increase progressively as of June 10, 2019, if Mexico failed to act decisively to halt irregular Central American migration. By the agreement, Mexico was forced to militarize its southern border using the National Guard, in order to contain Central American migrants; to accept that migrants crossing the southern border of the United States to request asylum be returned promptly to Mexican territory, where they should await the resolution of their asylum applications; and to provide them with work opportunities and access to health care and education. The United States only committed to speed up the resolution of asylum applications and to execute deportation procedures as expeditiously as possible. Both countries reiterated their commitment to strengthen and expand bilateral cooperation and avoid forced migration via the Comprehensive Development Plan, but failed to provide data on economic contributions or other considerations (SRE, 2019).

The Trump administration sealed the American asylum system for Central Americans by issuing a directive dated July 16, 2019, which states that asylum seekers in the southern border of the United States must meet the following conditions:

a) they must request asylum in another "safe" third country through which they have traveled and such protection must have denied to them,

b) they must be victims of "severe" forms of human trafficking, or

c) they must travel through a country that is not a member of the 1951 Convention on the Status of Refugees or the 1984 Convention on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

It should be noted that no exceptions are made when asylum-seekers are under age. If the migrants are not within one of the aforementioned exceptions, a process of rapid deportation will be initiated and they will be sent to their countries (Homeland Security Department and Executive Office for Immigration Review, 2019). As Mexico is a party to the 1951 and 1984 Conventions, only people who have requested asylum in another "safe" third country through which they have traveled and have been denied such protection or have been victims of "severe" forms of human trafficking may qualify. In this way, access to asylum is blocked for the majority of Central Americans who travel through Mexico to the US in search of international protection.

The directive has been legally challenged by different civil society organizations, such as the *American Civil Liberties Union (ACLU)*, the *Center for Constitutional Rights* and the *Southern Poverty Law Center*, because it is a flagrant violation of the principle of non-refoulement, the cornerstone of the right to asylum. It also violates United States immigration and asylum laws, which only restrict a person from seeking asylum if they are "firmly settled" in another country before arriving in the United States, and there is a safe third-country agreement with the United States, and the asylum seeker have been guaranteed a "complete and fair procedure" there. (Human Rights First, 2019a, p.1). In response to these legal challenges, in 2019 the Trump administration pushed for the signing of "safe third country" agreements with the countries of Central America, which were mediated -as with Mexico- by commercial threats to its realization: with Guatemala, on July 26; with El Salvador on September 20; with Honduras, on September 25 (US Department of Homeland Security, 2019b). On September 11, 2019, the Supreme Court of the United States rejected the first legal challenges by the board of directors, thus awarding a victory for the Trump administration. (US Supreme Court, 2019). This, in spite of the incongruity of considering both Mexico and the Central American countries as "safe" countries, since it is precisely those countries that are forcibly expelling their nationals due to the generalized climate of insecurity and systematic violations of human rights that take place there.

MEXICO AS A *DE FACTO* THIRD COUNTRY (NOT) SAFE: INSTRUMENTALIZATION OF THE ASYLUM RIGHT

The "Safe Third Country Agreement": a biopolitics that violates the principle of non-refoulement

The countries where asylum-seekers arrive are primarily responsible for evaluating their applications and granting such protection. However, the practice in the dominant Western countries, supported by the United Nations High Commissioner for Refugees (UNHCR), has been to reduce the number of asylum-seekers in their territories by means of biopolitical methods that divert asylum-seekers to other countries and transfer their international protection responsibilities. This is the case of the figure of the "safe third country", under which asylum-seekers can be sent back to countries they have traveled en route to countries where they seek asylum, or even to countries other than transit countries, by means of a bilateral or multilateral agreement that holds these nations responsible for granting said international protection (UNHCR, 2001, 2018).

This practice has been made possible thanks to the instrumentality of the 1951 Convention on the Status of Refugees in favor of the interests of destination nations, since the Convention does not include this concept, nor does it require people to be granted asylum in the countries through which they have traveled. However, the UNHCR, through its Executive Committee (Excom), introduced this figure in 1989, when migration began to take a turn towards becoming a security issue, under the arguments that what is not prohibited is allowed (UNHCR, 2008) and that refugees have no unrestricted right to choose the country of asylum. The rhetoric behind this figure is that "it reduces subsequent irregular migratory movements and avoids the creation of 'orbiting' refugee situation" and that it promotes international cooperation and shared responsibility (UNHCR, 2018).

The UNHCR states that before asylum-seekers are transferred to another country by virtue of a "safe third country" agreement, each application must be individually evaluated, especially in the case of unaccompanied or separated children, and that the third country will meet the following requirements: it must have the capacity to (re)admit the person; to provide access to a fair and efficient procedure to determine refugee status and other international protection needs; it must allow him to remain legally in his territory while the determination is being made; and it must grant the treatment standards of the 1951 Convention and other international human rights norms, including protection against re-foulement and access to paid employment (UNHCR, 2018).

However, in practice these agreements are used by countries of destination to reduce the number of asylum-seekers in their territories and transfer them to other countries, thus evading their international protection obligations and ultimately letting asylum-seekers to die. This is proved by the European regional experience:

a) The 2013 Dublin System of the European Union has been criticized for breaching *the rights of refugees,* since not all nation-States carry out a fair and efficient examination of asylum applications, nor can they be considered as "safe". Besides, asylum-seekers are detained for long periods before being transferred to another country, often against their will (Gil, 2015; Guild, Costello, Garlik, Moreno, & Carrera, 2015; Fratzke, 2015).

b) The 2016 European Union-Turkey Agreement has resulted in thousands of deaths in the Aegean Sea, arbitrary detention, misery and suffering for migrants and asylum-seekers who have been stranded in the five hotspots in the Greek islands of the Aegean Sea pending the resolution of their asylum claims (Amnesty International, 2017; Médicos sin Fronteras, 2019).

The concept of a "safe third country" violates one of the founding principles of International Refugee Law: protection against re-foulement of a person to a territory where they are under risk of persecution, in accordance with article 33 of the 1951 Convention on Human Rights. This principle is "the cornerstone of the international protection of refugees and asylum-seekers" (Inter-American Court of Human Rights, 2018, para. 179), because it makes it possible to guarantee and protect the fundamental and unremovable rights of the protected person: life, liberty, security, and personal integrity. Therefore, "the transfer of asylum -seekers to a third State where their lives, safety, or freedom are at risk, or where they can be sent to another country where such risks are incurred (indirect return) is a violation of the principle of non-refoulement" (Inter-American Court of Human Rights, 2018, para. 190).

It is not by chance that the Inter-American Court of Human Rights and the Human Rights Committee have stated that the prohibition against torture[3] creates a solid basis of protection against the return, deportation, or expulsion of a person to another country, or to a third nation-State that is not considered safe, when there is a well-founded presumption to believe that the asylum seeker would be in danger of being subjected to torture, or to cruel, inhuman or degrading treatment. This is because the "principle of non-refoulement seeks to ensure the effectiveness of the prohibition of torture in all circumstances and with respect to every person, without discrimination" (Inter-American Court of Human Rights, 2018, para. 181; Human Rights Committee, 2004, para. 9).

Summing up, the concept of the "safe third country" contradicts the basis of the right to asylum –the principle of non-refoulement–, since it breaks with the institution's protection logic: preventing people from being persecuted when their lives, safety, or freedom are in danger. Moreover, as it is not provided for in the 1951 Convention, it lacks a legal and legitimate basis, and practice shows that, when applied, it empties the right to asylum of its foremost guarantee: not to return people to countries where they may be persecuted or their lives are at risk, or, if applicable, not to send them to other countries where such risks exist.

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[3] The prohibition of torture is recognized in Article 5 of the 1969 American Convention on Human Rights and has the status of *ius cogens*, peremptory norms of General International Law that do not allow for the alteration or exclusion of its contents, nor can be ruled against and and acts contrary to them are null and void. They are accepted by the international community as a whole and do not need to be codified in order to be mandatory, in accordance with Article 53 of the Vienna Convention on the Law of Treaties of 1969 (UN, 1969).

Mexico as a de facto "third (un) safe country": instrumentalization of the right to asylum results in an empty right and leaves people to die

In 2019 the United States once more used the discourse of securitization of migration and initiated biopolitical strategies that externalized its borders with Mexico and prevented Central American migration from settling on its territory. The most recent uses Mexico as a "safe third country" through *Migrant Protection Protocols* (MPP) and the Joint Mexico-US Declaration -a de facto agreement of safe third-country- that diverts Central American migrants and asylum-seekers to Mexican territory. As a result of the instrumentalization of the right to asylum, this right has been denatured, since its main guarantee, the principle of non-refoulement, has been removed, and Central Americans trying to flee from persecution and death are left to die due to the following reasons:

> 1) By deporting migrants and asylum-seekers to Mexico under MPPs, they are exposed to lethal dangers. It is documented that these people are beaten, abducted, and raped on their way to US courts to hear their asylum and migration decisions, as well as on the streets of Mexico while they seek for work and food. For example, until December 2019, *Human Rights First* documented 636 cases of rape, kidnapping, torture, and other violent attacks against migrants and asylum-seekers returned to Mexico under MPPs in cities such as Tijuana, Mexicali, Ciudad Juárez, Nuevo Laredo […] (Human Rights First, 2019b). However, the speech used by the Trump administration is that the MPPs are an "alternative" to the separation of families, a way to reduce overcrowding in detention centers and one of the most "successful" initiatives of the *Department of Homeland Security*, which has achieved "operational efficiency" by reducing the number of asylum-seekers arriving at the southern border of the United States (US Department of Homeland Security, 2019a).

> These statements ignore the dangers faced by people who are devolved to Mexico and ran risks described as "anecdotal" by high-ranking officials in the Trump administration, such as Mark Morgan, commissioner of the *Customs and Border Protection* (White House, 2019). However, as is well known, Mexico is a place where irregular migrants and asylum-seekers are subject to violence, abuse, crime, and even death: it is a country destroyed and dispossessed because of massacres and enforced disappearances -San Fernando, Cadereyta, Ayotzinapa, among others-, extrajudicial executions, lynchings, femicide, homicide, crimes against LGBT people, sexual trafficking- especially of children and women-, forced labor and recruitment by organized crime, kidnapping, extortion, cartel warfare, and many others situations that have been widely documented (Suarez, Knippen, & Meyer, 2015; REDODEM, 2017 & 2018).

> Moreover, in order to comply with the agreement reached in June 2019 and to prevent Central American migrants from moving towards the United States, Mexico has recently militarized its southern border -now with the National Guard- and has executed

operations that use safety shields, beatings, stones, and tear gas that endanger the lives of Central American migrants that arrive in caravans (Henríquez, 2020). The number of arrests and deportations has also increased, reaching a record number between January and November 2019: 151 547 Central American migrants were detained, of whom almost one third were children - 47 406- and 115 237 were deported (Segob, 2019). And its capacity to detain migrants has also increased with the creation of a new migratory prison, "La Mosca", in Chiapa de Corzo, Chiapas.

2) The instrumentalization of the right to asylum by the United States significantly affects the chances of Central Americans to obtain international protection and, consequently, it endangers their lives. Not only are they unable to access asylum in the United States, but also in Mexico. The "third safe country" in which they could obtain it gives them no significant chances of achieving it. This happens because Mexico acts quickly and firmly when detaining and deporting migrants as soon as they arrive to the Mexican southern border, as demonstrated, for example, by the rapid dissolution of a migrant caravan in January 2020 (Pradilla, 2020b). And if by any chance they can apply for asylum in Mexico, they face an unfair and deficient asylum system that does not protect them against re-foulement because it is fraught with legal and practical obstacles that result in a human right to asylum without content and systematically not attainable for people in need of international protection (Ortega Velázquez, 2018). The figures for 2019 exemplify the above: the Mexican Refugee Aid Commission received 42,794 asylum applications from nationals of the countries of northern Central America: 30,045 from Honduras, 8,991 from El Salvador, and 3,758 from Guatemala. Only 5,273 were given refugee and complementary protection: 3 326 from Honduras, 1 652 from El Salvador, and 295 from Guatemala. Only 12.3 percent of the applicants could obtain international protection in Mexico (Comar, 2020).

Mexico acts as an extended border for the United States, and as a true wall for Central American migration trying to reach American soil. In fact, the Migration and Development Plan presented by Mexican Foreign Affairs Minister Marcelo Ebrard in December 2019 indicates that the flow of migrants arriving to the southern border of the United States went from 144 116 people in May 2019 to 42 710 in November of the same year, which indicates a decrease of 70.4 percent (López Obrador, 2019). However, for these people the cost in human rights and loss of life is very high, and it will increase even more because of crimes like human trafficking, since they will be forced to take new, more dangerous and precarious routes that will endanger their lives and will substantially increase the profits of these criminal businesses, since they will invariably require their help to cross borders.

CONCLUSIONS

The Foucaultian analysis of law challenges the claims of seeing it as a social science with an autonomous logic and as a distinctive field of action. Foucault analyzes law as a set of

practices, institutions, statutes, codes, authorities, discourses, texts, norms, and trial modes that are highly differentiated and are not unified, which never exist or act on their own, but are always intertwined with the logic of power and political interest (Rose & Valverde, 1998). Legal biopolitics is an evocative theoretical framework and a useful tool to study phenomena such as forced migrations from a critical perspective of the law. If we analyze these phenomena from the standpoint of traditional and dominant legal discourses, we are likely to run into large and obvious contradictions, for instance, Western democracies that use the human rights discourse of Western democracies at the same time that they leave to die those who undertake forced migration and seek to reach their territories to flee from spaces of death and persecution.

This article presents a genealogy of the security discourses used over the last 30 years by the United States to externalize its border with Mexico: drug trafficking, terrorism, and migratory caravans as invasions. These discourses have constructed Central American migrants as a threat to the public order and the national security, and as a political, cultural, and socioeconomic threat. To this end, the United States has used different biopolitical approaches, of which the most recent was to use Mexico as a "safe third country" in order to prevent these people from entering its territory, thus effectively evading the US international protection responsibilities. Mexico has played a crucial role in this process, since it has been an efficient manager of Central American migration trying to reach the United States in exchange for commercial advantages. Certainly, the Mexican government is not solely responsible for the disaster plaguing Central America, but it is also responsible for the humane treatment of its victims when they cross its territory. However, Mexico has chosen to be the first line of the Trump Wall, instead of becoming a reference for asylum in the region, for example, by institutionalizing alternatives to immigration detention and expanding and strengthening the Mexican asylum system to grant international protection to the persecuted.

Law can be a powerful instrument in protecting the neediest. The fact that it cannot be dissociated from politics does not mean that it cannot have "emancipatory" effects that facilitate the transformation of the system into a more human and egalitarian one (Rose & Valverde, 1998); or that it can be used as a "resistance" (Fitzpatrick, Álvaro, & Atiles, 2010) or as a "counter behavior", that is, "as a struggle against others ruling on one's self to achieve a different behavior, or to no longer being led by others in this way" (Foucault, 2006b, p. 225). It is necessary to resort to a policy in which economic and geopolitical interests do not prevail exclusively, one in which legal and political responsibilities are fulfilled, and legal and safe ways to guarantee asylum access for persecuted people are achieved. Refugees need protection, not rejection. These people have the legitimate right of leaving spaces where they are persecuted and their lives, safety, and freedom are in danger. For Foucault, this resistance is the right of the governed not to be governed in this way (Foucault, 2000).

Translation: Miguel Ángel Ríos

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